



## COVID-19 And Workers' Compensation Issues Facing School Boards

By: John Geaney, Esq.  
Capehart Scatchard

When New Jersey schools reopen, one of the many imperatives will be the need to safeguard the health of employees and avoid COVID-19 workers' compensation claims. This challenge is now facing many private employers across the nation as they bring back furloughed employees under the PPP (Paycheck Protection Program). Employees in the public and private sector are understandably worried about contracting the virus, and naturally they want to know what safety measures their employers will be taking.

Safety committees at schools and safety professionals with NJSIG will be making appropriate recommendations to protect students and employees. Among the protective measures may be the wearing of masks and gloves in schools for employees. One question that schools have raised is what happens if protective devices are required but some employees ignore the rules and fail to utilize the devices? Imagine a situation where an employee who refused to wear a mask contracts the virus and then attempts to bring a workers' compensation claim. Is the board liable for workers' compensation benefits?

There is a little-known defense in workers' compensation contained in N.J.S.A. 34:15-7. That provision states that ***the willful failure to make use of a reasonable and proper personal protective device furnished by the employer is grounds for denial of the workers' compensation claim if the employer has clearly made this a requirement of the employment and has uniformly enforced this rule.*** A school that wishes to invoke this defense must demonstrate to the Judge of Compensation that it has documented the repeated warnings given to the employee to wear the protective device and that despite repeated warnings, the employee willfully failed to utilize the protective device. That kind of proof will suffice to defeat such a workers' compensation claim.

It should be noted that some employees may also raise health issues that prevent them from wearing a mask. There is an exception contained in Governor Murphy's Executive Orders for such health issues. The school may need to address whatever the underlying disability is which precludes mask use just as the employer would for any disability under the Americans with Disabilities Act or under the New Jersey Law Against Discrimination.

No matter how careful schools are, some employees may become sick with the coronavirus. That may lead to workers' compensation claims, but such claims must be evaluated in a larger context. There are now well over a million Americans who have contracted the disease and perhaps millions more who have it but have not been tested. New Jersey has the second highest number of COVID-19 cases in the nation. How will schools decide whether an employee's COVID-19 claim is work related?

As in any workers' compensation claim involving an alleged occupational disease, the burden of proof rests on the employee to prove that his or her condition arose from work and was produced by causes which are characteristic of or peculiar to the employment in a material degree. Conditions that are commonly experienced by most Americans – such as stress or the flu -- are almost never compensable in workers' compensation precisely because they are commonplace and ubiquitous.

Proving that a COVID-19 claim is work related will be difficult for school employees where the school has instituted safety guidelines. This virus is so contagious that one can contract the infection almost anywhere at all through contact with friends, family, strangers, travelling, walking in a park, riding a subway, or even sitting on a beach.

When managing claims like this, NJSIG asks a wide range of questions as part of its investigation in order to obtain information which will lead to appropriate decisions on compensability. One of the most important steps is to obtain family doctor records to see if the employee identified a potential source of the infection when he or she called the family doctor to ask to be tested. Sometimes those records will contain statements identifying family or friends as the likely source. Getting hospital and family doctor records becomes paramount in this health crisis because COVID-19 cases will surely be very fact sensitive.

How much evidence does the Judge of Compensation need to decide a COVID-19 case? The employee has to prove the claim by a preponderance of the evidence. To use a football analogy, the employee has to move the ball just past the 50 yard line to win. But if the employer moves the ball back over the 50 yard line, the employer wins. Neither the employee, nor the employer needs to score a touchdown. One can also think of the preponderance standard as being just over 50%. Judges are used to employing this standard, and they apply it every day in court.

Concerns have also been raised that school board employees may try to bring civil suits against their schools for exposing them to the coronavirus. These kinds of civil law suits filed by employees are extremely rare and seldom successful. There is a good reason for that. New Jersey has one of the strongest exclusive remedy provisions in the nation. The exclusive remedy means that when a worker is injured arising out of a work activity, the only remedy that the worker has is to obtain workers' compensation benefits. The worker gives up the right to sue in exchange for the fact that the worker can be entirely at fault but still receive workers' compensation benefits. An example of the exclusive remedy is this: two school board employees drive their cars onto school property and collide with each other. Both employees are injured but they cannot sue each other. Their only remedy is workers' compensation.

There will always be a few plaintiff lawyers who try on occasion to bring civil suits by employees against employers, but as mentioned above, only a tiny percentage is every successful. The plaintiff has to prove that the employer engaged in intentional conduct in harming the worker to get past the exclusive remedy. Negligent action by the employer is not nearly enough. Even reckless action by the employer is not enough. Literally the employee has to prove that his or her employer intended to cause injury, that there was a substantial certainty of harming the employee and that the hazard was not a part of everyday work life. These suits will fail because of the reasons noted above: the coronavirus is everywhere, little is known about it, people can get it even if they wear N95 masks, and the CDC itself has had to backpedal on several areas of advice.

In summary, it is fair to say that challenges lie ahead for schools as employees return to work, but good safety programs and thorough investigation of claims will minimize workers' compensation issues.