



GOVERNMENT OF THE DISTRICT OF COLUMBIA  
OFFICE OF RISK MANAGEMENT



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Chief Risk Officer

**Notice Number:** PSWCP 2023-01

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**Subject:** Public Sector Workers' Compensation Claims Arising out of the 2019 Novel Coronavirus (COVID-19)

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**Purpose:** Pursuant to authority provided under Reorganization Plan No. 1 of 2003 and Section 2302a of Subchapter 23 of the Comprehensive Merit Personnel Act, the Office of Risk Management (ORM) provides revised guidance for adjudicating COVID-19 claims through its Public Sector Workers' Compensation Program ("PSWCP") and rescinds its prior guidance on this topic, set forth in Notice No. 2020-01.

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**Effective Date:** May 4, 2023

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**Citation:** D.C. Code § 1-1518.01; § 1-623.02a

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**Background:** An injury or disease is compensable under Chapter 23 of the Comprehensive Merit Personnel Act (CMPA), D.C. Code § 1-623.01 *et seq.*, if it arises out of and in the course of employment. For an employee's injury to have arisen out of the employment, the obligations or conditions of employment must have exposed the employee to the risks or dangers connected with the injury.<sup>1</sup> This nexus is a predicate to establishing compensability and is generally referred to as the "positional-risk" standard or test.<sup>2</sup> For an injury to occur in the course of employment, the injury must occur "within the period of employment, at a place where the employee may reasonably be expected to be, and while [the employee] is reasonably fulfilling duties of his or her employment or doing something reasonably incidental thereto."<sup>3</sup> An employee or claimant under the CMPA is not

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<sup>1</sup> *Grayson v. D.C. Dept. of Emp. Services*, 516 A.2d 909, 911 (D.C. 1986).

<sup>2</sup> *Id.*

<sup>3</sup> *Bentt v. District of Columbia Dept. of Employment Servs.*, 979 A.2d 1226, 1235 (D.C. 2009) (citations omitted).



entitled to a presumption of compensability.<sup>4</sup> The burden is always on the claimant to establish the necessary nexus of injury to work.<sup>5</sup>

The nature of COVID-19 presents a unique challenge to determining compensability. Because COVID-19 exists in the community outside of an employee's work environment, it is difficult to determine the precise moment and method of virus transmission. Furthermore, while an employee's exposure to the contagion that causes COVID-19 may not always result in a positive test for the disease, exposure will subject employees to isolation or quarantine<sup>6</sup> that may result in wage-loss without an actual injury.

These circumstances necessitate the issuance of this guidance to address COVID-19 claims and explain workers' compensation coverage under the CMPA and applicable law.

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**Guidance:**                    ***Coverage for Infectious Diseases***

In determining coverage regarding an initial claim for workers' compensation benefits generally, an employee or a claimant bears the burden to establish by a preponderance of the evidence that the claim is compensable as both (1) arising out of and (2) in the course of employment.<sup>7</sup> To establish the injury arises out of employment, an employee or claimant must satisfy the so-called "positional-risk" standard. This standard provides that an injury arises out of employment if the injury would not have occurred but for the fact that conditions and obligations of the employment placed the claimant in a position where he or she was injured.<sup>8</sup> This standard is applied when evaluating compensability involving an infectious disease.<sup>9</sup> But application of the "but for" positional-risk standard may be difficult to satisfy when illness arises from an

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<sup>4</sup> *D.C. Dep't of Mental Health v. D.C. Dep't of Emp't Servs.*, 15 A.3d 692, 698 n. 4 (D.C. 2011).

<sup>5</sup> See 7 D.C.M.R. § 119.1(d) (2019).

<sup>6</sup> Centers for Disease Control and Prevention, *Isolation and Precautions for People with COVID-19*, available at: <https://www.cdc.gov/coronavirus/2019-ncov/your-health/isolation.html> (last updated August 11, 2022) (If an individual tests positive for COVID-19, the individual should remain in isolation or quarantine for at least 5 days. Isolation can end after 5 days if the individual experienced no symptoms or is fever-free for 24 hours without the use of fever-reducing medication. If symptomatic and symptoms are not improving, an individual should continue to isolate until fever-free for 24 hours and symptoms are improving. If an individual tested positive and experienced symptoms that were moderate to severe, the individual should isolate through day 10. Loss of taste and smell may persist for weeks or months and should not delay the end of isolation.)

<sup>7</sup> 7 D.C.M.R. § 119.1 (2019).

<sup>8</sup> See *Clark v. D.C. Dept. of Employment Services*, 743 A.2d 722, 727 (D.C. 2000). "*i v. Childs. Nat'l Hosp. et al.*, CRB No. 22-039, 2022 DC Wrk. Comp. LEXIS 242 (Oct. 17, 2022).

<sup>9</sup> *Broniatowski v. Childs. Nat'l Hosp. et al.*, CRB No. 22-039, 2022 DC Wrk. Comp. LEXIS 242 (Oct. 17, 2022).

infectious disease circulating in the community. In these circumstances, evaluation of the claim may need to consider whether the employment created an increased or aggravated risk of exposure.

“[I]t is impossible to divorce the increased-risk issue from the evidentiary question whether the claimant in fact contracted the disease in the particular place to which the employment took the claimant.”<sup>10</sup> Evaluation must consider whether the conditions of employment created an increased or aggravated risk of contracting the disease under particular conditions or in a particular place that the employment took the claimant.<sup>11</sup> “[C]ourts agree that injury due to ... exposure to contagious diseases arises out of the employment if the employment increases the risk of this kind of harm.”<sup>12</sup> If an employee has an increased or aggravated risk of exposure to an infectious or communicable disease while at work, contracting the disease has been found to have arisen out of the employment rather than as a result of exposure in the community at large.<sup>13</sup> Conversely, workers’ compensation coverage has been denied for employees who contract a contagion, illness, or disease when an individual in the general population has the same risk of exposure.<sup>14</sup>

The Supreme Court has emphasized the “crucial distinction” between occupational risks and universal risks.<sup>15</sup> Occupational risks and hazards are specific to what employees face at work and “must be tethered in a ‘causal sense’ to the workplace, and they differ ‘in both degree and kind’ from everyday risks that all persons face.”<sup>16</sup> An infectious disease can be an occupational risk if it “poses a special danger because of the particular features of an employee’s job or workplace.”<sup>17</sup> By contrast, “universal risks” – like any number of communicable diseases – “do not have a causal

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<sup>10</sup> 1 Larson’s Workers’ Compensation Law § 5.05[2] (Matthew Bender, Rev. Ed. 2022).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See, e.g., *Edwards v. D.C. Youth and Rehab. Servs.*, AHD PBL No. 07-007, 2008 DC Wrk. Comp LEXIS 203 (Jan. 28, 2008) (*aff’d* by *Edwards v. D.C. Youth and Rehab. Servs.*, CRB No. 08-106, 2009 DC Wrk. Comp. LEXIS 272 (Nov. 4, 2009)) (Contraction of tuberculosis while at a correctional facility held compensable as correctional facility created an increased exposure risk to TB for certain correctional facility workers due to residents of the correctional facility having tuberculosis); see also *Traveler’s Ins. Co. v. Donovan*, 125 F. Supp. 261 (D.D.C. 1954) (contraction of tuberculosis on a work assignment in Japan was compensable because prevalence of the disease was five times greater in Japan than in the District of Columbia).

<sup>14</sup> *Neil v. D.C. Dep’t of Fire and Emergency Med. Servs.*, OHA No. PBL 97-48, 2000 DC Wrk. Comp LEXIS 63 (February 11, 2000) (Influenza infection held not compensable “...since any individual in the general populace might become infected by those germs; to place such a burden upon an employer [to pay workers’ compensation benefits] would be both onerous and unfair.”).

<sup>15</sup> *Nat. Fed. Of Indep. Bus. v. Dep’t of Labor, Occupational Safety & Health Admin.*, 142 S.Ct. 661, 665 (2022).

<sup>16</sup> *Flower World, Inc. v. Sacks*, 43 F.4th, 1224, 1231 (9<sup>th</sup> Cir. June 10, 2022) (citing *NFIB*, 142 S.Ct. at 666).

<sup>17</sup> *Id.* at 665-66.

relationship to the workplace but, instead, are “hazards of daily life.”<sup>18</sup> Universal risks do not become workplace hazards “simply because most Americans have jobs and face those same risks while on the clock.”<sup>19</sup>

### ***Requirements for Establishing a PSWCP COVID-19 Claim***

While the COVID-19 contagion is a risk that can occur in many workplaces, “it is not an occupational hazard in most.”<sup>20</sup> For a COVID-19 claim, an employee or claimant must first provide medical evidence from a qualified medical professional to support a COVID-19 diagnosis and a confirmed positive test result within fourteen (14) days of performing work-related services or duties at a place of employment. Second, as part of the positional-risk standard analysis, compensability for a COVID-19 claim must consider whether the employment created an aggravated risk or special danger of exposure to the COVID-19 contagion, as compared to the background exposure risk attendant to routine involvement and interaction in the greater community. There must be sufficient evidence from an employee or claimant that the COVID-19 exposure has a causal connection to the workplace and employment duties rather than to an alternative source outside of and unrelated to the work environment and/or duties.

In considering whether the conditions of employment may create an aggravated exposure risk, it may be useful to consider the four (4) exposure risk categories for employees based on their potential exposure at work to known or suspected sources of COVID-19 established by the federal Occupational Safety and Health Administration (OSHA).<sup>21</sup> The four (4) categories are very high, high, medium, and low risk. An employee may move from one exposure risk category to another if work duties or assignments change.<sup>22</sup>

### ***Very High and High Exposure Risk Category Employees***

An employee is in a “very high” exposure risk category if performing a job with a very high potential for exposure to known or suspected sources of COVID during specific medical, postmortem, or laboratory procedures.<sup>23</sup>

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<sup>18</sup> *Id.* at 665.

<sup>19</sup> *Id.*

<sup>20</sup> *Fraternal Order of Police et al. v. D.C.*, No. 2022 CA 000585 B (D.C. Super. Ct. Aug. 25, 2022).

<sup>21</sup> Occupational Safety and Health Administration, *COVID-19 Hazard Recognition*, available at: <https://www.osha.gov/coronavirus/hazards#:~:text=OSHA%20has%20divided%20job%20tasks,exposure%20risk%20level%20to%20another> (last visited Jan. 12, 2023).<sup>22</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

An employee is in a high exposure risk category if performing a job with a high potential for exposure to know or suspected sources of COVID-19.

In evaluating a claim by an employee or claimant in either of these two (2) exposure risk categories, consideration must be given to whether the requisite personal protective equipment (PPE) for the type of employment involved was available and afforded to the employee in accordance with applicable work place safety standards. And while these OSHA risk categories likely establish an aggravated risk of exposure, they do not create a presumption of exposure. The positional-risk standard still obtains, and the burden remains on the employee or claimant to establish a causal link between actual occupational conditions and resultant COVID-19 disease.<sup>24</sup>

### ***Medium and Low Exposure Risk Category Employees***

A “medium” exposure risk employee is employed in a position that requires frequent close contact or sustained close contact with other people in areas with community transmission.<sup>25</sup> A “low” exposure risk employee is employed in a position that does not require close contact.<sup>26</sup> Employees in this latter category have minimal occupational contact with the public and other coworkers.<sup>27</sup>

Additionally, an employee in a “low” exposure risk position generally has a lower risk of exposure to COVID-19 than what is readily observed from a routine level of interaction with the greater community in the execution of necessary daily and periodic activities (e.g., shopping for groceries or medications, commuting to work and home, attending a medical or dental appointment, etc.) or limited civic engagement (e.g., voting, public demonstrations). Employees categorized as “medium” exposure risk may at most have only a slightly greater exposure risk to COVID-19 than the risk attendant to everyday life outside of work – not an aggravated risk in utilizing the positional-risk standard.

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<sup>24</sup> *Broniatowski*, CRB No. 22-039, 2022 DC Wrk. Comp. LEXIS 242 at 9 (the positional-risk analysis applies to evaluating the compensability of a COVID-19 exposure claim). The previous PSWCP COVID-19 Guidance, Notice PSWCP 2020-01, incorrectly concluded that the aggravated exposure risk consideration expressed in several decisions, discussed *supra* at footnote 13, supported a rebuttable presumption of workplace exposure for those employees categorized as very high or high risk by OSHA. *Broniatowski* makes clear that the previous Guidance extrapolated the concept of aggravated risk too far in recognizing such a presumption. The burden remains with the employee or claimant at all times; conditions that create an increased exposure risk to contracting COVID-19 must be considered as part of the application of the positional-risk test, but they are not dispositive.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

***Employees exposed to COVID-19 at the workplace, who test negative for COVID-19, but are temporarily unable to work<sup>28</sup> due to quarantine.***

An employee, who may have been exposed to COVID-19 at the work place through close contact with a confirmed infected individual,<sup>29</sup> but does not in fact test positive for COVID-19, has not sustained a predicate injury that could entitle the employee to workers' compensation coverage. For coverage to obtain, there must be an unexpected traumatic event that produces objective symptoms of an injury, actual occupational disease, or actual infection sustained while in the performance of the employment duties.<sup>30</sup> Employees in this category are eligible for initial medical treatment – i.e. coverage for COVID-19 testing to determine whether the employee tests positive for COVID-19. Employees in this category may be eligible for leave accommodations, as provided in accordance with DCHR guidance on this issue.

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<sup>28</sup> Including telework.

<sup>29</sup> The Centers for Disease Control and Prevention defines “Close Contact” as “[s]omeone who was less than 6 feet away from an infected person (laboratory-confirmed or a clinical diagnosis) for a total of 15 minutes or more over a 24-hour period.” Centers for Disease Control and Prevention, *Contact Tracing Plan Appendices: Appendix A – Glossary of Key Terms*, available at: <https://www.cdc.gov/coronavirus/2019-ncov/php/contact-tracing/contact-tracing-plan/appendix.html#contact> (last updated Aug. 11, 2022).

<sup>30</sup> See D.C. Code §§ 1-623.01(5); 1-623.01(22); 1-623.02(a).