



DLI Workers' Compensation Division updates related to COVID-19

- Visit www.dli.mn.gov/updates for the most recent information about Department of Labor and Industry (DLI) changes, cancellations and resources related to the COVID-19 pandemic.



Administrative conferences, mediations

Since March 23, all DLI administrative conferences and mediations are being conducted remotely by telephone or video conference only. Parties also have the option of rescheduling these events to a later date. For more information, contact your assigned mediator/arbitrator via their email address listed at www.dli.mn.gov/business/workers-compensation/work-comp-meet-our-mediators-arbitrators.

Rehabilitation consultations

Until further notice, DLI will not take any enforcement action under Minnesota Rules 5220.0130 against any qualified rehabilitation consultant (QRC) who conducts a rehabilitation consultation with an injured worker by telephone or video, rather than in person. DLI encourages QRCs to limit in-person meetings and implement social-distancing measures when providing a rehabilitation consultation and other rehabilitation services to injured workers. Placement vendors and their staff members, who meet with injured workers, are also encouraged to conduct meetings by phone or video.

Work Comp Campus

The Workers' Compensation Modernization Program (WCMP) continues to work on implementing Work Comp Campus as scheduled. Email questions and concerns to dli.wcmp@state.mn.us.

Workers' Compensation COVID-19 presumption

This new law, effective April 8, states certain employees who contract COVID-19 are presumed to have an occupational disease covered by the Minnesota workers' compensation law. Generally these employees include first responders, health care workers, correctional workers and those workers required to provide child care services for the children of first responders and health care workers.

See the bill language, bill summary and FAQs at www.dli.mn.gov/updates.

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Denials of liability related to COVID-19 illnesses

The Department of Labor and Industry (DLI) reviews all denials of liability according to the requirements in workers' compensation statutes and rules.

The examples cited in this document are not rules and any denials filed that are similar to the examples would continue to be evaluated on a case-by-case basis. However, the examples are intended to give our stakeholders a better sense of the types of denials we receive and the issues we see with them.

This is intended to assist claims managers by identifying denial deficiencies and briefly discussing how investigations, documentation and analysis could be improved.

When COVID-19 illnesses are compensable under the workers' compensation law

Injuries or occupational diseases that arise out of and in the course of employment are compensable under the Minnesota Workers' Compensation Act. For an injury to be compensable, it is sufficient that the employment is a substantial contributing factor to the condition or to an aggravation or acceleration of a pre-existing condition. It is not necessary that the employment be the only cause of the condition.

COVID-19 claims can be compensable under three statutory provisions.

1. **A new statutory presumption for employees on the front lines of the COVID-19 pandemic.** Under the new law, the employees listed below are presumed to have contracted a workers' compensation occupational disease if they have contracted COVID-19.

- An employee is entitled to the presumption if they contract COVID-19 on or after April 8, 2020, while employed in one of these occupations:
 - a licensed peace officer under Minnesota Statutes, section 626.84, subdivision 1, a firefighter, a paramedic or an emergency medical technician;
 - a nurse or health care worker, correctional officer or security counselor employed by the state or a political subdivision (such as a city or county) at a corrections, detention or secure treatment facility;
 - a health care provider, nurse or assistive employee employed in a health care, home care or long-term care setting, with direct COVID-19 patient care or ancillary work in COVID-19 patient units; and
 - a person required to provide child care to first responders and health care workers under Gov. Tim Walz's Executive Orders 20-02 and 20-19. The Minnesota Department of Education has more information about this at https://education.mn.gov/mdeprod/idcplg?IdcService=GET_FILE&dDocName=MDE032187&RevisionSelectionMethod=latestReleased&Rendition=primary and https://education.mn.gov/mdeprod/idcplg?IdcService=GET_FILE&dDocName=MDE032075&RevisionSelectionMethod=latestReleased&Rendition=primary.
- An employee can show they "contracted" COVID-19 under the new law if they have either a positive laboratory test or, if a test was not available for the employee, a diagnosis based on symptoms by a licensed physician, licensed physician's assistant or licensed advanced practice registered nurse.
- If an employee has contracted COVID-19 and is employed in one of the occupations described above, the illness is presumed to be a workers' compensation occupational disease and is compensable, unless the employer "rebutts" (disproves) the presumption.



Denials, continues ...

Denials, continued ...

- The employer may only rebut the presumption by proving the employee's employment was not a direct cause of the disease. The employer has the burden of proving, by the preponderance of the evidence, that the employee was not exposed to COVID-19 while performing his or her job duties or that the exposure to COVID-19 could not have been a cause of the employee's illness.
 - An employee who has contracted COVID-19, but is not entitled to the presumption under the new law is not prohibited from claiming an occupational disease as provided in other paragraphs of the occupational disease law (Minn. Stat. § 176.011, subd. 15) or from claiming a workers' compensation injury under subdivision 16. (See numbers 2 and 3 below.)
 - A link to the new law and a summary are at www.dli.mn.gov/sites/default/files/pdf/COVID-19_work_comp_presumption.pdf. FAQs about the law are at www.dli.mn.gov/sites/default/files/pdf/COVID-19_work_comp_presumption_faqs.pdf.
2. **COVID-19 may be compensable as a personal injury under Minn. Stat. §176.011, subd. 16.** Subdivision 16 reads (in part) as follows: "'Personal injury' means any ... physical injury arising out of and in the course of employment and includes personal injury caused by occupational disease; but does not cover an employee except while engaged in, on, or about the premises where the employee's services require the employee's presence as a part of that service at the time of the injury and during the hours of that service ..." (see www.revisor.mn.gov/statutes/cite/176.011#stat.176.011.16).
 3. **COVID-19 may be compensable as an occupational disease under other paragraphs of Minn. Stat. § 176.011, subd. 15.**
 - Under paragraph (a), an occupational disease arises out of and in the course of employment and is peculiar to the occupation in which the employee is engaged and due to causes in excess of the hazards ordinary of employment. An employer is not liable for compensation for any occupational disease that cannot be traced to the employment as a direct and proximate cause and is not recognized as a hazard characteristic of and peculiar to the trade, occupation, process or employment, or which results from a hazard to which the worker would have been equally exposed outside of the employment.
 - Paragraph (b) provides two other presumptions that the employee has an occupational disease due to the nature of employment:
 - i. certain first responders and law enforcement officers who contract myocarditis, coronary sclerosis, pneumonia or its sequel, if at the time of employment the employee was given a thorough physical examination by a licensed doctor of medicine, and the written report was filed with the employer; and
 - ii. a person who, by nature of their position provides emergency medical care or an employee who was employed as a licensed police officer under Minn. Stat. § 626.84, subd. 1; firefighter; paramedic; state correctional officer; emergency medical technician; or licensed nurse providing emergency medical care; and who contracts an infectious or communicable disease to which the employee was exposed in the course of employment outside of a hospital (see www.revisor.mn.gov/statutes/cite/176.011).

When an insurer must make a primary liability determination for a claim

- The self-insured employer or insurer (referred to here as insurer) may deny liability by giving the employee written notice of the denial of liability. If the injury is required to be reported to the commissioner, the denial of liability must be filed with the commissioner and served on the employee within 14 days after notice to or knowledge by the employer of the claimed compensable injury.
- The insurer must commence payment of temporary total compensation within 14 days of notice to or knowledge by the employer of a compensable injury. Commencement of payment does not waive any rights to any defense the insurer has with respect to the compensability of the claim or the amount of the compensation due.

Denials, continues ...

- If the insurer has commenced payment of compensation, but determines within 60 days of notice to or knowledge by the employer of the injury that the disability is not a result of a personal injury, the insurer may discontinue payment of compensation by filing a notice of denial of liability within 60 days of notice or knowledge. After the 60-day period, payment may be terminated only by the filing of a notice of discontinuance of benefits as provided under Minn. Stat. § 176.239. The insurer may recover payments made if the commissioner or compensation judge finds that the employee's claim of work-related disability was not made in good faith (see www.revisor.mn.gov/statutes/cite/176.221#stat.176.221.1).
- This process provides an opportunity for an insurer that completes an investigation after the initiation of payment of benefits to submit another notice of denial of liability if facts are discovered that provide a basis for denial of the claim.

Legal requirements for a denial of liability

- **A denial of liability must include detailed facts and specific reasons supporting the denial.** A notice of denial of liability must:
 - state in detail the facts forming the basis for the denial and specific reasons explaining why the claimed injury or occupational disease was determined not to be within the course and scope of employment; and
 - include the name and telephone number of the person making this determination.

(See www.revisor.mn.gov/statutes/cite/176.221#stat.176.221.1.)

- **A denial must be specific to convey clearly the basis for the denial in easily readable and understandable language to a person of average intelligence.** Notices of discontinuance and denials of liability must be sufficiently specific to convey clearly, without further inquiry, the basis upon which the party issuing the notice or statement is acting.
 - The denial must state the specific reason for the denial in language easily readable and understandable to a person of average intelligence and education, and a clear statement of the facts forming the basis for the denial.
 - For example, a denial that states only that the injury did not arise out of and in the course and scope of employment or that the injury was denied for lack of a medical report is not specific within the meaning of this item.
 - The insurer must attach a copy of a medical report or summary of any health care provider contact that forms a basis for the denial.
 - If the commissioner or compensation judge determines that a notice or statement is not sufficiently specific, the notice or statement may be rejected as unacceptable and the party issuing it shall be informed of this. The rejected notice or statement may be amended to meet the requirement of this section or a new notice or statement may be filed.
 - “[T]he specificity requirements of the statute ... are for the benefit of the injured worker. The insurer's denial must set forth the facts which the insurer found to be conclusive in making its decision and those facts must provide a legal basis for the denial of benefits.” *Seller v. Dura Supreme, Inc.; and MN Dept. Of Labor and Ind./Workers' Compensation Division*. (WCCA Feb. 25, 2008)

(See www.revisor.mn.gov/statutes/cite/176.84 and www.revisor.mn.gov/rules/5220.2570/.)

- **A denial must represent a real controversy and must not be frivolous or for the purpose of delay.** Upon reasonable notice and hearing or opportunity to be heard, the commissioner, a compensation judge or, upon appeal, the court of appeals or the supreme court shall award compensation, in addition to the total amount of compensation award, of up to 30% of that total amount where an employer or insurer has:
 - instituted a proceeding or interposed a defense that does not present a real controversy but that is frivolous or for the purpose of delay;
 - unreasonably or vexatiously delayed payment;
 - neglected or refused to pay compensation;

Denials, continues ...

Denials, continued ...

- intentionally underpaid compensation or frivolously denied a claim; or
- unreasonably or vexatiously discontinued compensation in violation of Minn. Stat. §§ 176.238 and 176.239.

“Frivolously” means without a good faith investigation of the facts or on a basis that is clearly contrary to fact or law.

(See www.revisor.mn.gov/statutes/cite/176.225#stat.176.225.1.)

- **It is prohibited conduct to file a denial of liability for workers’ compensation benefits without conducting an investigation.**

(See www.revisor.mn.gov/statutes/cite/176.194.)

Reporting a denial of liability for a COVID-19 claim on an NOPLD

To meet the specificity and other legal requirements, a denial of liability for a claimed COVID-19 injury or illness should follow the steps below, based on the insurer’s investigation. Each step should be addressed in the denial. Steps 1 through 4 describe the factual and legal information that should be included in a Notice of Insurer’s Primary Liability Determination (NOPLD) form denial for all COVID-19 claims. Steps 2 and 3 focus on denials of claims of employees covered by the new presumption law.

Step 1. Provide facts about the diagnosis.

- a) Specifically state whether the employee has been diagnosed with COVID-19, either by a positive laboratory test or, if a laboratory test was not available for the employee, as diagnosed and documented by a health care provider.

Note: If the employee is covered by an employment listed in the new COVID-19 presumption law, the diagnosis must be by the employee’s licensed physician, licensed physician’s assistant or licensed advanced practice registered nurse (APRN) based on the employee’s symptoms.

- b) If you disagree that the employee has COVID-19, provide facts to support your disagreement.

Step 2. If the employee has COVID-19, provide facts about whether the applicable statutory presumption for the occupation has been met.

- a) Provide specific facts about whether the employee’s illness is presumed to be an occupational disease according to the new law (see www.revisor.mn.gov/laws/2020/0/72/).
- b) If you agree that the statutory presumption is established, move to Step 3. If you do not agree the presumption is established, provide specific facts that show why one or more of the elements of the presumption have not been met:
 - Describe the employment setting.
 - Describe the employee’s occupation or job duties.
 - For health care, home care and long-term care workers, describe facts to show whether the employee was employed as “a health care provider, nurse or assistive employee employed in a health care, home care or long-term care setting with direct COVID-19 patient care or ancillary work in COVID-19 patient units.” Describe the facts and how you know them. For example:
 - i. Did the employee work in a COVID-19 unit? Did the employee ever float to or help in a COVID-19 unit?
 - ii. Did the employee ever care for or assist a person who was diagnosed with COVID-19, whether the diagnosis was before or after the care was given?
 - iii. If the employee worked in home care, describe the setting: Did the employee care for multiple people or just one? Did more than one employee care for that same person during the same period of time?

Denials, continues ...

Notes:

- i. "Assistive" and "ancillary" employees do not need to have a medical credential.
- ii. The statutory standard for health care, home care and long-term care workers is not whether the employee had direct **contact** with a person that has contracted COVID-19. The law does not require that the person be in the facility for treatment of COVID-19.

Step 3. Provide facts to support any rebuttal of an established presumption.

- a) If the presumption is established, can it be rebutted by showing that the employment was not a direct cause of the disease? The burden of rebutting the presumption falls on the employer or insurer, who must provide specific facts showing the employment was not a direct cause.
 - The denial should describe how you obtained the facts showing the employee could not have contracted COVID-19 from direct care for a person with COVID-19 or working on a COVID-19 unit.
- b) If you claim the presumption can be rebutted because of the length of time from when the employee provided direct care for a person with COVID-19 and when the employee became ill, provide a timeline of symptoms and infection.
 - What were the time frames between when the employee last worked and a person tested positive (before and after the last day of work)?
 - If the employee works in home care or long-term care, when were the residents last tested? How often are they tested? When was the employee tested or diagnosed?
 - If the employee works in a health care setting and you deny liability because the employee could not have contracted COVID-19 at work, provide specific details supporting that conclusion, such as the last date the employee worked in a health care setting with direct COVID-19 patient care or performed ancillary work in COVID-19 patient units, compared to the date the employee contracted COVID-19.

Step 4. If the presumption has not been met under steps 1 and 2, or has been rebutted under step 3, consider whether the employee has sustained a personal injury under Minn. Stat. § 176.011, subd. 16, or meets another presumption (see www.revisor.mn.gov/statutes/cite/176.011#stat.176.011.16).

- a) Did the employee sustain a personal injury that arose out of and in the course of employment under Minn. Stat. § 176.011, subd. 16? For example, did the employee contract the illness from a coworker, family member of a patient or other work source?
- b) Did the employee sustain an occupational disease under another provision of the workers' compensation law? An employee can claim COVID-19 is an occupational disease under other paragraphs of Minn. Stat. § 176.011, subd. 15, paragraph (a) or another presumption in paragraph (b) (see www.revisor.mn.gov/statutes/cite/176.011#stat.176.011.15).

Each of the steps above should be addressed in the denial. Provide facts to show the information and analysis from your investigation.

Examples of COVID-19 denials that are not specific or do not provide a factual or legal basis for the denial

- "We have no medical information that relates the injury to the employment," "we do not have any medical reports that support the claim" or "the employee was not tested for COVID-19."
 - A test for COVID-19 is not necessarily required. Medical documentation of COVID-19, either through a positive test *or* a diagnosis by a health care provider, is needed to establish a compensable claim. In the case of a claim under the new COVID-19 presumption law in Minn. Stat. § 176.011, subd. 15 (f), the test result or diagnosis must be provided to the insurer. An insurer that is unable to obtain the testing results or diagnosis should specify who

Denials, continues ...

was contacted about the report, when this request was made and whether there was any response to the request. If a medical report is cited in support of a denial, it must be sent with the denial.

- A denial that states only that the injury was denied for lack of a medical report is not specific within the meaning of this item. If the denial is based on a medical reason, the medical report that provides the basis for the denial should be attached (see Minn. Rules 5220.2570, subp 2, (E)). A medical report is not always needed to accept liability. If a medical report is necessary to determine compensability but is not available, the denial should state why a medical report is needed, who was contacted about the report, when this request was made and whether there was any response to the request. If a medical report is not necessary, the specific reasons for the denial need to be explained. If the medical report is available, it must be sent with the denial.
- “The employee does not satisfy clause 1 of the new law and so has not established the presumption.”
 - This does not meet the specificity, plain language or legal requirements for a denial. Employees will not generally know what “clause 1” refers to or why that is a basis to deny.
 - Even if the employee does not satisfy the requirements under the new Minn. Stat. § 176.011, subd. 15, paragraph (c), the employee may have a compensable COVID-19 claim under paragraphs (a) or (b) or subdivision 16. It is not the employee’s obligation to determine under what specific subdivision or paragraph of the workers’ compensation law COVID-19 might be compensable.
- “COVID-19 is in the community. It is not peculiar to the occupation in which the employee is engaged beyond the hazards of ordinary employment.”
 - This is part of the standard for establishing an occupational disease under paragraph (a). It would not be a valid legal defense if the employee is entitled to the presumption under paragraphs (b) or (c), or has a personal injury under subdivision 16. Again, it is not the employee’s obligation to determine under what specific subdivision or paragraph of the workers’ compensation law COVID-19 might be compensable.
- “The employee was not exposed to someone with COVID-19 at work.”
 - This does not provide facts to rebut any of the statutory presumptions. From whom was this information obtained? What time period applies? The COVID-19 presumption language does not refer to “exposure.”
 - This could lack a legal basis because the existing statutory presumptions in Minn. Stat. § 176.011, subd. 15, paragraphs (b) and (c), do not require every employee to show exposure to a specific person with COVID-19.
- “The employee caught COVID -19 from a member of the employee’s family.”
 - This statement alone does not provide facts to show whether any of the statutory presumptions or rebuttal requirements were met. To rebut the presumption, the employer must show that the employment was not a direct cause of the employee’s COVID-19 diagnosis. Showing there may have been another cause of the employee’s diagnosis does not rebut the presumption.
- “The employee does not know of any resident or patient with COVID-19.”
 - This statement is nonspecific, because the employer, not necessarily the employee, knows whether a resident, patient, client or other person in a health care facility has tested negative or positive and when they were last tested.
- “The statutory presumption was met, but the employee’s employment was not a direct cause of the disease.”
 - This is not specific or understandable to a person of average intelligence or understanding, because an employee would not understand what “statutory presumption” means or whether it refers to a presumption in Minn. Stat. § 176.011, subd. 15, paragraphs (b) or (c).
 - It does not provide any facts to support the insurer’s assertion that the employment was **not** a direct cause of the disease.

What are the consequences for filing a denial of liability that does not meet the legal, factual and specificity requirements?

- **Penalties** may be assessed for denials that do not meet the legal requirements or a denial of liability, under Minn. Stat. §§ 176.221, subd. 1a; 176.84, subd. 2; 176.194, subd. 4; and Minn. Rules 5220.2560; and 5220.2570.
- **Additional compensation of up to 30%** of the compensation awarded may be payable to the employee under Minn. Stat. § 176.225, subd. 1.
- **Payment of the employee's attorney fees** may be awarded.
- **The insurer may be referred to the commissioner of the Department of Commerce** for action against the insurer's license under Minn. Stat. §§ 176.194, subd. 4 and 176.195 (see www.revisor.mn.gov/statutes/cite/176.195).

Frequently asked questions about denials of liability

1. "It's the 14th day, I just got the first report of injury and I haven't been able to contact anyone. It looks like there is lost time beyond the waiting period. What should I do?"

An insurer that denies a claim after failing to conduct a good faith investigation is subject to penalties and payment of additional benefits to the employee. If you do need to contact someone to conduct a good faith investigation, you can commence payment and then deny liability later (if necessary) by filing another NOPLD form within 60 days.

If your determination is not made within the 14-day period, you run the risk of being penalized for a late payment or late denial of benefits. You should address this situation with the insured, including advising them that you may seek reimbursement of any penalties imposed for failure to timely file the denial.

2. "The employer said to deny the COVID-19 claim. Is that all I need to do?"

As with any claim, you still must conduct an investigation and determine whether to accept or deny the claim based on facts obtained during the investigation and the application of the law.

3. "I have no medical reports and have not been able to speak to the health care provider. Can I deny the COVID-19 claim just because I don't have the reports?"

The new law requires confirmation of COVID-19 by a positive laboratory test or written documentation of the physician, physician assistant or advance-practice registered nurse's diagnosis. This documentation must be provided to the employer or insurer to establish the presumption. If you have attempted to obtain confirmation, you should specify in your denial when, how and from whom (such as the employer, employee or health care provider) you attempted to obtain documentation of a positive test result or COVID-19 diagnosis. The law requires a health care provider to provide health care provider reports within seven working days of a written request and notice to the employee. You may contact DLI for help in obtaining medical records. For another option, see the answer to the first question.

4. "I denied a COVID-19 claim that had only a small amount of lost time and medical bills. New information has become available that makes me question my earlier decision, but isn't persuasive enough for me to change my mind. The injured worker has mentioned getting an attorney. What are my options?"

You can continue to investigate the claim to get additional information that will help with your decision making. If you maintain the denial and a claim petition is filed there will be litigation costs in addition to potential benefits that may be owed. Mediation is also an option where the parties can work toward a mutual resolution of the claim.

DLI's Alternative Dispute Resolution unit offers mediation services. For more information, call 651-284-5032 or 800-342-5354, or visit www.dli.mn.gov/workers/workers-compensation/work-comp-alternative-dispute-resolution-services.

Other denial scenarios that may also apply to COVID-19 claims

The following are some of the statements the Department of Labor and Industry has seen on denials of liability for workers' compensation claims, along with the reason why the statement does not meet the legal requirements. Some of these could also apply to COVID-19 claims.

- “The injury did not arise out of and in the course of employment.”
 - A denial that states only that the injury did not arise out of and in the course of employment is not specific (see Minnesota Rules 5220.2570, subpart 2, item E).
- “The injury was not caused, aggravated or accelerated by work activities.”
 - This does not provide an adequate legal or factual basis for the denial.
- “We respectfully deny the employee is entitled to workers’ compensation benefits.”
 - This does not provide facts or a legal basis to support that the work injury did not occur.
- “The employee was not credible.”
 - This does not provide a factual or legal basis for the assertion that the employee was not credible or what the significance is of the lack of credibility to the claimed injury.
- “In spite of repeated calls, the employee has not been available.”
 - This does not provide facts to support that the work injury did not occur.
 - If it is necessary to obtain information from the employee to investigate the claim, the denial should specify what information is needed from the employee, what attempts were made to obtain the information from the employee and when the contact was attempted.
- “The injury was idiopathic.”
 - This statement is an acknowledgement an injury occurred, but does not indicate why it was determined not to be work-related.
 - Also, the word “idiopathic” would not be easily understood by many employees.
- “There was no witness.”
 - This may have been a fact, but it does not provide a legal basis for the denial. There is no requirement in the workers’ compensation law that an injury be witnessed; it may well be compensable even if no one witnessed it.

Other examples of improper denials

A “frivolous” denial means a denial without a good faith investigation of the facts or on a basis that is clearly contrary to fact or law.

- Sometimes, denials indicate an investigation is not complete and is continuing. Even though the investigation is continuing, a denial that includes this language still must have a specific and valid legal and factual basis for denying the claim.
 - “This claim is under investigation.”
 - “Conditional denial: We have not obtained the medical records.”
 - “An authorization to obtain medical records for a pre-existing condition has been sent.”
 - “This claim is disputed until the results of an independent medical examination can be reviewed.”

Other examples of denials without a legal or factual basis

- “The employee had a pre-existing condition.”
- “The employee did not comply with the company’s policy of reporting injuries.”
- “The employee did not go directly to a doctor.”
- “The injury was not reported to the employer until after the medical treatment was sought by the claimant.”
- “The employee did not seek treatment for two weeks and was able to continue working.”
- “The employee did not miss time from work until weeks after the injury.”
- “The employee has been terminated or laid off by the employer.”
- “The employee refused light-duty work.”
- “The employee is getting disability benefits from the employer.”
- “The employee is receiving unemployment benefits.”
- “All medical bills have been submitted to the health insurer.”
- “There is no medical documentation that the employee should be off work due to the work injury.”

HELPFUL TIPS:

Conducting mediations, conferences remotely

- Before the conference or mediation, the assigned mediator/arbitrator will need the telephone numbers for the participating parties.
- The mediators/arbitrators will likely be calling from what appears to be an unlisted or blocked telephone number. Attorneys representing injured workers should make their clients aware of this.
- Parties wishing to submit exhibits for a conference should distribute them at least 24 hours in advance via email. Be sure copies are distributed **to all interested parties**, including the assigned mediator/arbitrator.
- The Department of Labor and Industry will continue to provide remote interpreting services for all conferences and mediations. Make sure the assigned mediator/arbitrator is aware **in advance** of any needs regarding interpreting services.

Filing a first report of injury for COVID-19 claims

The Department of Labor and Industry (DLI) has become aware of a discrepancy between the number of COVID-19 first reports of injury received to date by DLI and the number of employees reported by the Minnesota Department of Health who have tested positive for COVID-19 who may have contracted COVID-19 at work.

DLI enforces timely compliance with Minnesota's workers' compensation statutes and rules. One of these provisions is to ensure the prompt reporting of worker injuries. Employers are required to report an injury, including an employee's contraction of COVID-19 that may have occurred at work, which wholly or partly incapacitates the employee from performing labor or service for more than three calendar days. The employer is required to report the injury to its insurer on a *First Report of Injury* (FROI) form prescribed by the commissioner and must provide a copy of the form to the employee, with the *Workers' Compensation System Employee Information Sheet* (see Minnesota Statutes § 176.231, subdivision 1). Remember when reporting COVID-19 claims to use the Workers Compensation Insurance Organizations updated cause-of-injury and nature codes. The new codes include a cause code of 83 for pandemic and a nature code of 83 for COVID-19. The codes can be used for any dates of injury beginning in December 2019.

An employer must report each COVID-19 injury to its insurer within 10 days after it has received notice of the injury or has knowledge of the injury. Notice may include notification by the Minnesota Department of Health that a worker or workers have tested positive for COVID-19 and knowledge may include an awareness that an employee has, or claims to have, COVID-19 that they may have contracted at work. There is no requirement that an employee complete a FROI form. It is the employer's responsibility to complete and submit it.

An employee must provide notice of an injury to the employer within specified time frames, *unless the employer had actual knowledge* (see Minn. Stat. § 176.141). Case law provides that "actual knowledge" is knowledge of information that would put a reasonable man on inquiry, based on the facts and circumstances. An employer must have some information connecting the work activity with an injury. Actual knowledge does not require the employer to know that an employee's claimed injury was work-related. Knowledge of the disease, as distinguished from knowledge of causal relationship between the disease and the employment, is sufficient. Actual knowledge for purposes of notice does not require that the employer be provided with clear and convincing evidence of medical causation, merely that the facts known to the employer be such as to reasonably suggest the possibility that a compensable injury may have occurred. See, *Anderson v. Frontier Communications*, 819 N.W.2d 143 (Minn. 2012); *Grapevine v. City of Worthington*, 302 N.W.2d 2 (Minn. 1980); *Boldt v. Jostens, Inc.*, 261 N.W. 2d 92 (Minn. 1977); *Noga v. Minn. Vikings Football Club* (WCCA Sept. 2018); *Denais v. Minnesota Mining and Mfg. Co.*, (WCCA 2009); *Mulholland v. Carl Erickson Trucking*, slip op. (WCCA, June 1998).

Filing a first report of injury is not an admission of liability. After investigating the claim, the insurer must commence payment of benefits, or deny liability for an alleged injury and serve notice of a denial on the employee, within 14 days of notice to or knowledge of an injury (see Minn. Stat. § 176.221, subd. 1). A delay in reporting an injury to the insurer or DLI, or in paying or denying liability for an injury, may result in penalties and increased benefits to injured workers (see Minn. Stat. §§ 176.321, subd. 10, and 176.221).

Payment of full wages and medical bills for employees ill with COVID-19 is not a defense to filing a FROI form. The claim must still be reported. If the claim is compensable, the insurer is required to report the portion of full wages that constitute wage-loss benefits and pay Special Compensation Fund assessments on the wage-loss benefit. Finally, the employer must make appropriate adjustments to the employee's payroll records to assure the employee's sick leave or vacation time is not inappropriately charged and to ensure income taxes are not withheld from the portion of the full wages that constitutes workers' compensation wage-loss benefits (see Minn. Stat. § 176.221, subd. 9).

An employer may not discriminate against a worker for reporting an injury. Employers are also prohibited from advising employees not to report an injury, to agree to hold an employer harmless for a work injury or to relinquish rights an employee may have to workers' compensation benefits. For more information, see *Waiver of workers' compensation rights prohibited* on page 17.



Department tracks workers'-compensation-related COVID-19 claims

The Department of Labor and Industry (DLI) is continually monitoring the filings for workers' compensation benefits due to COVID-19. It began receiving COVID-19 claims in mid-March, before the change to Minnesota Statutes § 176.011, subdivision 15, that established a rebuttable presumption of an occupational disease for some workers. DLI is tracking the claims to provide a detailed report about the handling of COVID-19 workers' compensation claims to the Workers' Compensation Advisory Council and the state Legislature in January 2021.

The following figures provide information about claims received through July 22. The figures will be updated every two weeks and posted on the DLI website at www.dli.mn.gov/updates. These figures include all claims filed, ignoring whether the claim meets requirements for indemnity benefits. Claims that have not yet received liability determinations are also included.

Figure 1 shows the number of claims by industry sector and, for more-detailed industries within those sectors, if they have at least 20 claims. By far the largest number of claims are in health care and social assistance, which includes hospitals, nursing homes, home health care and assisted-living facilities. Manufacturing, which includes meat processing, has the second largest number of claims. Public administration, which includes first-responder services, is the second-highest sector, even though it has only one-tenth the number of claims as health care.

Figure 1. Distribution of COVID-19 claims by industry, claims received by July 22

Industry sectors*	Number of claims	Industry sectors*	Number of claims
Manufacturing	338	Residential mental health and substance abuse facilities	33
Animal (except poultry) slaughtering	43	Continuing care retirement communities	172
Poultry processing	269	Assisted living facilities for the elderly	93
Wholesale and retail trade	20	Other residential care facilities	23
Transportation and warehousing	22	Services for the elderly and persons with disabilities	57
Administrative and support and waste management and remediation services	105	Other individual and family services	32
Janitorial services	103	Accommodation and food services	31
Health care and social assistance	2,038	Limited service restaurants	21
Offices of physicians (except mental health)	36	Public administration	216
Home health care services	79	Police protection	62
General medical and surgical hospitals	617	Correctional institutions	83
Nursing care facilities	711	Fire protection	31
Residential intellectual and developmental disability facilities	132	All other industries	48
Total = 2,818			
*Detailed industries with 20 or more claims are indented.			

Figure 2 shows claim counts for occupation groups and subgroups with at least 20 claims. Workers in service occupations, which includes many health care support workers and first-responders, account for the majority of the claims. The second-highest occupation group, professional occupations, includes doctors and nurses.

Figure 2. Distribution of COVID-19 claims by occupation, claims received by July 22

Occupation groups*	Number of claims	Occupation groups*	Number of claims
Management, business and financial occupations	120	Food preparation and serving occupations	44
Management occupations	104	Building and grounds cleaning and maintenance occupations	175
Professional occupations	792	Personal care and service occupations	133
Community and social services occupations	91	Office and administrative support occupations	42
Education, training and library occupations	22	Installation, maintenance and repair occupations	48
Health care practitioners and technical occupations	668	Production occupations	234
Service occupations	1,385	Transportation and material moving occupations	39
Health care support occupations	844	All other occupations	11
Protective support occupations	189	Occupation not reported	147
Total = 2,818			

*Subgroups with 20 or more claims are indented.

Figure 3 tracks the weekly number of claims by the date of onset of the illness. DLI receives the claims a few weeks after the reported date of illness, although some claims have been received two months after the illness onset date. The number of claims increased from late February through mid-April and has averaged about 300 claims a week through the middle of May. The weekly average starting in June has been about 80 claims a week, although additional claims during this period continue to be reported.

Figure 3. Claims by reported COVID-19 illness date, claims received by July 22

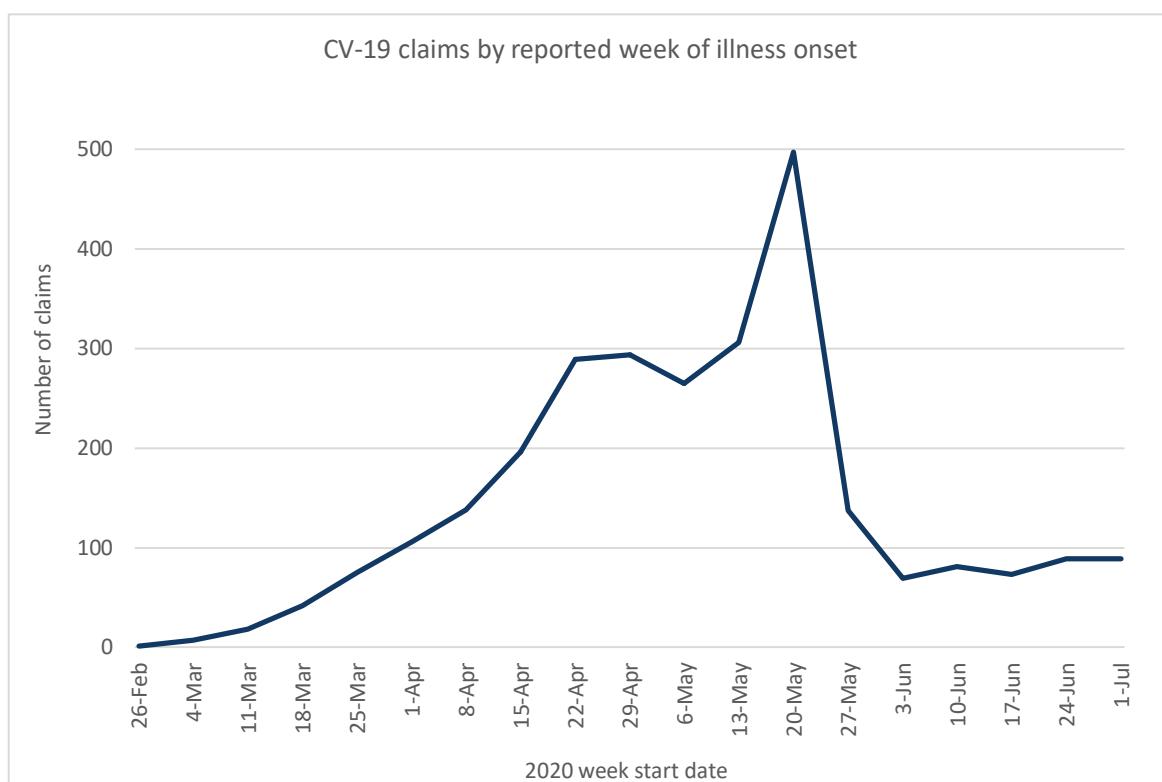
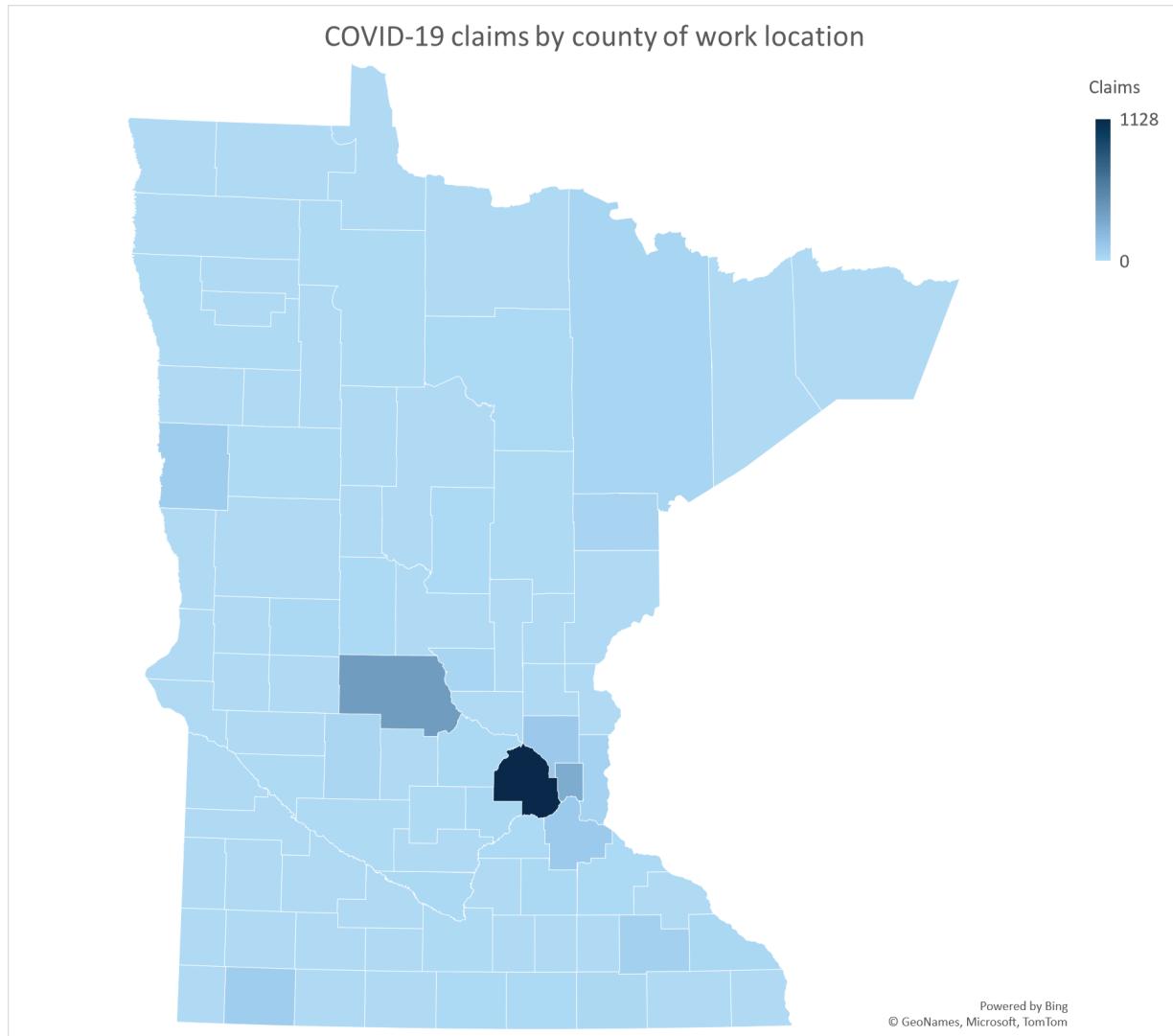


Figure 4 shows the distribution of claims by county, using the reported work location or the employer's physical address if the work location is not reported. A few cases with work locations outside of Minnesota are not included. Hennepin County has 40% of the claims, followed by Stearns County with 14%. The seven-county Twin Cities metropolitan area accounts for 61% of the claims. Other counties with large numbers of claims are Clay, Nobles and Olmsted. Their high numbers are due to health care facilities, meat processing plants and first responder claims. The values for each county are visible on the online version of this figure at www.dli.mn.gov/updates.

Figure 4. Distribution of COVID-19 claims by county, claims received by July 22



COVID-19 and recordkeeping

- Federal OSHA: Revised enforcement guidance about recording cases of coronavirus disease 2019 (COVID-19) at www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19

Minnesota OSHA (MNOSHA) Compliance follows federal OSHA recordkeeping guidance, which is used across the country and needs to be consistent for national data comparison, with the exception that in Minnesota, low-hazard industries are also required to record injuries and illnesses.

MNOSHA Compliance will enforce the recordkeeping requirements of 29 CFR Part 1904 for all employers with employee COVID-19 illnesses.

Recording a COVID-19 illness does not, of itself, mean the employer has violated any OSHA standard. And, pursuant to existing regulations, employers with 10 or fewer employees have no recording obligations unless they have been notified by the Bureau of Labor Statistics; they need only report work-related COVID-19 illnesses that result in a fatality and report any employee's in-patient hospitalization, amputation or loss of an eye.



More information about COVID-19 is available from federal OSHA at www.osha.gov/SLTC and from the Centers for Disease Control and Prevention at www.cdc.gov/coronavirus/2019-ncov.

Turn to Office of Workers' Compensation Ombudsman for help with claims

The Department of Labor and Industry's Office of Workers' Compensation Ombudsman informs, assists and empowers injured workers and small businesses having difficulty navigating the workers' compensation system.

The ombudsman assists injured workers by:

- providing information to help them protect their rights and to pursue a claim;
- contacting claims adjusters and other parties to resolve a dispute;
- assisting in preparing for settlement negotiations or mediations; and
- making appropriate referrals to other agencies or entities if needed.

The ombudsman assists small businesses by:

- providing information about what to do when an employee is injured;
- directing them to appropriate resources for assistance in obtaining and resolving issues regarding workers' compensation insurance; and
- responding to questions pertaining to employers' responsibilities under Minnesota's workers' compensation law.

The Office of Workers' Compensation Ombudsman also recommends statute or rule changes to improve the effectiveness of the workers' compensation system.



To request assistance, contact the Office of Workers' Compensation Ombudsman at 651-284-5013, 800-342-5354 or dli.ombudsman@state.mn.us.

Discontinuing benefits on COVID-19 claims: Specificity, layoffs

The Minnesota Department of Labor and Industry (DLI) has started receiving Notice of Intention to Discontinue Workers' Compensation Benefits (NOID#3) forms on existing workers' compensation claims that may have been impacted by the COVID-19 pandemic. This communication is to remind claims staff of the circumstances when workers' compensation benefits must continue and the information and supporting documentation that must be included on the NOID#3 form.

NOID #3 form specificity and supporting documents

DLI has noticed some of the reasons for discontinuing benefits on recently filed NOID#3 forms for COVID-19 claims lack the required specificity to determine whether the reason for discontinuance is valid in accordance with the Minnesota workers' compensation law. In addition, some of the NOID #3 forms being filed lack the required attached documentation that supports the reason for discontinuing the benefits. DLI reminds claims staff of the following.

- When electronically filing a NOID #3 form, you must "state the date of intended discontinuance and set forth a statement of facts clearly indicating the reason for the action. Copies of whatever medical reports or other written reports in the employer's possession that are relied on for the discontinuance shall be attached to the notice." If the employee has been or is presently represented by an attorney for the same injury, the NOID#3 form must also be served on the most recent attorney of record (see Minnesota Statutes § 176.238, subdivisions 1 and 9).
- The legal reason or reasons for the proposed discontinuance or reduction must be stated in language that is easily read and understood by a person of average intelligence and education, and in sufficient detail to inform the employee of the factual basis for the discontinuance or reduction (see Minnesota Rules 5220.2630, subpart 4(B)(5)).
- A penalty of up to \$1,000 for each violation may be assessed for failure to comply with these requirements (see Minn. Stat. § 176.238, subd. 10).

Additional reminders when a claimant experiences a layoff due to COVID-19

Temporary total disability (TTD) benefits

If the employee is receiving TTD benefits and is still totally medically disabled from working, then the employee has not yet returned to the job market, and a layoff from the employer related to COVID-19 has no impact on their eligibility for continuing TTD benefits.

If the employee is receiving TTD benefits and has been released to return to work with medical restrictions the employer cannot accommodate, a layoff from the employer due to COVID-19 has no impact on the claimant's eligibility for continuing TTD benefits.

TTD benefits are still subject to cessation for other reasons in accordance with Minn. Stat. § 176.101, such as 90 days post-service of maximum medical improvement, 130 weeks maximum TTD benefits paid or refusing an offer of suitable work.

Temporary partial disability (TPD) benefits

If the employee is receiving TPD benefits while working in a medically restricted capacity and is laid off from the employer due to COVID-19, the employee is no longer eligible for TPD benefits as provided in Minn. Stat. § 176.101, subd. 2(b). However, under Minn. Stat. § 176.101, subd. 1(e)(1), the employee may be entitled to recommencement of TTD benefits. The statute provides three reasons why the employee would not be entitled to recommencement: if the layoff (or termination) is due to misconduct; if the employee has already been paid 130 weeks of TTD benefits; or if the employee is already 90 days post-service of maximum medical improvement. Depending on whether the layoff is permanent or



temporary, the employee may be required to search for work to retain entitlement to TTD benefits and may be entitled to vocational rehabilitation benefits. See below for information about payment of TTD and unemployment benefits.

Unemployment and workers' compensation benefits

Minnesota workers' compensation benefits are primary over unemployment benefits under Minn. Stat. § 268.085, subd. 3a. Note that Executive Order 20-29 related to unemployment benefits does *not* waive subdivision 3a.

Therefore, if an employee who is entitled to receive or is receiving TTD or TPD benefits is laid off, the workers' compensation wage-loss benefits are primary over any unemployment benefits that may be payable. One hundred percent of the workers' compensation wage-loss benefit is deducted from any unemployment benefit payable. However, if there is a workers' compensation wage-loss claim pending, unemployment benefits may be paid if the employee is available for suitable employment as defined by Minn. Stat. § 268.085, subd. 15, is seeking some type of available work and is able to do that work. If the employee later receives workers' compensation wage-loss benefits for weeks the employee also received unemployment benefits, the employee must repay the unemployment benefits up to the amount of workers' compensation benefits received. If the employee is not seeking or able to accept suitable employment, the employee is not eligible for unemployment benefits.

More information

Additional information about unemployment benefits is available:

- at www.uimn.org;
- at www.uimn.org/applicants/affectsbenefits/other-income/index.jsp; and
- in Minn. Stat. § 268.085 at www.revisor.mn.gov/statutes/cite/268.085.

Waiver of workers' compensation rights prohibited

The Minnesota Department of Labor and Industry (DLI) has received information that some employers are requiring employees to sign a waiver form agreeing the employer is not liable if the employee contracts COVID-19 on work premises. Some waivers state that employees who refuse to sign the waiver will be fired or unable to return to work; others state the employee agrees that by returning to work they have assumed the risk of contracting COVID-19; and some require the employee to agree to mandatory arbitration.

These waivers and agreements are prohibited and are not enforceable under Minnesota law. Employees cannot sign away the right to file a workers' compensation claim and an employer may not discriminate against a worker for reporting an injury. It is also prohibited for employers to advise employees to not report an injury, agree to hold an employer harmless for an injury or relinquish rights an employee may have to workers' compensation benefits.

Minnesota law states, "Any agreement by any employee or dependent to take as compensation an amount less than that prescribed by this chapter is void" (Minnesota Statutes § 176.021, subdivision 4). A settlement of a workers' compensation claim is not valid unless it is in writing and has been approved by the commissioner of DLI or a compensation judge at the Office of Administrative Hearings as being reasonable, fair and in conformity with the workers' compensation law, as required by Minn. Stat. § 176.521.

Assumption of risk is not a valid defense to a workers' compensation claim under Minn. Stat. § 176.031. Additionally, mandatory arbitration is not allowed for a workers' compensation claim; Minnesota provides for its own dispute-resolution system for workers' compensation disputes involving an employee.

A waiver agreement, such as described above, could expose an employer to liability for civil damages for obstructing employees from seeking workers' compensation benefits. Minnesota Statutes § 176.82, subd. 1, Retaliatory discharge, states:



"Any person discharging or threatening to discharge an employee for seeking workers' compensation benefits or in any manner intentionally obstructing an employee seeking workers' compensation benefits is liable in a civil action for damages incurred by the employee including any diminution in workers' compensation benefits caused by a violation of this section including costs and reasonable attorney fees, and for punitive damages not to exceed three times the amount of any compensation benefit to which the employee is entitled. Damages awarded under this section shall not be offset by any workers' compensation benefits to which the employee is entitled."

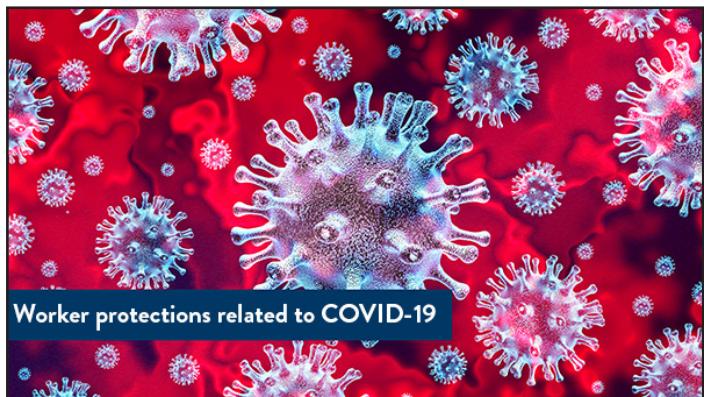
Asking or requiring an employee to sign a waiver could also discourage employees from exercising their legal rights under labor standards or occupational safety and health laws. Minnesota employees have the right to express concerns about safety and health to their employer and to request that Minnesota OSHA conduct an inspection of their workplace (Minn. Stat. §§ 182.654, 182.659 and 182.669). An employer may not discharge, discipline, threaten or otherwise discriminate against or penalize an employee because the employee in good faith reports a violation or suspected violation of any federal or state law or refuses an employer's order to perform an action that the employee has an objective basis in fact to believe violates any federal or state law (Minn. Stat. § 181.932, subd. 1). Employees who are exposed to or are experiencing symptoms of COVID-19 may also be eligible for benefits, such as paid sick leave, under the federal Families First Coronavirus Response Act.

Because these waivers violate multiple provisions of Minnesota law, employers must not ask employees to sign them. Employers that have asked employees to sign such a waiver must:

1. Immediately stop requiring or asking employees to sign this waiver.
2. Provide written notice to employees who have signed the waiver or have been presented with the waiver that it is void and cannot be enforced; it does not prohibit an employee from filing a workers' compensation claim for COVID-19, or any other claim related to employment protection or benefits provided by Minnesota law; and that no adverse employment action will be taken against any employee who claims statutory benefits related to COVID-19.
3. If any employee was fired or otherwise not allowed to return to work for refusing to sign the waiver, offer re-employment with the same terms as employees who did sign the waiver received.

Worker protections related to COVID-19

Employees are protected by a number of state and federal laws. These protections and employers' legal obligations are explained in *Worker protections related to COVID-19* at www.dli.mn.gov/updates. The five-page document is available in English, Hmong, Somali and Spanish and includes the following topics.



- Use of sick leave
- Family Medical Leave Act (FMLA)
- Families First Coronavirus Response Act (FFCRA)
- Employers cannot discriminate: Workers have the right to request reasonable accommodations
- Reminders for employers
- Workers cannot be fired or denied the opportunity to be rehired for applying for unemployment insurance
- UI benefits
- Protections for workers who contract or have been exposed to COVID-19
- Workers' compensation
- Final wages
- Changes to working conditions: Overtime mandates; work location changes
- Hours worked; hours paid: Salaried exempt workers; volunteering
- Workplace safety and health: Reporting health and safety concerns at work; refusal to work