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Alaska Court System
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ALASKA STATE LEGISLATURE



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REPRESENTATIVE ANDY JOSEPHSON

MEMORANDUM

DATE: March 15th 2021

TO: Members of the House Labor and Commerce Committee

FROM: Representative Andy Josephson

SUBJECT: Responses to Committee Questions from HB 45 Hearing on 3/5/21

Rep. Snyder questioned the definition of “grocery store” used. Rep. Snyder expressed concerns that the definition might not be adequate to cover unique food vendors or stores in Alaska.

- The definition of “grocery store” used in the bill can be found in AS 44.25.048.
- This definition reads “ ‘grocery store’ means a store maintained for the sale of food products exclusively to the public at retail.”
- This definition was selected in working with Legislative Legal and is the only existing definition of “grocery store” in Alaska Statute. A new more inclusive definition could be drafted by legal.

Rep. McCarty questioned whether emergency declarations made by the Governor could be only statewide or if regional/ local emergencies could exist.

- Under the Alaska Disaster Act, disaster emergencies declared by the Governor can be local, regional or statewide in scope. In a declaration under AS 26.23.020(c) the Governor must indicate “the area threatened or affected.”

Rep. McCarty posed a question about the seasonal flu and asked if this presumption might apply in this case.

- The presumption of compensability only is effective “during a condition of disaster emergency declared by the governor under AS 26.23.020(c) due to an outbreak of a contagious disease.”

- It is unlikely that a seasonal flu would rise to the level of a public health emergency but a new variant of influenza or a severe outbreak might rise to this level depending on the judgment of the Governor.

Rep. McCarty asked about the definition of disaster emergency as it applies to this bill.

- The process the Governor follows for declaring a Disaster Emergency is outlined in AS 26.23.020(c) and reads:
 - “If the governor finds that a disaster has occurred or that a disaster is imminent or threatened, the governor shall, by proclamation, declare a condition of disaster emergency. The disaster emergency remains in effect until the governor finds that the danger has passed, or the disaster has been dealt with so that the emergency no longer exists. The governor may terminate the disaster emergency by proclamation. A proclamation of disaster emergency may not remain in effect longer than 30 days unless extended by the legislature by a concurrent resolution. The proclamation must indicate the nature of the disaster, the area threatened or affected, and the conditions that have brought it about or that make possible the termination of the disaster emergency. A proclamation to declare a condition of disaster emergency must also state whether the governor proposes to expend state funds to respond to the disaster under (i) or (j) of this section.”
- In the case of COVID-19 the definition of disaster can be found under AS 26.23.900(2)(E):
 - “‘disaster’ means the occurrence or imminent threat of widespread or severe damage, injury, loss of life or property, or shortage of food, water, or fuel resulting from...(E) an outbreak of disease or a credible threat of an imminent outbreak of disease that the commissioner of health and social services or a designee of the commissioner of health and social services certifies to the governor has a high probability of occurring in the near future; the certification must be based on specific information received from a local, state, federal, or international agency, or another source that the commissioner or the designee determines is reliable;”

Rep. Kaufman questioned whether an employee receiving benefits under this presumption would open the employer to liability (suit from a customer).

- It is unlikely that an employer would be opened to liability due to an employee's illness. This is because, in accordance with AS 23.30.107 (b), medical records for the purpose for workers' compensation are not considered public records.
 - To an extent these records can be disclosed if a workers' compensation case becomes a matter of legal dispute.

Rep. Kaufman expressed concerns about some employees in high-risk categories. He inquired as to whether this presumption being in place might open the door to discrimination.

- The U.S. Equal Employment Opportunity Commission (EEOC) published a lengthy document on their website during the 2009 H1-N1 Flu Pandemic and they have recently updated their advice to reflect the realities of the current COVID-19 pandemic. This analysis speaks to how the Americans with Disability Act should be applied during a pandemic.
 - The complete EEOC analysis can be found here:
<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>
 - One of the questions in this publication speaks directly to Rep. Kaufman's concern:
 - "During a pandemic, may an ADA-covered employer ask employees *who do not have influenza symptoms* to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to influenza complications?"
 - "No. If pandemic influenza is like seasonal influenza or the H1N1 virus in the spring/summer of 2009, making disability-related inquiries or requiring medical examinations of employees *without* symptoms is prohibited by the ADA.⁽³²⁾ However, under these conditions, employers should allow employees who experience flu-like symptoms to stay at home, which will benefit all employees including those who may be at increased risk of developing complications.⁽³³⁾
- If an employee voluntarily discloses (without a disability-related inquiry) that he has a specific medical condition or disability that puts him or her at increased risk of influenza complications, the employer must keep this information confidential. The employer may ask him to describe the type of assistance he thinks will be needed (e.g. telework or leave for a medical appointment). Employers should not assume that all disabilities increase the risk of influenza complications. Many

disabilities do not increase this risk (*e.g.* vision or mobility disabilities).

If an influenza pandemic becomes more severe or serious according to the assessment of local, state or federal public health officials, ADA-covered employers may have sufficient objective information from public health advisories to reasonably conclude that employees will face a direct threat if they contract pandemic influenza.⁽³⁴⁾ Only in this circumstance may ADA-covered employers make disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of influenza complications.”

Rep. Kaufman inquired as to the shared costs to the business community. He expressed curiosity as to what this might be.

- The Analysis of HB 45 completed by National Council on Compensation Insurance (NCCI) provides a look at 3 hypothetical scenarios and costs associated with them. This analysis hinges on different infection rates of 5%, 15% and 25%. Expected Mortality Rate used in this analysis was 0.5%.
 - **In the 5% scenario (scenario closest to Alaska’s overall infection rate) the NCCI report suggests an overall cost of \$2 million to the WC system as a whole**
 - According to the Department of Labor and Workforce Development report, “Effects of COVID-19 on Workers’ Compensation in Alaska”:
 - The overall infection rate in Alaska in late December 2020 was 5.9% and the mortality rate was 0.4%.
 - The work-related incidence of COVID-19 was also found to be much lower with only 1/12 cases being linked to transmission at work.
 - This suggests that overall costs for Workers’ Compensation due to COVID-19 in Alaska may be lower than the NCCI estimates.

Rep Kaufman asked about the implications of employers providing paid sick leave and how this would impact the need for use of workers’ compensation.

- Scott Jordan, Director of Risk Management, explained that in the case of an illness or injury that was determined to be work related, workers’ compensation would be the first payment made (this is paid at 80% of an employee’s average weekly wage).
 - An employer providing sick leave does not impact whether the employee receives workers’ compensation. An employee may not be required to use their sick leave prior to receiving workers’ compensation.

- For state employees leave is used to pay the 20% not paid by workers' compensation and use of this leave allows them to stay current with benefits.
- Charles Collins, Director of the Division of Workers' Compensation stated the following via email:
 "If a claim is filed, after three days of time loss, (AS 23.30.150), benefits must then be paid by the 14th day after injury, (AS 23.30.155(b)), personal or sick leave is not an allowable use. That being stated, if we are speaking to COVID or another communicable disease, an employer may have a policy, rule, that states working when symptomatic is not allowed and require employees to use sick leave until a negative test or asymptomatic. Entirely a different procedure as it would require no claim being filed."

Rep. McCarty asked for more details and to the costs and number of claims in Alaska.

- Director Collins provided up-to-date data through 3/12/21 via email

Opened	Closed	Current	Paid	BTC to date	OBT to date	EP to Date	Denials (04)
2483	1436	1047	782	\$982,238.40	\$283,210.33	\$293,652.26	272

He noted the following:

- BTC (Benefit Type Code) is medical and related, such as impairment or wage replacement due to TTD or PTD.
- OBT (Other Benefit Type) includes transportation, leave pay, legal and other types of expenses.
- EP (Employer Payments) these are payments employers made with no other associated workers' compensation expenses.