



## News Release

### **York Insurance Services Group discusses California case law and the compensability of workers' compensation H1N1 claims**

PARSIPPANY, N.J. (November 10, 2009) – York Insurance Services Group, Inc., a premier provider of a full range of insurance services, including claims administration, managed care, specialized loss adjusting, risk management, public entity pool administration, loss control and others, today released a paper analyzing precedents set by California case law and their impact on whether H1N1 influenza is a compensable illness.

Angela Hatley, vice president of client relations, and Jackie Secia, director of quality, audit, and training, found that proving compensability requires confirmation of special exposure in the workplace to the H1N1 strain. The paper, reproduced below, discusses how the courts determine if a special exposure exists, likely scenarios for H1N1 claims, and what employers should do when employees file an H1N1-related workers' compensation claim.

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#### **About York Insurance Services Group**

York Insurance Services Group, Inc., is a premier provider of claims-handling, specialized loss adjusting, managed care, pool administration, loss control and other risk management and insurance services nationwide. York provides risk management and managed care solutions to a wide variety of strategic partners, including insurance carriers, self insureds, brokers, wholesalers, MGAs, programs, risk pools and public entities. York delivers customized claims solutions for all lines of business, including property, liability, products liability, ocean and inland marine, environmental, transportation and logistics, construction and workers' compensation. York is based in Parsippany, N.J., and has nearly 1,200 employees nationwide. Visit us on the Web at [www.yorkisg.com](http://www.yorkisg.com).

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## INFLUENZA: IS IT A COMPENSABLE ILLNESS?

On June 11, 2009, the World Health Organization declared a pandemic of the H1N1 strain of influenza. A *pandemic* is defined in medicine as “an epidemic over a wide geographic area affecting a large proportion of the population.” The Centers for Disease Control and Prevention (CDC) describe a pandemic as a “disease with little or no human immunity spreading easily from person-to-person in a large geographic area.”

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### California case law

October 4, 2009, was the official start date of the flu season with an increased amount of publicity focused on the H1N1 strain of the virus. Increased publicity can create over-reaction. We have already experienced over-reaction in the workplace as it relates to whether or not influenza is a compensable consequence of employment.

The California Supreme Court cases, when analyzing compensability of an illness or disease in the workplace, focus on the rule that the employee must establish compensability and prove special exposure. The employee has the burden to prove that the employer placed him/her at greater risk than that of the general public.

There are cases where employees were able to prove that they were exposed and placed at greater risk, even when a disease was spreading in the community. As an example, employees such as physicians, nurses, interns, and ambulance drivers may be able to establish exposure much greater than that of the general public. *Pacific Employers vs. I.A.C.* 19 Cal. 2<sup>nd</sup> 622

In the California Supreme Court case, *Pattiani v. I.A.C.* 199 Cal. 596, it was held that the employee, in order to establish compensation, must establish the fact that he was subjected to some special exposure in excess of that of the commonality, and in the absence of such proof, the illness cannot be held to have been proximately caused from the employment. *Pattiani*, supra, also stated, ‘The employee’s risk of contracting the disease by virtue of the employment must be materially greater than that of the general public, i.e., the injury must be a natural or reasonable result of the employment or of the conditions thereof...’

The case of *San Francisco vs. I.A.C.* 183 Cal. 273, 282 tells us in part, ‘It must further be shown that the disease contracted was not merely a hazard of the community, but that the employee was subjected to some special exposure in excess of the commonality. In the absence of such showing, the illness of the employee cannot be said to have been proximately caused by an injury arising out of the employment or by a reason of a risk or condition incident to the employment.’

Influenza is so prevalent, especially during flu season, it is very difficult to discern if the employee contracted the virus at work, and the connection to work becomes doubtful.

The California Supreme Court cases narrow the liability to the employer because of the uncertainty of the causal connection.

Let's consider the employee who may present to the employer claiming he has been exposed to or has symptoms of the flu or H1N1, and he "got it at work." An employee may state, in general, that he has been exposed to or has the symptoms of H1N1; however, information gathered from the CDC Web site indicates the presence of H1N1 can be determined only by viral cultures.

Let's consider a typical employee's day. The employee lives with others who have been exposed or are contagious themselves; the employee interacts with others outside the workplace, he or she touches doorknobs, countertops, grocery carts, etc.; he or she shakes hands, pays for items and receives change, pumps gas, buys coffee, uses public restrooms, sits at dining tables and in movie theaters, visits the doctor/dentist, visits homes of others, plays sports, works out at gyms, attends events and goes to work. All these interactions expose the employee to viruses and bacteria. Which exposure to the flu virus was the one that caused the illness to the employee?

The CDC indicates that an infected person can infect another person one day before becoming ill from flu and up to five to seven days after the illness. The virus is viable on environmental surfaces from two to eight hours after it has been deposited on the surface. The virus is spread person to person, touching something an infected person has touched and then touching your mouth and nose with the virus. When was the employee exposed to the flu virus that caused the illness?

When you go to the doctor with flu/cold symptom or with the flu/cold, does the doctor question you as to where/when/how you contracted the flu/cold?

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### **What should employers do?**

In general, our recommendation is to direct your employee to his or her group health care provider or personal provider for medical attention. Any lost time would not be industrial, and he or she would have to access other leave time such as sick leave.

A claim of perceived exposure, symptoms of flu or flu should be handled on a case-by-case basis.

There will be situations where the employee believes he or she has a work-related illness. If employees request a claim form or medical treatment, our recommendation is to **immediately** refer them to the claims adjuster to initiate a conversation and make a determination as to whether there is a direct causal connection to the duties of the employment in excess of the commonality and believe that an illness has resulted.

## **References**

Labor Code 5401 in part states: Within one working day of receiving notice or knowledge of injury, which results in lost time beyond the employee's work shift, or which results in medical treatment beyond first aid, the employer shall provide a Claim Form. First aid is any one-time treatment, and any follow-up visit for observation of minor industrial injuries ... which do not normally require medical care.

Title 8 Cal C 10109 states: A reasonable and timely investigation to obtain information needed to determine benefits must be conducted upon receipt of notice/knowledge of an injury or claim for a workers' compensation benefit. The injured workers' burden of proof does not excuse the administrator's duty to investigate the claim.

The content of this memorandum does not constitute legal advice and was not prepared by an attorney.