



COVID-19: National self-insured employers update
Managing your workers' compensation risks

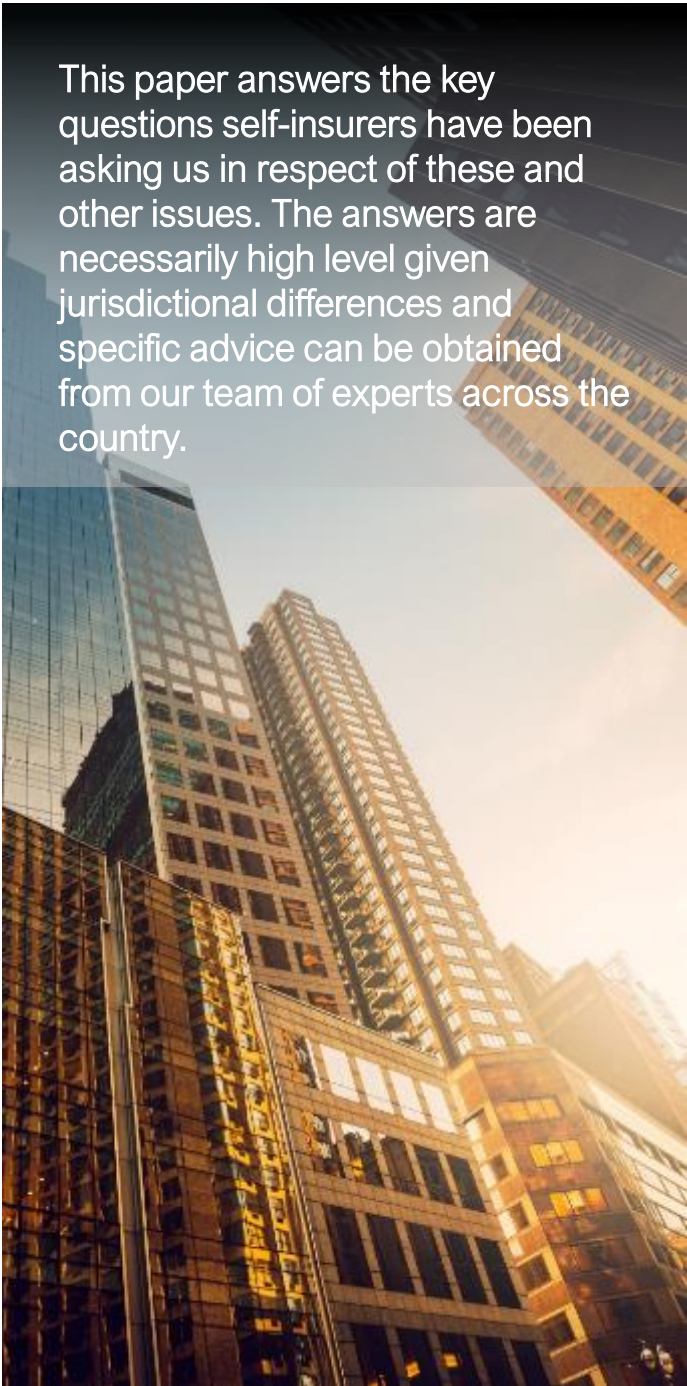
Your key questions answered

Current position

National employers that are self-insured for workers' compensation in multiple states and territories face unique challenges arising from the COVID-19 pandemic. New South Wales icare has reported over 250 notifications across the scheme for workers suspected of having contracted COVID-19 at work and/or of suffering an associated 'mental disorder'.

These and similar statistics that are emerging in other jurisdictions have led some self-insurers to look at mobilising special teams of case managers, lawyers, medical experts and allied health providers to ensure that COVID-19 related claims are managed in a cohesive and consistent way.

Similar challenges arise regarding workers with other types of claims due to the disruption that COVID-19 has created for their rehabilitation programs and the consequential impact on the duration and cost of their claims. Injuries or illnesses suffered by workers whilst working from home during the pandemic adds yet another layer of complexity.



This paper answers the key questions self-insurers have been asking us in respect of these and other issues. The answers are necessarily high level given jurisdictional differences and specific advice can be obtained from our team of experts across the country.

Q: We have had to stand down some of our workforce as a result of COVID-19

How will that decision impact workers' compensation benefits for workers with already accepted claims? Should the JobKeeper payment be taken into account when calculating weekly benefits?

Workers with accepted claims before the stand down who continue to suffer total incapacity for work due to their injury will remain entitled to weekly benefits on the usual basis – i.e. their entitlement to compensation for lost income because of their injury will be unaffected by the stand down. Consistent with that, the federal government has confirmed that workers who are totally incapacitated for work are **not** eligible to receive the JobKeeper payment.

For workers with partial incapacity who at the time of the stand down were on modified duties or reduced hours, the situation is less clear. While in most cases those workers will be entitled to receive JobKeeper (subject to the other eligibility criteria being met), each case must be carefully considered in assessing whether the worker's weekly benefits are restricted to what they would have received had the stand down not occurred. The rule against 'double dipping' would suggest that it should, with the 'wages' component being replaced by JobKeeper and the weekly benefits being adjusted accordingly. However, the answer is not straightforward and will depend on how the worker's incapacity is assessed in the context of both the effects of their injury and the availability of suitable duties. In certain circumstances, a lack of suitable duties could result in a partially incapacitated worker being re-assessed as having a total incapacity, thereby rendering them ineligible for JobKeeper and leaving the self-insurer with the additional cost.

This is a particularly complex issue for self-insurers and specific advice should be obtained.



Q: We have had to stand down some of our workforce as a result of COVID-19

How do we comply with our ongoing rehabilitation obligations under the current government restrictions, and ensure that our workers do as well?

Broadly speaking, rehabilitation includes both medical treatment and the provision of suitable duties, with the ultimate goal of returning the worker to their pre-injury position. While self-insurers have an ongoing duty to provide both aspects of rehabilitation to their injured workers, there is no doubt that the government restrictions to contain the spread of COVID-19 have significantly impacted their capacity to do so. That said, the self-insurer's duty to provide rehabilitation and the worker's corresponding duty to participate in it, only extend to what is reasonable in the circumstances. This means, for example, that where an assessment cannot be performed in person then telehealth should be explored as an alternative to ensure that ongoing treatment and advice remains available. Similarly, rehabilitation coordinators should stay in regular contact with injured workers and their health providers in order to keep treatment and return to work plans current.

This includes the prospect of enrolling workers in online courses to maintain their existing skills and/or to enable them to upskill into new areas. For injured workers who have been stood down or otherwise unable to attend work due to the pandemic, it is imperative that self-insurers explore creative ways of engaging them in conditioning programs to maximise their readiness for work once the relevant restrictions are lifted. This can be done using platforms like Zoom or Webex (or at least by telephone), not only to monitor compliance but importantly to provide ongoing advice and encouragement. Furthermore, the risk of workers developing secondary psychological injuries (eg. an adjustment disorder) during this period is particularly heightened, and therefore self-insurers should consider proactively offering EAP and other support services to mitigate that risk.



Q: Like many employers, a number of our employees are currently working from home. Will we be liable to pay workers' compensation if they sustain an injury or illness at home? If so, what can we be doing to manage that risk?

This is a particularly complex issue because of the inherently blurred lines between 'work' and 'home'.

To be compensable, each scheme requires the injury or illness to at least have arisen out of or in the course of the worker's employment. Where the employer has required or encouraged its employees to work from home during the pandemic, one aspect of that test is satisfied. However, as the High Court of Australia made clear in *Comcare v PVYW*, the central enquiry is whether the employer encouraged the employee to engage in the particular activity they were undertaking at the time they suffered the injury or illness – if not, it cannot be said to have arisen out of or in the course of employment.

A number of jurisdictions further strengthen the test by requiring that the worker's employment itself was a 'substantial', 'significant' or 'major' contributing factor to the injury or illness. There are additional thresholds in respect of psychological injuries, including exclusions where the injury arose out of the employer's reasonable management action. To mitigate the risk of compensable injuries being suffered while employees are working from home, and also to assist in discharging the employer's duty of care, self-insurers should (as a minimum) follow the guidance in [Comcare's Working from Home Checklist during COVID-19](#).



With restrictions continuing to ease, many employers (particularly those with a large white collar workforce) are now looking at institutionalising remote working as part of the 'new normal'. In undertaking a cost/benefit analysis, self-insurers should look closely at any alteration to their workers' compensation risk profile in doing so, including a change to the 'state of connection' for workers who would ordinarily travel interstate to perform their duties, resulting in those workers moving out of one scheme and into another. There are also unique physical and psycho-social hazards which need to be carefully assessed as part of the decision making process.

Our national team of workers' compensation and safety experts across the country can provide holistic advice to self-insured employers in each jurisdiction to mitigate the unique risks associated with remote working and in formulating their strategy regarding new ways of working into the future.



Q: What happens if one of our workers tests positive to COVID-19 and claims that it was contracted at work? Are we potentially liable to pay workers' compensation and, if so, how should the claim be handled?



As above, threshold requirements in each state and territory require the disease to have arisen out of or in the course of the worker's employment and most contain either a substantial, significant or material connection with the employment test, in order to be compensable. As always, each claim must be assessed on its own facts. Other than in New South Wales (which passed amendments last Friday covering workers in 'prescribed employment' such as health and aged care), ultimately the onus will remain with the worker to prove that their COVID-19 diagnosis satisfies the legislative criteria.

In reality though, self-insurers in each state and territory will need to be extra diligent in investigating claims in order to assess the potential for the worker to have contracted the disease at work. This will require a thorough understanding of the worker's activities outside work (particularly during the incubation period), their exposure to any known cases in the workplace and the employer's own controls in relation to mitigating the risk of transmission in relevant areas of its business. Self-insurers should consider a nationally integrated approach in order to respond to COVID-19 claims. This could include establishing a central database of COVID-19 controls, the appointment of a single infectious diseases expert and preparation of proforma statutory declarations to be completed by claimants to be provided to the expert in advance of the examination.

We have already advised some of our self-insurer clients in relation to these issues and can quickly respond to any specific needs as they arise.

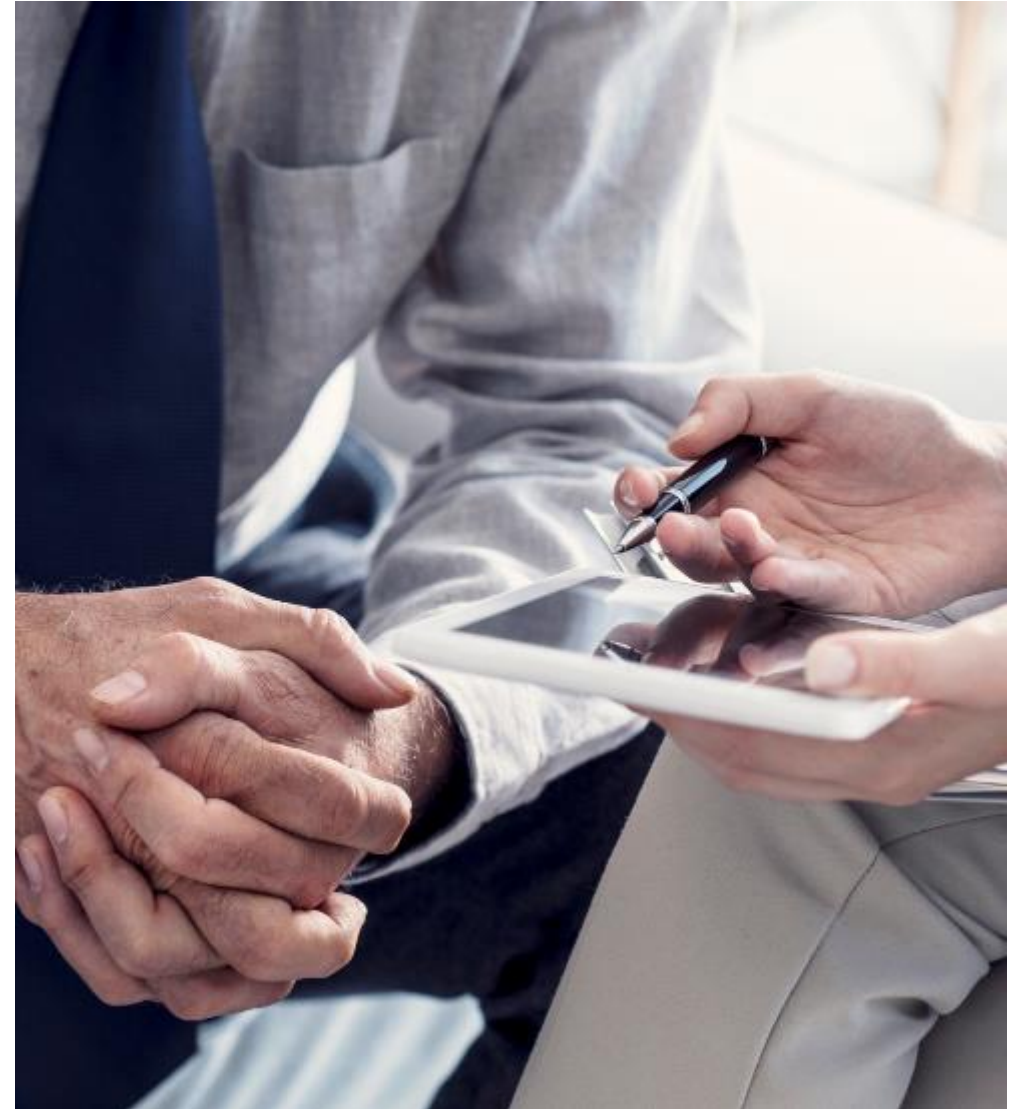
Q: We have a worker who claims they have suffered a psychological injury due to stress related to COVID-19. Are we potentially liable to pay workers' compensation and, if so, how should the claim be handled?

There are a range of potential psychological claims arising from COVID-19. They include workers who have suffered stress due to the risk of contracting the virus in the workplace; from being exposed to verbally and potentially even physically abusive customers; or over concerns about how their employer has managed its response to the pandemic, including responding to their fears about a lack of job security or a reduction in their salary or wages.

The first step in assessing such a claim is to determine whether the worker has sustained a diagnosable psychiatric or psychological injury, as distinct from stress and anxiety more generally (as so many people in society are experiencing at the moment).

Only the former will meet the statutory definition of 'injury' or 'disease' in each jurisdiction. If so, the analysis shifts to whether the worker's condition arose out of or in the course of their employment, and whether the employment was the 'substantial', 'significant' or 'major' causal factor. If the worker's condition has arisen out of management action, the reasonableness of such action and the manner in which it was conducted will be called into play.

While each claim must be assessed on its own facts in the context of the relevant jurisdiction, much like COVID-19 itself, the risk of psychological claims arising from the pandemic transcends state and territory borders and therefore lends itself to a nationally coordinated response. As above, this could include establishing a central database of COVID-19 controls and other key policies, the appointment of both a psychiatrist and psychologist (depending on the nature of the injury alleged) and the development of pro forma statutory declarations to be completed by the claimants and provided to the relevant medical expert prior their assessment.



The road ahead

While the workers' compensation issues arising from the current pandemic are complex and in many respects unprecedented, national self-insurers are in a position to take a 'balcony view' of how those issues could potentially play out across their businesses and to formulate a best practice strategy for responding.

Those who do so will not only mitigate the unique risks associated with COVID-19, but will also be in an optimal position to support their workforce and identify opportunities for strengthening their workers' compensation portfolio into the future.



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