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COVID-19: A Guide to Assist California Employers and Claims Administrators in Determining in What Circumstances There is a Duty to Provide A DWC-1 Claim Form Related to a COVID-19 Alleged Injury Claim and Related Issues

Introduction: There is clearly a need for guidance and clarification in this area given the daily increase in the number of COVID-19 cases being reported throughout California and more importantly employees who have already filed workers' compensation claims and the unpredictable number of employees who will file worker's compensation claims in the foreseeable future alleging they were exposed to or contracted COVID-19 as a result of their employment.

Based on current case law, there is not a basic difference in how an employer or claims administrator should approach, analyze and determine under what particular facts and circumstances they have a duty to provide a claim form and notice of potential eligibility for benefits to an employee in a COVID-19 case than in any other claimed or alleged industrial injury. The same statutes and cases that were applicable before the current crisis are still applicable today.

Some of the present confusion appears to be attributable to both employers and claims professionals attempting to prematurely determine the compensability of a COVID-19 industrial injury as opposed to isolating and focusing on when and under what circumstances the duty of the employer to provide a claim form is triggered. With respect to compensability issues, please see our previously published white paper for a guide to assist employers and carriers in determining potential compensability related to COVID-19 entitled "California: A Preliminary Assessment of Potential Workers' Compensation Liability Related to the Coronavirus (COVID-19)". The guide can be found at (http://pbw-law.com/news.html).

Another factor contributing to the confusion related to the duty of an employer to provide a claim form are OSHA regulations related to what are "recordable" or "reportable" COVID-19 work related illness cases. As will be discussed in detail hereinafter, the statutory threshold and criteria related to an employer's duty to provide a claim form related to an alleged COVID-19 injury is completely different and much lower than the OSHA recording and reporting requirements. Therefore it would be a mistake for California employers or their claims administrators to rely on the OSHA guidelines and regulations to determine whether they have a duty to provide a claim form to an employee who is asserting or alleging a COVID-19 work related injury.

The Insidious Nature of COVID-19: What is different about COVID-19 than other communicable diseases both inside and outside the workplace is its insidious nature ie., a disease developing so gradually as to be well established before becoming apparent. Unlike most communicable diseases characterized as non-occupational, such as colds and the common flu, COVID-19 is characterized as a worldwide pandemic. Also unlike many common communicable viruses and diseases, based on current medical and scientific literature, a person can contract the virus and remain pre-symptomatic (during the 2 to 14 day incubation period), entirely asymptomatic or minimally symptomatic but still capable of transmitting the disease and infecting other people both in and outside the workplace. Scientists are still trying to quantify and determine the risk posed by asymptomatic cases.

As a consequence, unlike workplace environments or occupations that pose an inherently greater risk of employees contracting COVID-19 such as healthcare workers, first responders etc., there are many seemingly benign workplace environments where employees may be unknowingly exposed to an increased or special risk of contracting COVID-19. The other problem with employees who have contracted COVID-19 but are pre-symptomatic or asymptomatic is they are not being tested. In most states including California, COVID-19 testing is currently limited primarily to people who are already symptomatic and seeking medical care and treatment. Therefore it is impossible to know at the present time how many pre-symptomatic or asymptomatic people are going to work every day and may be unknowingly transmitting the virus to their coworkers and the public.

When and Under What Circumstances Does an Employer Have a Duty to Provide a Claim Form Related to An Alleged Industrial Injury Due to COVID-19?

In California, we are very fortunate we can turn to a decision from the California Supreme Court to provide us with guidance in interpreting and applying the applicable statutes and regulations. The following guidelines are based on the California Supreme Court's decision in *Honeywell v. Workers' Comp. Appeals Bd. (Wagner)* (2005) 35 Cal.4th 24, 70 Cal.Comp.Cases 97, as well as subsequent case law interpreting and applying the *Honeywell* decision to a variety of facts and circumstances.

As a general rule under Lab.Code § 5400 an injured worker cannot maintain a claim of industrial injury unless the employer has been given written notice of the injury within 30 days of its occurrence. (All references are to the Labor Code unless otherwise indicated). One legal commentator described the written notice requirement of section 5400 as a "weak reed for a defendant to rely upon" to defeat the employers duty to provide a claim form. As with all general rules, there are exceptions to the written notice requirement. The primary Labor Code Sections that apply are sections 5400, 5401, and 5402.

Section 5402(a) states as follows:

> Knowledge of an injury, **obtained from any source**, on the part of an employer, **or** his or her managing agent, superintendent, foreman, **or** other person in authority, **or** knowledge of the **assertion** of a claim of injury sufficient to afford the opportunity to the employer to make an investigation into the facts, is equivalent to service under Section 5400. (emphasis added).

That's a lot of "or's in a very short paragraph. But as the *Honeywell* court indicates, if any of the elements in section 5402(a) are met or satisfied, they are deemed substitutes for the written notice required under section 5400. Sections 5400 and 5402 delineate the situations where an employer has a duty to provide a claim form.

1. **Written Notice or Knowledge Of Lost Time From Work or Medical Treatment Beyond First Aid:** Within one working day of when the employer receives **either** written notice (§5400) **or** knowledge of an injury **"from any source**" that has caused lost time form work beyond the employee's work shift at the time of injury or results in medical treatment beyond first aid, the employer shall provide the employee either personally or by first-class mail, with a workers' compensation claim form and notice of potential eligibility for benefits. In the event of death, the notice is provided to the employee's dependents (§ 5401(a).) The definition of "first aid" as it relates to the employers duty to provide a claim form is set out in detail in section 5401(a).

2. **Knowledge of an Injury Being Asserted from Any Source:** With respect to the knowledge of an injury "from any source" and "assertion of a claim of injury" triggering a duty of an employer to provide a claim form, a recent example is demonstrated in the case of *Griffin v. County of San Bernardino, PSI* 2018 Cal.Wrk.Comp. P.D. LEXIS 13 (WCAB panel decision). In *Griffin* a fire captain filed a cumulative trauma claim by way of an application for adjudication alleging hearing loss. Prior to filing his workers' compensation claim he filed a separate application for a service-connected disability retirement on October 23, 2012, alleging bilateral hearing loss that was work related. Three days later on October 26, 2012, the governmental agency responsible for determining applicant's eligibility for a disability retirement sent a written memo to the human resources officer at applicant's employer informing them that the applicant had applied for a work related disability retirement due to alleged bilateral hearing loss.

In June of 2013, in connection with his disability retirement application, applicant was evaluated by a doctor who issued a report indicating that applicant's disability and hearing loss was work related. At the trial on the workers' compensation case, applicant testified that while he assumed and believed his hearing loss was work related, the first time a medical professional told him his disability was work related was in June of 2013. The defense argued that applicant's workers' claim filed by way of an application for adjudication, was barred by the statute of limitations and that defendant had no duty to provide a claim form under section 5401 to the applicant since the memo and related information sent to the County did not show the employer knew if the claimed

hearing loss resulted in lost time or medical treatment or was supported by any other facts that triggered or required the employer's duty to provide a claim form to the applicant in October of 2012.

The WCJ ruled in favor of the employer and found applicant's claim was barred by the statute of limitations based on a date of injury of October 23, 2012. Applicant filed for Reconsideration arguing that the date of injury was June 20, 2013 when the doctor first advised applicant his hearing loss was work related and alternatively also argued the defendant was estopped from asserting the statute of limitations defense because it failed to provide applicant with a claim form and notice of potential liability after being informed of applicant's injury based on the memo sent to the employer's human resource officer.

The WCAB relying on the Supreme Court's decision in *Honeywell*, rescinded the WCJ's Findings and Order and held that applicant's claim was not barred by the statute of limitations.

> However, our Supreme Court has made clear, "The employer's duty under section 5401 [to provide a claim form and notice of eligibility of potential benefits] arises when it has been notified in writing of an injury by the employee (§ 5400) or has **'knowledge' of the injury <u>or</u> claim from another source** (§ 5402, subd. (a)…." (*Honeywell v. Workers' Comp. Appeals Bd. (Wagner)* (2005) 35 Cal.4th 24, 38 [70 Cal.Comp.Cases 97] [original emphasis].)

The Board agreed with the WCJ that the information that was sent to the employer related to the applicant's disability retirement claim "did not confer knowledge of injury upon the employer, the memorandum informed the employer that applicant **claimed** industrial hearing loss that rendered him unable to work in his position." (emphasis added). Instead it was the applicant's claim or assertion of a work injury that was the dispositive factor in terms of the employer's duty to provide a claim form. In that regard the WCAB stated:

> However, as the statutory and judicial mandates cited above clearly show, **knowledge of assertion of a claim of industrial injury triggers the duty to provide the claim form.** Thus, the employer had plain notice of a claim of injury triggering the obligation under section 5401(a) to provide a claim form and notice of eligibility of potential benefits. Since there is no evidence applicant was provided with a claim form or had actual knowledge of his workers' compensation rights, we find that the statute of limitations was tolled, and that the application for adjudication of claim was timely filed. (emphasis added).

2. **An "Assertion" Of A Claim Of Injury:** As discussed both *Honeywell* and *Griffin* hereinabove, as well as the express and unambiguous language of sections 5400 and 5402, even in situations where there is no documented lost time from work or medical treatment beyond first aid to indicate an industrial injury has occurred, it is sufficient if the employer has knowledge an

industrial injury is being "asserted." "An employer owes a clear duty under section 5401, subdivision (a) to provide a claim form and notice of potential eligibility when it learns of an industrial injury has occurred **or** is being **asserted." (**emphasis added).

It is the "assertion" language of section 5402(a) that seems to be a major analytical stumbling block for many employers, claims administrators and some attorneys in determining an employer's duty to provide a claim form. For example in a COVID-19 scenario if an employee alleges or asserts ie, communicates to the employer that he or she believes they have contracted COVID-19 at work whether verbally or in writing, then best practice under *Honeywell* and subsequent cases would be for the employer to provide the employee with a claim form and to carefully document when and how it was done. Whether the employee ever returns the claim form is an entirely separate issue.

Under the scenario where an employee is "asserting" they have suffered a work related COVID-19 injury, it is not required under § 5402(a) that the employer believes or agrees with the employee's "assertion" of an industrial injury in order to trigger the duty to provide a claim form. All that is required is the "assertion" of an alleged industrial injury. It is legally irrelevant under the 'assertion" of a claim language of section 5402(a) whether an employer thinks or believes their duty to provide a claim is required only if the employer is "reasonably certain" an industrial injury has occurred.

Other Applicable Regulations: There are other regulations that should be considered related to the filing and acknowledgement of claim forms. (see, CCR §§ 10136-10142). CCR §10137 states that an employer has a duty to provide timely compensation to an injured worker even if the employee has not completed and filed the claim form required by section 5401. Also if a claims administrator obtains knowledge that the employer has failed to provide a claim form, the claims administrator shall provide one to the employee within three working days of its knowledge that the claim form was not provided by the employer. (CCR §10140(b).)

Also if the claims administrator cannot determine if the employer has provided a claim form to the employee, the claims administrator shall provide a claim form to the employee within 30 days of the administrator's knowledge of the claim. (CCR §10140(c)).)

OSHA ISSUES

OSHA Recording and Reporting Requirements Related to Workplace Injuries and Illnesses Are Not Controlling With Respect to an Employers Statutory Obligation to Provide a Claim Form Under Labor Code Sections 5400-5402

The duty of California employers to provide claim forms under sections 5400, 5401 and 5402 where a COVID-19 workers' compensation injury is asserted by an employee or someone on his behalf is based on a much lower legal threshold than the OSHA Recording and Reporting Requirements for COVID-19. The primary reason for this is that both the OSHA recording and

reporting requirements mandate that there must be a confirmed COVID-19 case supported by a positive laboratory test and in addition the COVID-19 case must be work related. For purposes of an employer's duty to provide a claim form in California all that is required is an assertion of an alleged industrial causation that triggers the duty of an employer to provide a claim form under section Labor Code 5402. For more specifics related to OSHA record keeping requirements see, https://www.osha.gov/recordkeeping/

OSHA Recordable Cases: Both the common cold and flu are exempt from both OSHA's recording and reporting requirements. (29 CFR 1904.5(b)(2)(viii). However, OSHA has expressly determined that COVID-19 is a recordable illness and it is also potentially reportable. But for COVID-19 to be both recordable and reportable it has to be industrial not just alleged or suspected of being industrial. To be recordable in an employer's 300 log, there are three threshold requirements or criteria that must be satisfied.

1. A COVID-19 case must be a confirmed case. In order to be a confirmed case a positive COVID-19 laboratory confirmed test is required and cannot be based on mere symptoms or even a doctor's opinion in the absence of a positive test. OSHA follows CDC guidelines which with respect to the definition of "confirmed case." Suspected cases of COVID-19 do not meet the CDC guidelines.

2. The illness ie., COVID-19 must be work related. Work related is defined in 29CFR 1904.5. The determination of work relatedness is factually nuanced and assessed on a case by case basis.

3. Does the case involve one or more of the standard general recording criteria set forth in 29 CFR 1904.7 such as medical treatment beyond first aid, lost time from work, or restricted duties or work limitations.

New OSHA Enforcement Guidance for Employers Recording Cases of Coronavirus Disease (COVID-19) Issued on April 10, 2020: On April 10, 2020, OSHA issued interim guidelines related to enforcement of the recording of COVID-19 occupational illnesses. These guidelines will remain in effect until further notice and are intended to be time-limited to the current public health crisis. It applies to areas where there is ongoing community transmission.

The interim guidelines do not apply to employers in the healthcare industry, emergency response organizations (e.g., emergency medical, firefighting, and law enforcement services), and correctional institutions who are still obligated to continue to make work relatedness determinations and comply with previous recording requirements. However with respect to all other employers, OSHA until further notice will not enforce the recording requirements to make the same "work-relatedness" determinations they would normally be required to make **except** in

The following situations:

> 1. There is objective evidence that a COVID-19 case may be work related. This could include, for example, a number of cases developing among workers who work closely together without an alternative explanation; and
>
> 2. The evidence was reasonably available to the employer. For purposes of this memorandum, examples of reasonably available evidence include information given to the employer by employees, as well as information that an employer learns regarding its employees' health and safety in the ordinary course of managing its business and employees.

Employers should frequently check OSHA's webpage for updated information related to OSHA recording and reporting requirements at www.osha.gov/coronavirus

OSHA Reportable Cases: As a general rule the same basic analysis for recordable cases hereinabove would apply as a threshold coupled with whether the work related COVID-19 illness requires or results in an in-patient hospitalization or death are deemed reportable to OSHA. There is a strict timeline for reporting in-patient hospitalizations to OSHA of within 24 hours and deaths within 8 hours. For further important information and criteria related to in-patient hospitalizations and fatalities see, 29 CFR 1904.39(b)(6).

None of the OSHA recording or reporting threshold criteria hereinabove are required under sections 5401 and 5402 to trigger an employer's statutory duty to provide a claim form in California.

Consequences of an Employer's Failure to Provide a Claim Form and Notice of Potential Eligibility for Benefits

1**. Defendant Estopped/Barred From Asserting a Statute of Limitations Defense:** There are a number of significant adverse consequences related to an employer's failure to comply with their duty to provide a claim form. One of which is that a defendant will be denied the ability to assert a statute of limitations defense since the statute will be tolled when there is a confirmed failure to provide a claim form. As illustrated by the *Griffin* case hereinabove, the defendant was estopped and barred from asserting the statute of limitations defense even if applicant's claim would have been otherwise time barred by the late filing of the application for adjudication.

In another case, applicant was found to be 100% permanently disabled and defendant's statute of limitations defense under Lab. Code 5405 was rejected by the WCJ and the WCAB. In January of 1991, applicant presented a disability slip from her PTP taking her off work to her supervisor. The supervisor told her she would take care of it. Another supervisor testified she was aware that applicant had informed her immediate supervisor she hurt her back at work. The employer

never provided applicant with a claim form and as a consequence applicant's claim was not barred by the statute of limitations. (*County of San Bernardino v. Workers. Comp. Appeals Bd. (Sprague)* (1995) 60 Cal.Comp.Cases 221 (writ denied).

2. **Ability of the WCJ, WCAB or a Party to Raise the 90 Day Rebuttable Presumption of Compensability at Any Time:** Another good example of an adverse consequence related to an employer's failure to provide a claim form under section 5400 or 5402 is reflected in a case where an employee requested a claim form from the employer three times before he was terminated. The employer never provided a claim form but the applicant filed one after becoming represented. Defendant failed to properly deny the claim until eight months after applicant first requested the claim form. A prior timely denial was never served on the applicant. Applicant never raised the 5402(b) 90-day rebuttable presumption of compensability prior to trial or at trial. However, the WCJ raised the 5402(b) 90-day rebuttable presumption of compensability during trial. On appeal defendant claimed a denial of due process related to the WCJ's raising the 90 day rebuttable presumption when the parties failed to do so. On reconsideration the WCAB affirmed the WCJ's finding of a CT and specific injury and also held that a statutory presumption even a rebuttable one, can be considered at any time relying on *Gee v. Workers' Compensation Appeals Bd.* 96 Cal.App.4th 1418, 1425, 67 Cal.Comp.Cases 236.

3. **The Defense of Laches May Be Barred:** In one case an insurer tried to assert the defense of laches to a claim (stale claim) submitted to the carrier more than seven years after the injury. The court rejected the defense of laches since there was evidence the employer had received notice of the injury the day after it occurred. Notice to or knowledge of a workplace injury on the part of the employer is the equivalent of notice to the insurer. (*Truck Ins. Exchange v. Workers' Comp.Appeals Bd*. (2016) 2 Cal.App.5th 394, 2016 Cal.App. LEXIS 666).

4. **Administrative Penalties:** There are administrative penalties for failure to provide a claim form within one working day of receipt of a request from the injured worker or the worker's agent. The applicable penalties rage from $500.00 up to $5,000.00 depending on the length of the delay in providing the claim form if benefits were not already being provided at the time the claim form was requested. (CCR § 10111.1(d)(3).)

5**. An Employer's Negligence in Failing to Provide a Claim Form Will Generally be Insufficient to Allow the 90-Day Denial Period to Begin Before a Claim Form is Actually Filed With the Employer:** Both the Court of Appeal and the Supreme Court flatly rejected a standard of negligence ie., unintentional conduct by an employer by not providing a claim form in a timely manner as a valid argument that the 90-day period for denial of liability should run from the date the employer received notice or knowledge of the injury or claimed injury as opposed to the date the employee actually files a claim form with the employer.

The Supreme Court in *Honeywell* stated:

> Applying these principles to the running of section 5402's 90-day period, we conclude an employer generally will be estopped to deny the period began running before the filing of a claim form only if (1) the employer, knowing the employee **had suffered or was asserting an industrial injury** refused to provide a claim form, or misrepresented the availability of or need for the employee to file a claim form; (2) the employee was actually misled into believing that no claim form was available or necessary and failed to file one for that reason; and (3) because of this reliance, the employee suffered some loss of benefits or setback as to the claim (emphasis added citation omitted).

As a corollary to when the 90-day denial period begins, there is no duty of an employer or their insured to notify an employee that their injury claim is rejected or denied until the employee actually files a claim form with the employer and the failure to do so will not start the 90 day denial period when the employer had knowledge of the injury but negligently failed to provide a claim form to the employee. In *Fleetwood Enterprises, Inc., v. Workers' Comp.Appeals Bd. (Moody)* (2005) 134 Cal.App.4th 1316, 70 Cal.Comp.Cases 1659, an employer had immediate knowledge that a serious motor vehicle injury might be work related in October of 1999. There was no dispute that the employer failed gave the applicant a claim form. Three years after the date of injury, applicant served a claim form on the employer in May of 2002 which was timely denied. Applicant argued the 90-day denial period should have started shortly after the accident in October of 1999 making defendant's denial in August of 2002 untimely.

The WCJ and WCAB found the employer's denial untimely and that the 90-day denial period started after the accident and therefore there was a rebuttable presumption of compensability. The Court of Appeal annulled the WCAB's decision relying on the Supreme Court's decision in *Honeywell.* The Court of Appeal held that the duty to notify an employee that his claim is denied or "rejected *only* arises when the employee actually files a formal claim." Although the employer in this case had a duty to provide a claim form based on knowledge of an industrial injury there still was no duty to reject or deny the claim until a claim form was actually filed with the employer in order for the employer and the claims administrator to not be subject to the rebuttable presumption of compensability.

Statutory Defenses and Other Issues if a Claim Form is Not Returned to an Employer

The following is a list of potential statutory defenses, issues and consequences that may apply when an employee who has been provided with a claim form fails to file or return it:

> 1**. There is no right to a Section 4650(d) automatic penalty**. Lab. Code, § 5401 subdivision (d) provides in part: "The claim form shall be filed with the employer prior to

the injured employee's entitlement to late payment supplements under subdivision (d) of Section 4650….."

2**. The employee may not seek a Section 4060, 4061 or 4063 QME panel.** Lab. Code, § 5401 subdivision (d) also provides in part: "The claim form shall be filed with the employer….. prior to the injured employee's request for a medical evaluation under Section 4060, 4061, or 4062."

3**. The employee is not entitled to a Section 5402 presumption of liability.** As discussed in detail hereinabove, Lab. Code, § 5402 subdivisions (b) provides: "If liability is not rejected within 90 days **after the date the claim form is filed** under Section 5401, the injury shall be presumed compensable under this division." (Emphasis added.)

4. **The employee is not entitled to section 5402 medical treatment up to $10,000 prior to denial of the claim**. Lab. Code, § 5402 subdivision (c) provides: "Within one working day **after an employee files a claim form** under Section 5401, the employer shall authorize the provision of all treatment, consistent with Section 5307.27, for the alleged injury and shall continue to provide the treatment until the date that liability for the claim is accepted or rejected. Until the date the claim is accepted or rejected, liability for medical treatment shall be limited to ten thousand dollars ($10,000)." (Emphasis added.)

Labor Code §§ 5401 & 5402 Investigate Issues

There are a number of issues involved in the investigation of claims as it relates to the 90-day denial period and the related rebuttable presumption of compensability if the claim is not denied timely under section 5402(b). With respect to whether an employer or claims administrator will be subjected to the 5402(a) rebuttable presumption of compensability, the Supreme Court in *Honeywell* agreed with the WCAB that "section 5402 reflects a legislative policy of encouraging prompt investigation of claims." However, in annulling the WCAB's en banc decision, the Supreme Court stated that the legislative intent of sections 5401 and 5402 was **not** to encourage or require employer or insurer investigations **prior** to the actual filing of a claim form.

> The requirement of a claim-form instituted as part of a reform law designed to make the system more cost-efficient-**was manifestly intended to relieve the employer and its insurer from having to investigate and evaluate every *possible* claim, some of which might never ripen into actual claims for benefits.** The prompt investigation was thus tempered by considerations of efficiency and the avoidance of unnecessary costs…."

However, in terms of best practices related to broader issues than just the section 5402 90-day denial period, there are other statutes and regulations that must be considered with respect to the issue or question of whether an employer must send an Employer's First Report of Injury (Form 5020) to the claims administrator and in turn whether the claims administrator has to open a

claims file and conduct an investigation when a claim form has been actually provided to the employee but not returned to the employer or claims administrator.

Employer's Report of Injury (Form 5020) Where Claim Form Given to Employee but not Returned to Employer: As discussed in detail hereinabove, an employer has a duty to provide a claim form when the employer has knowledge from any source of an injury involving lost time from work or treatment beyond first aid. The same duty to provide a claim form arises even where there is no lost time or medical treatment beyond first aid and if the employer has knowledge from any source an injury claim is being "asserted" even in a case or situation that may not appear to be work related.

However, in contrast to the broad duty to provide a claim form and notice of potential eligibility that is triggered when there is knowledge by the employer of an "assertion" of an injury by an employee even if it does not involve lost time from work or treatment beyond first aid, there is a different standard related to the employer's duty to submit a form 5020 to the claims administrator. In that regard the near the top of the form 5020 is the following language:

> California law requires employers to report within **five days** knowledge of every occupational injury or illness which results in lost time beyond the date of the incident **OR** requires medical treatment beyond first aid. If an employee subsequently dies as a result of a previously reported injury or illness, the employer must file within **five days** of knowledge an amended report indicating death. In addition, every serious injury, illness, or death must be **reported immediately** by telephone or telegraph to the nearest office of the California Division of Occupational Safety and Health. (original emphasis)

This language would seem to indicate there is no mandatory duty for an employer to send a form 5020 to the claims administrator based on an employer's knowledge of an "asserted" injury where a claim form has been given to the employee but not returned. In this situation what triggers the employer's 5020 report within five days of the injury to the claims representative is knowledge of an "injury or illness which results in lost time beyond the date of the incident OR requires medical treatment beyond first aid." It is important to note the express language near the top of the form 5020 does not include the employer's knowledge of an "assertion" of an injury, but instead requires knowledge of an injury that actually caused lost time from work and treatment beyond first aid.

There are additional requirements in cases involving every serious injury, illness or death that these be reported by the employer immediately by phone or fax to the nearest Cal-OSHA office. There is also a recommendation that in these types of cases that the employer should also notify the insurer immediately by telephone or fax. For further guidance in this area see the California Workers' Compensation Institute's informational guidelines for employers at https://www.cwci.org/Employers_.html

Individual insurers and claims administrators may have their own policies and procedures related to when they require their insured employers to report claims of alleged or asserted injuries when claim forms have been given to the employee and returned and also when claim forms have been given but not returned to the employer. They may also have their own policies and procedures as to when to open a claim file and initiate an investigation in the same situations.

Doctor's First Report of Occupational Injury or Illness (Form 5021): If an employer receives or has knowledge of a Doctor's First Report of Occupational Injury or Illness it should prompt the employer to provide a claim form to the employee and to complete and send an Employer's Report of Injury to the claims administrator within the required time frames. If the doctor's first report is sent or served only on the claims administrator and not the employer, and if the claims administrator knows or cannot determine whether the employer has provided the claim form then it would be the duty of the claims administrator to provide a claim form to the employee and to make a decision whether to initiate an investigation of the claim.

IMPORTANT NOTE AND DISCLAIMER

Given the current fluid and rapidly evolving nature of the Cornavirus-COVID-19 pandemic in the United States, this memo constitutes our preliminary analysis and is provided solely as a reference tool to be used for informational purposes and is subject to change based on evolving information. Therefore it should not be construed or interpreted as providing legal advice related to any specific case or cases. Each insurance company, claims administrator and employer should seek their own independent legal advice and opinion before they determine a course of action on a specific case or cases related to the compensability of injuries in the workplace and any liability for benefits related to an alleged COVID-19 injury.

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