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Families First Coronavirus Response Act

Insights for Employers

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Families First Coronavirus Response Act

- March 18, 2020 - U.S. Senate approved, and the President signed, the House's **Families First Coronavirus Response Act (FFCRA)**.

- The Act is designed to provide assistance to American workers in response to the novel coronavirus (COVID-19) spreading across the United States.

What it Means for Employers

- Effective on **April 1, 2020**. Covered employers must start preparing now for the new law's impact.

- Two major provisions of the FFCRA that impact employers are:
  1. The Emergency Family and Medical Leave Expansion Act.
  2. The Emergency Paid Sick Leave Act.

- The FFCRA ***will only apply to employers with fewer than 500 employees***.

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Families First Coronavirus Response Act

- The DOL has indicated it will publish FFCRA regulations regarding the Act.
- The DOL has provided significant FFCRA guidance and continues to update it almost daily: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions
- The FFCRA amends the FMLA and FLSA, and relies upon the definition of employer in those Acts.

Families First Coronavirus Response Act

From the DOL's Guidance:

As an employer, how do I know if my business is under the 500-employee threshold and therefore must provide paid sick leave or expanded family and medical leave?

- You have fewer than 500 employees if, at the time your employee's leave is to be taken, you employ fewer than 500 full-time and part-time employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States. In making this determination, you should include employees on leave; temporary employees who are jointly employed by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer's payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship). Workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than employees, are not considered employees for purposes of the 500-employee threshold.

Families First Coronavirus Response Act

- Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are found to be joint employers, all of their common employees must be counted in determining whether paid sick leave must be provided under the Emergency Paid Sick Leave Act and expanded family and medical leave must be provided under the Emergency Family and Medical Leave Expansion Act.

Families First Coronavirus Response Act

- In general, two or more entities are separate employers unless they meet the integrated employer test under the Family and Medical Leave Act of 1993 (FMLA). If two entities are an integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act.

FMLA Integrated Employer Test

- A determination of whether or not separate entities are an integrated employer under the FMLA is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality.

- Factors considered in determining whether two or more entities are an integrated employer include:
  i. Common management;
  ii. Interrelation between operations;
  iii. Centralized control of labor relations; and
  iv. Degree of common ownership/financial control.

FLSA Joint Employer Test

In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig., 683 F.3d 462, 469 (3d Cir. 2012)- the Third Circuit identified these factors to be considered in determining joint employer status:

1) The alleged employer's authority to hire and fire the relevant employees;
2) The alleged employer's authority to promulgate work rules and assignments and to set the employees' conditions of employment: compensation, benefits, and work schedules, including the rate and method of payment;
3) The alleged employer's involvement in day-to-day employee supervision, including employee discipline; and
4) The alleged employer's actual control of employee records, such as payroll, insurance, or taxes.

The Emergency Family and Medical Leave Expansion Act

- Amends the Family and Medical Leave Act (FMLA) on a temporary basis (through December 31, 2020).
- Provides certain employees with up to 12 weeks of FMLA-protected leave for reasons related to COVID-19.

The Emergency Family and Medical Leave Expansion Act

Specifically, The Emergency Family and Medical Leave Expansion Act modifies the FMLA **only with respect to COVID-19-related leave** as follows:

- **Expanded Definition of "Eligible Employee"**: Any employee (full or part-time) who has been employed for at least 30 calendar days by the employer.

  Note, this replaces the typical requirement that the employee must work for an employer for 12 months and have worked 1,250 hours in the 12 months prior to taking leave.

- **Alternate Definition of "Covered Employer"**: An employer with fewer than 500 employees.

The Emergency Family and Medical Leave Expansion Act

- Covered employees may take COVID-19-related FMLA leave for "a qualifying need related to a public health emergency," defined as follows:
  - "The employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency."
  - Note, the term "school" used above only includes elementary and secondary schools – not colleges and universities.
  - A "child care provider" (who is unavailable due to COVID-19) must be "a provider who receives compensation for providing child care services on a regular basis," not a simply an unpaid family member who watches the child while the primary care-provider is at work.

The Emergency Family and Medical Leave Expansion Act

- **Paid Leave Requirement**: Whether covered employers are required to provide paid FMLA leave to their eligible employees when taking COVID-19-related FMLA leave depends on the length of the leave:
  - **First 10 Days**: The first 10 days of COVID-19-related FMLA leave are unpaid.
  - Note that these days would likely be covered by The Emergency Paid Sick Leave Act – discussed later.

The Emergency Family and Medical Leave Expansion Act

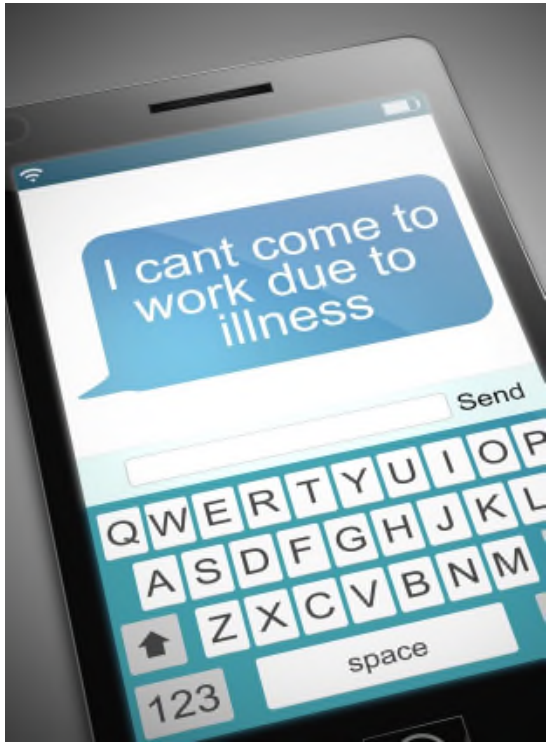
- **<u>After the Initial 10 Days</u>**: After the 10 days of unpaid leave, covered employers must provide paid COVID-19-related FMLA leave at no less than two-thirds the employee's regular rate of pay **for the number of hours the employee would have been normally scheduled.**
  - For employees whose weekly schedules vary such that employers are unable to determine with certainty the number of hours the employee would have worked, employers must pay those employees based on the average number of hours the employee worked over **the prior 6 months, or (if the employee did not work the prior 6 months – such as in the case of new employees), the number of hours the employee was expected to work.**
  - **This paid leave entitlement is capped at $200 per day and $10,000 in the aggregate per employee.**

The Emergency Family and Medical Leave Expansion Act

- **Restoration to Position**: Like traditional FMLA leave, COVID-19-related FMLA leave is job-protected and employees taking COVID-19-related FMLA leave must be restored to their same or equivalent position when they return to work.
  - However, employers with fewer than 25 employees do not have to restore employees taking COVID-19-related FMLA leave to their same or equivalent position if:
    - The employee's position does not exist after the employee's leave due to economic conditions or other changes in operating conditions of the employer caused by a public health emergency during the period of leave.
    - The employer makes reasonable efforts to restore the employee to an equivalent position.
    - The employer makes efforts to contact any displaced employee if an equivalent position becomes available for up to a year after they are displaced.

The Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act will generally require employers ***with fewer than 500 employees*** to provide employees with **two weeks of paid leave for one of six qualifying reasons.**



Specifically, The Emergency Paid Sick Leave Act defines:

- **Employee:** The Emergency Paid Sick Leave Act generally applies to all private employees who are covered by the Fair Labor Standards Act (FLSA).

- **Covered Employer**: All private employers covered by the FLSA and who employ fewer than 500 employees.

The Emergency Paid Sick Leave Act

- **The Reasons for Sick Leave**: Under the Act, an employee is only entitled to paid sick time if the employee is unable to work (or telework) due to a need for leave because:
  1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
  2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
  3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
  4. The employee is caring for an individual who (a) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or (b) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
  5. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.
  6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

The Emergency Paid Sick Leave Act

- Employers may elect to exclude health care providers and emergency responders from the Act's paid sick leave requirements.
- An employer is not required to provide paid leave to an employee who is subject to reduced hours or layoff because the employer's business has been impacted by COVID-19.

The Emergency Paid Sick Leave Act

- **Duration of Paid Sick Time**: Full-time employees are entitled to 80 hours of paid sick time, while part-time employees are entitled to the number of hours that the employee works, on average, over a two-week period.
  - Note, as with the changes to the FMLA, for employees whose schedules vary weekly, employers must pay those employees based on the average number of hours the employee worked over the prior 6 months.
  - Or, if the employee did not work the prior 6 months – such as in the case of new employees, the number of hours the employee was expected to work.

The Emergency Paid Sick Leave Act

- **How Paid Sick Leave Is Paid**: Employers are required to pay paid sick time at the greater of:
  a) The employee's regular rate or;
  b) The applicable minimum wage.

  - For reasons 1-3, employees get 100% of their pay; for reasons 4-6, employees get 2/3 of their pay.

  - Like The Emergency Family and Medical Leave Expansion Act, the Act places caps on the maximum paid sick time to which employees are entitled:
    - For reasons 1-3, $511 per day and $5,111 in the aggregate and;
    - For reasons 4-6, $200 per day, and $2,000 in the aggregate.

The Emergency Paid Sick Leave Act

- **Immediate Availability**: Paid sick leave will be available for the employee regardless of how long the employee has been employed.

- **What About Existing Paid Leave Policies?**: If employers already offer paid leave to their employees, while they still must provide paid sick leave under this Act, **employers are free to alter their existing paid leave policies to help alleviate some of the impact of the Act's paid sick time requirements**.

The Emergency Paid Sick Leave Act

- **Sequencing**: An employee may first use the paid sick leave under The Emergency Paid Sick Leave Act and **employers may not require employees to use other paid leave before the employee uses the paid sick time under The Emergency Paid Sick Leave Act.**
  - Starting on April 1st, covered employers cannot make their employees use their PTO or vacation time before being paid under the Act.
  - However, before the Act goes into effect (i.e., before April 1, 2020), if an employee wants to be paid for leave, the employer can require the use of other paid leave.
  - Once employees have exhausted their paid leave afforded by The Emergency Paid Sick Leave Act, employers are free to require their employees to resume using their PTO and vacation time to receive full pay for time off.

The Emergency Paid Sick Leave Act

- **No Preemption**: The Act does not preempt any local and state law requirements regarding paid sick leave.
  - Employers must be careful to not ignore state and local laws governing paid sick leave, such as the Pittsburgh Paid Sick Days Act and the Philadelphia's Promoting Healthy Families and Workplaces Act – all requiring most employers to provide employees with paid sick leave.

- **No Replacement**: Employers are not allowed to condition the use of paid sick leave on the employee finding a replacement to "cover" for them.

- **No Carry-Over**: Paid sick leave hours cannot be carried over after December 31, 2020.

The Emergency Paid Sick Leave Act

- **No Retaliation**: The Act contains anti-retaliation protections for employees who:
  a) Utilize paid sick leave under The Emergency Paid Sick Leave Act or;
  b) File a complaint alleging violations of The Emergency Paid Sick Leave Act.

  Any employers found to have retaliated against any employee, will be considered to have violated the FLSA. Successful plaintiffs would be entitled to the same damages as provided by the FLSA.

- **Penalties for Violation**: Employers who fail to provide their employees with paid sick time will be considered to have failed to pay minimum wages in violation of the FLSA. Successful plaintiffs would be entitled to the same damages as provided by the FLSA.

The Emergency Paid Sick Leave Act

- **Notice**: The Act further requires employers to notify their employees of their rights under The Emergency Paid Sick Leave Act by posting a notice in a conspicuous location. The Secretary of Labor was directed to make available a compliant notice within 7 days of enactment of the Act.

- Here is a link to the notice: https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

- FAQs re: the notice: https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions

FFCRA- Small Business Exemption

When does the small business exemption apply to exclude a small business from the provisions of the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act?

An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing paid sick leave and expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

FFCRA- Small Business Exemption

- The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
- There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

FFCRA- Small Business Exemption

If I am a small business with fewer than 50 employees, am I exempt from the requirements to provide paid sick leave or expanded family and medical leave?

- A small business is exempt from certain paid sick leave and expanded family and medical leave requirements if providing an employee such leave would jeopardize the viability of the business as a going concern. This means a small business is exempt from mandated paid sick leave or expanded family and medical leave requirements only if the:
- employer employs fewer than 50 employees;
- leave is requested because the child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; and
- an authorized officer of the business has determined that at least one of the three conditions described in Question 58 (which is above) is satisfied.

The Department encourages employers and employees to collaborate to reach the best solution for maintaining the business and ensuring employee safety.

Of Course The FFCRA is Not the Only Consideration

- **Don't Forget:**
  - **The pre-Act provisions of the Family and Medical Leave Act**
  - **The Americans with Disabilities Act**
  - **The Pennsylvania Human Relations Act**
  - **Any other applicable state or local law**

Additional Resources

- **DOL Wage and Hour Division: Families First Coronavirus Response Act: Employer Paid Leave Requirements:** https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave

- **DOL: FFCRA Poster:** https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

- **DOL Wage and Hour Division: Families First Coronavirus Response Act: Questions and Answers:** https://www.dol.gov/agencies/whd/pandemic/ffcra-questions

The Emergency Paid Sick Leave Act

Importantly, the Act provides covered employers with refundable tax credits to be paid to employers to cover the costs associated with The Emergency Family and Medical Leave Expansion Act and The Emergency Paid Sick Leave Act.

Overview of Tax Implications

- First, reduction in the employer's FICA payment obligations for employees who are on leave under either of the leave provisions of the Act;
- Second, the employer will receive credit towards its FICA obligations based upon its payment of wages to employees who are on leave under either of the leave provisions of the Act;
- Third, *no* change in withholding requirements for employees' FICA and income taxes.

Reduction in FICA Payments

While news releases suggest that payroll tax liability is eliminated for employees who are on leave, that is not entirely accurate:

- FICA has two components, a 6.2% Social Security tax, and a 1.45% Medicare tax.
- The Act provides that wages paid under the leave provisions of the Act are not "wages," but only as to the Social Security tax;
- Employers get a compensating credit to offset the Medicare tax component of FICA.

Credits for Emergency Paid Sick Leave

- Employers receive credit for "qualified sick leave wages" which are certain wages paid under the Emergency Paid Sick Leave Act, plus
  - Allocated health plan expenses; and
  - Additional 1.45% of qualified sick leave wages (equal to Medicare tax).
- The credit is refundable; and
- To prevent double benefits, it is included in the employer's income for tax purposes.

Qualified Sick Leave Wages

Qualified sick leave wages are limited to $200 per person per day, which increases to $511 per day if:

- The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID–19;
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID–19; or
- The employee is experiencing symptoms of COVID–19 and seeking a medical diagnosis.

Credits for Emergency Family Leave

- There is a similar structure for employers to receive credit for "qualified family leave wages," which has the same components as Emergency Sick Leave credits.
- This credit is also refundable and is also included in the employer's income.
- The wages taken into account per individual are $200 per person per day, and $10,000 in the aggregate.

Coronavirus Aid, Relief, and Economic Security Act or "CARES"

Employers with **500 or fewer** employees will qualify for "Paycheck Protection Loans," through an expanded SBA loan program.

- No collateral or guaranty is required;
- Subject to forgiveness if applied to payroll costs, costs of group health care benefits, and other existing obligations;
- Forgiveness is not taxable at the federal level;
- Can borrow up to 2.5 times average monthly payroll costs.

CARES Tax Provisions

Employee retention tax credit:

- Eligible employers will receive a refundable credit of 50% of wages paid to those employees who cannot work but do not qualify under FFCRA leave provisions that is applicable to employer's Social Security tax obligations;
- Eligibility is tied to reductions in operations because of governmental restrictions or to reductions in gross receipts below 50% of the same quarter of last year.

CARES-Tax Provisions, continued

Payroll tax relief for employers:

- Provides for deferral of 6.2% Social Security tax imposed on employers incurred in 2020 until the end of 2021 and 2022;
- Makes deposits of Social Security taxes timely if paid on deferral dates;
- But it does not apply to the extent of loan forgiveness for payroll protection loans.

CARES-Tax Provisions, continued

- CARES also includes changes to:
  - Treatment of net operating losses;
  - Limits on deductibility of business interest;
  - Retroactively revises depreciation treatment of "qualified improvement property."

- There are also benefits for individuals.

Workers' Compensation Considerations

- Definition of "injury":
  - Act 61 of 1972 eliminated the requirement of an "accident" under § 301(a) of the Pennsylvania Workers' Compensation Act (the Act), and substituted the term "injury" in that section and throughout the entire Act.
  - The prior definition of injury in § 301(c)(1) was changed from "violence to the physical structure of the body" to "an injury to an employee, regardless of his previous physical condition, arising in the course of his employment and related thereto…".

Workers' Compensation Considerations

- Section 301(c)(2) was added to the Act by Act 223 of 1972, and included within the definition of injury various enumerated "occupational diseases" defined in § 108 of the Act (e.g. asbestosis, pneumoconiosis).

- If an Employee proves that at or immediately before his disability, he worked in an industry in which the enumerated occupational disease is a hazard, **causation shall be presumed**. The Employer can attempt to rebut this presumption.

Workers' Compensation Considerations

- **COVID-19 is not an enumerated occupational disease**. However, under the omnibus, or "catch all" provision of § 108(n) of the occupational disease provisions of the Act, an employee can establish the liability of her employer for a **non-enumerated occupational disease** by satisfying three elements:
  1) Exposure to the disease by reason of employment;
  2) That the disease is causally related to the industry or occupation; and
  3) That there is a substantially greater incidence of the disease in that industry or occupation than in the general population.

Workers' Compensation Considerations

- Even Employees in the transportation and healthcare setting will have a difficult time proving the third element, much like with seasonal influenza or common bacterial conditions such as staph infections, which are prevalent in the community.

- Thus, except in very rare cases (e.g., those who directly handle the virus for research purposes) a rebuttable presumption of causation under the occupation disease provisions of the Act is not possible, and Employees will bear the burden of proving actual exposure to the disease in the workplace.

Workers' Compensation Considerations

- The Commonwealth Court in Pennsylvania has held that "persons exposed to a **serious risk** of contracting a disease that is known to be **highly contagious** or **infectious** and **potentially deadly** have been "injured" for purposes of receiving workers' compensation. Jackson Township Volunteer Fire Company v. WCAB (Wallet).

- The "exposed" Employee would be entitled to testing and monitoring to determine whether or not the virus had been contracted. Medical benefits for payment of the medical monitoring/testing would be afforded to the "exposed" Employee even if the Employee remains in good health and is asymptomatic. Brendley v. Pennsylvania Department of Labor and Industry.

Workers' Compensation Considerations

- Any disease that is caused by the workplace (and any preexisting non-occupational disease that is aggravated by the workplace) and related thereto is also compensable as an injury under § 301(c)(1) of the Act. Pawlosky v. WCAB (Latrobe Brewing Co.).

- ***In other words***, an Employee may bring a claim for the aggravation of pre-existing non-occupational disease that was aggravated by the COVID-19 virus. The Employee would bear the burden of proving that exposure to the COVID-19 virus occurred during the course of the Employee's employment.

Workers' Compensation Considerations

- Additionally, to the extent the Employee experiences "work removal" or "quarantine" and experiences a wage loss as a result of the "work removal" or "quarantine," the Employee will be able to establish an indemnity entitlement under the Workers' Compensation Act, again, assuming that the Employee can establish a known and identifiable exposure that occurred in the workplace.

Workers' Compensation Considerations

- An Employee must be disabled for 7 calendar says (including weekends) before workers compensation benefits are payable. Benefits for time lost from work are payable on the 8th day after the injury. Medical benefits are paid from the date of the injury. Once an Employee has been off work 14 days, he or she receives retroactive payment for the first 7 days.

- ***In other words***, if an Employee is off work 7 days or less, he is not entitled to receive workers compensation payments for disability. Medical bills are covered. For example, if the Employee is off work 10 days, he would be paid 3 days of disability benefits. However, if the Employee is off 14 days or more, he will receive retroactive payments all the way back to the first day of disability.

- The standard quarantine period for COVID-19 is 14 days.

Workers' Compensation Considerations

- Employer's Reporting Requirements
  - An Employer's obligation to document an injury with the Bureau of Workers' Compensation through a First Report of Injury (FROI) is not triggered where the disability is less than the day, shift or turn in which the injury was received. § 438, 77 P.S. § 994.
  - If an employee makes a request for COVID-19 testing, but is not otherwise missing a day, shift or turn from work, the obligation to file an Employer's First Report of Injury (FROI) will not be triggered.
  - Likewise, if the Employer, through its workers' compensation insurance carrier/third-party administrator simply agrees to cover the cost of the COVID-19 testing, the obligation to file a FROI will not be triggered.

Workers' Compensation Considerations

- Employer's Reporting Requirements
  - If an Employee reports COVID-19-related symptoms, which the Employee believes developed as a result of exposure to the virus at work, without concomitantly providing the Employer with proof of a positive diagnosis of COVID-19, and without confirming that exposure to the virus occurred at work, the obligation to issue a FROI will not be triggered.

Workers' Compensation Considerations

- Employer's Reporting Requirements
  - If one of your Employees receives a positive COVID-19 test result and reports that positive COVID-19 test result as being work-related, you and your workers' compensation insurance carrier/third-party administrator have the option of either:
    1) Issuing a Notice of Workers' Compensation Denial if the facts warrant; or
    2) Accepting the claim by issuing a Notice of Temporary Compensation Payable/Notice of Compensation Payable.
  - However, it must be remembered that if you voluntarily accept liability for a COVID-19 claim, you may be found to have permanently accepted the COVID-19 diagnosis and would be limited in your ability to raise any defenses against the claimed COVID-19 diagnosis in future proceedings.

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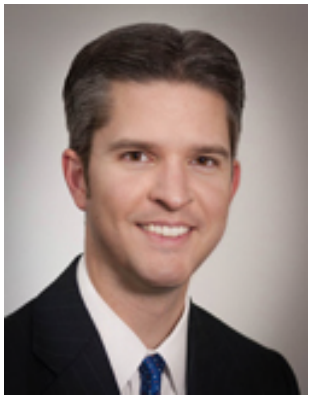

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