Employers, insurance companies, and third-party administrators ("TPAs") continue to encounter issues relating to Coronavirus' impact on new and existing workers' compensation claims. Stay at Home orders, including Governor Lee's Executive Orders 22 and 23, impact Tennessee employers. Employers, TPAs, and insurers should consider the impact employment decisions have on injured workers' eligibility for temporary disability benefits. Contact us with questions regarding this guidance and to discuss your factual situation.

Our first Coronavirus memo tackled compensability of Coronavirus claims. This memo covers Coronavirus and temporary disability (TTD and TPD) claims. TTD/TPD eligibility, light duty, furloughs, layoffs, buyouts, and several related situations are discussed below. Basic and complex issues are discussed.

REQUIRED DISCLAIMER

This guidance is for general, educational purposes and not intended to be legal advice. Seek separate legal advice on your specific cases and facts. The legal analysis of your specific question or claim depends on facts which might alter, or completely change, what you will read below. The below analysis covers only Tennessee's workers' compensation claims.

BASICS OF TEMPORARY DISABILITY BENEFITS

Most Coronavirus-related questions we are getting are answered by basic temporary disability benefits law. There are two types of temporary disability benefits: temporary total disability (TTD) benefits and temporary partial disability (TPD) benefits. An injured employee's entitlement depends on the facts of each case.

What are temporary total disability (TTD) benefits?

An employee gets TTD benefits if unable to work due to a compensable injury. This happens when the authorized treating physician takes the employee off work entirely, or the physician assigns work restrictions the employer cannot accommodate, resulting in the employee's not working at all.

TTD benefits end when the employee returns to work (including on light duty) or reaches maximum medical improvement (MMI). The amount of the TTD benefit is 66 2/3% of the employee's average weekly wage, subject to the minimum and maximum compensation rate.

What are temporary partial disability (TPD) benefits?

An employee gets TPD benefits if, as a result of a compensable injury, the employee returns to light duty but earns a wage that is less than that the average weekly wage. The amount of the TPD benefit is 66 2/3% of the difference between the average weekly wage and the wage earned on light duty. For example, if the employee's average weekly wage is $500, gets hurt, and is returned to light duty work earning $300, the employee is entitled to 66 2/3% of $200, which is

$133.34. Like TTD, TPD benefits ends when the employee reaches maximum medical improvement.

What if the employer offers light duty work that the employee declines or cannot perform?

There may be instances when the employer offers light duty work, but the employee either declines the offer or is unable to perform. In such cases, a reasonableness standard applies. Was the employer reasonable in attempting to return the employee to light duty work versus the reasonableness of the employee in failing to return to work. The reasonableness of each is determined on a case-by-case basis. Generally, if the employee is unable to perform the light duty work due to the injury, the employee will be entitled to temporary disability benefits. If the employee declines the light duty work for personal reasons or other reasons unrelated to the work injury, the employee likely is not entitled to temporary benefits.

Can the employer pay regular wages instead of TTD benefits?

Yes. An employer may choose to pay regular wages to an injured employee, even if the employee is unable to return to work. In this case, the temporary total disability benefit is reduced by the amount of the regular wages. If regular wages are as much as the employee would have received in TTD, no TTD is owed. If regular wages are less than what the employee would have been paid in TTD, a TPD analysis is applied (see above).

Does the employer still owe TTD benefits if the employee receives unemployment?

Yes, the employer still owes TTD benefits despite the employee receiving unemployment benefits. An employer is not entitled to reduce any temporary total disability benefits owed if the laid off employee receives unemployment benefits. In such case, the employee remains entitled to temporary total disability benefits and must repay the unemployment benefits.

COMMON SCENARIOS INVOLVING TEMPORARY DISABILITY BENEFITS

Below are some common scenarios employers may encounter when considering light duty work, furloughs, and buyout packages. The list is not exhaustive. Because each situation is unique, legal counsel should be consulted to evaluate potential liability for temporary disability benefits.

- The injured employee is taken completely out of work by the authorized treating physician and the employer furloughs or lays off all or most employees, or simply closes pursuant to a Stay at Home order. The injured employee remains entitled to TTD benefits. (Some employers have asked why this is fair: employees with work injuries gets TTD, but uninjured employees do not. This inequity is the law. The policy argument is that the uninjured employee can find another job more easily than an employee with restrictions).

- The injured employee has restrictions and is working light duty, then the employer furloughs or lays off all or most employees, including the injured worker. The injured employee is entitled to TTD benefits. However, if the injured employee finds alternate work, the employee may be entitled to TPD benefits.

- The injured employee is released to return to work on light duty while the employer is temporarily closed due to a Stay at Home Order, resulting in the employee not returning to work on light duty. The injured employee is entitled to TTD benefits. However, if the injured employee finds alternate work, the employee may be entitled to TPD benefits.

- The injured employee is released to return to work on light duty and the employer provides light duty work that the employee can perform at home. The employee is not entitled to TTD benefits. The employee might be entitled to TPD benefits if the employee's earned wages are less that the average weekly wage.

- The injured employee is released to return to work on light duty and the employer provides light duty work that the employee cannot perform at home for reasons unrelated to the injury. For example, the employee cannot work remotely due to lack of a computer or internet service. In this case, the courts may find that the injured employee is entitled to TTD benefits based on the reasonableness test.

- The injured employee is taken completely out of work by the authorized treating physician. The employer offers a buyout package providing for a temporary continuation of wages. The injured employee accepts the buyout package. The employee remains eligible for TTD benefits, but the TTD benefits may be reduced by the wages paid through the buyout.

- The injured employee is on light duty and the employee is not working a light duty job because no such work is available. The employer offers a buyout package providing for a temporary continuation of wages. The injured employee accepts the buyout package. The employee remains eligible for TTD, but the TTD benefits may be reduced by the wages paid through the buyout.

- The injured employee is on light duty and the employee is working a light duty job, which results in either TPD benefits or no disability benefits because the employee's earnings are not reduced. The employer offers a buyout package providing for a temporary continuation of wages and the employer could have continued to accommodate the temporary restrictions into the future (i.e., was not preparing to eliminate the position as part of a workforce reduction). The employee would not be entitled to any TTD or TPD benefits. Per the reasonableness test, the employee opted to resign rather than work the light duty job, resulting in the employee not being eligible for temporary disability benefits. In some cases, there may be an argument that TPD would be owed, in which case the amount should be 66 2/3% of the difference between the employee's average weekly wage and the pay received through the buyout.

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QUESTIONS?

Please contact Manier & Herod with questions, comments, and concerns. We are happy to consult on all potential claims to determine the best course of action based on your particular facts.