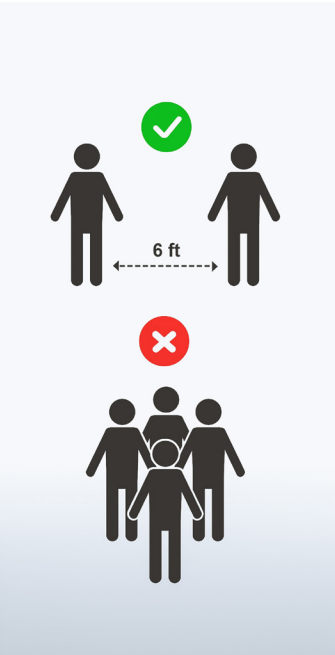
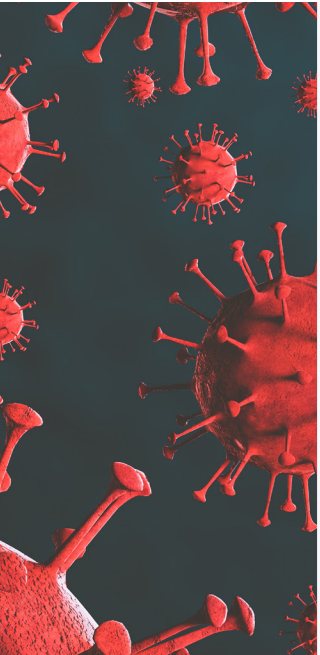


NAMIC ISSUE ANALYSIS



COVID-19 WORKERS' COMPENSATION PRESUMPTIONS: A SURVEY AND ANALYSIS OF THEIR INDELIBLE IMPACT

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TABLE OF CONTENTS

Introduction	2
Background	2
Communicable Disease	4
Presumptions in General	6
COVID-19 & Workers' Compensation – Reactions to a Pandemic	8
Executive Orders	8
State Legislation	9
Emergency Rulemaking	10
Regulatory Bulletins	10
Federal Activity	10
Analysis and Discussion of COVID-19 Presumption Activity	11
Executive/Emergency Orders	11
Constitutional Principles and Retroactivity	12
Rates and Underwriting	13
Rebutting a presumption	15
Certification and Cost-Shifting	16
Future Considerations	17

NAMIC ISSUE ANALYSIS

INTRODUCTION

The concept of workers' compensation has been around for more than a century. Its origins are rooted in providing protection for employees or workers injured in the course and scope of their employment. Those words and industry-specific terms – “in the course and scope of employment” – have been the subject of countless disputes between employer and employee when ascertaining who should receive indemnification for wage loss and medical expenses for job-related injuries and disease. The line between compensable and non-compensable workers' compensation claims can be narrow. The discernment of these principles and qualifications has evolved in every state in our country over the last one-hundred years in many ways, shapes, and forms.

With the onset of COVID-19, a new discussion and public policy dynamic have emerged that the insurance industry has had to come to grips with over the spring and summer months of 2020 and beyond. The results of this unprecedented discussion and resulting activity may forever alter and shift the workers' compensation paradigm in numerous ways. The intent of this paper is to explore the issues, the public policy activities, the resultant measures to address, and to briefly analyze the impacts that the hyper-reactive atmosphere the COVID-19 pandemic has created for the employer and insuring community.ⁱ

A NOTE ABOUT COVID-19 IN GENERAL AND FIRST RESPONDERS

Few could have predicted the onslaught of the COVID-19 virus and ensuing pandemic crisis that has been inflicted upon the world. Any attempts to quantify its widespread impact and reach will most likely become quickly outdated. Causing fatalities and possibly permanent impairment to people across the globe, not to mention economic and financial devastation for multitudes of industries and businesses, the aftermath of this pandemic, could well be endured for potentially decades to come. The intent of this discourse is not to reduce or lessen any of the struggles or hardships any individual has incurred while enduring COVID-19 or thereafter.

Further, the intent of this paper is not to shortchange the thankless and critical work of first responders and other front-line employees who have graciously and without concern for personal well-being sacrificed their lives and health to assist others, preserve dignity, save lives, protect the public, and make the world generally more bearable. The real focus of this paper is to discuss effective public policy solutions and to avoid hasty decisions made by public officials by ensuring that rational outcomes are thoroughly explored before actions are taken. In regard to coping with this and future pandemics, public solutions, as opposed to a misplaced reliance on the private sector or on any one industry, should be the primary focus for policymakers.

BACKGROUND

To understand the atmosphere in which we currently exist concerning COVID-19 workers' compensation presumptions, we must first understand the history of workers' compensation and briefly review the major developments in this line of insurance.

Under the “Grand Bargain,”ⁱⁱ laws began to change around the turn of the 20th century due to dissatisfaction with the tort system. The burden of filing a claim for work-related injury was on the employee, but the employer had several common law defenses that could be utilized to prevent recovery by the employee. As a bargain for avoiding the uncertainty of the courts, the workers' compensation structure was created, essentially becoming a no-fault system of compensating for lost wages and medical expenses for workers harmed in carrying out their work-related responsibilities. The goal of workers' compensation has always been to get the employee back to work, which is generally in their best interest. If a return to work is not possible,

COVID-19 WORKERS' COMPENSATION PRESUMPTIONS: A SURVEY AND ANALYSIS OF THEIR INDELIBLE IMPACT

workers' compensation will determine and compensate an individual for permanent impairment or provide survivor benefits in the event of a work-related fatality.

After the adoption of workers' compensation systems based on this Grand Bargain, litigation in the traditional sense was no longer viable in return for defined statutory benefits the employee would receive. The defenses that were given up by the employers were substantial and included:

- **“Assumption of risk”** – the worker voluntarily assumed the risks of the job;
- **“Fellow-servant rule”** – the concept that a co-worker and not the employer caused the injury;
- **“Contributory negligence”** – delving into the activities of the employee in causing his or her own accident

Few claims would potentially survive these defenses, and the magnitude of what employers actually gave up in conceding to the bargain has unfortunately been forgotten by some advocates attacking workers' compensation systems.

From these principles developed the concept of “exclusive remedy,” which meant that the workers' compensation systems for the various bargains would be the only means of recoupment for employees. This provided stability for employers as well as employees so that the employment relationship could continue to thrive without dealing with the tort system and potentially delayed litigation, as well as the associated costs. The concept of a more expedited process that was less burdensome on the parties also developed state by state. The state-by-state development was preferable as states had differing primary industries, and laws could develop to protect the parties and be administered based upon those particularities.

Workers' compensation has always been essentially a creature of statute. The rights and benefits as enumerated in statutes across the country were not acknowledged as common law, or law that was developed over time from customs and decisions. Insurance markets require a certain amount of stability and for the most part, at least early in the workers' compensation systems, statutes provided exact pronouncements of entitlement to benefits and what the particular standards would be for obtaining the same. Workers, employers, and insurers were able to discern what a given injury would entail in terms of indemnification for wage loss, reimbursement for medical expenses, and disability disbursements to compensate for everything from permanent impairment to specific injured or impaired body parts. This was done with the goal of getting the worker rehabilitated and back to a functioning work environment where he or she could continue to be gainfully employed. Further, injuries or compensable loss is generally broken down into two broad categories, which include trauma and occupational disease.



NAMIC ISSUE ANALYSIS

COMMUNICABLE DISEASE

It is with this backdrop that we transition to discussions of COVID-19, a communicable disease. Traditionally, communicable diseases have not been the subject of workers' compensation recoupment. For example, workers traditionally have contracted influenza and its various strains, but those were not generally compensable within workers' compensation systems. The effects of these illnesses were normally absorbed by sick leave pursuant to employment practice policies and health-related insurance where losses incurred.

It is important to understand that the lack of compensable communicable diseases was not based upon assumption or general belief or attitudes, but rather codified by various states such that it became well understood that these types of injuries or diseases were generally not within the bounds of coverage. The issue of causality or the requirement that a nexus or link between the harm and the activity must be shown or proven has always been a fundamental criterion of a claim. An occupational disease – the criteria for which COVID-19 would need to fit to be covered – has been defined in state codes well before the onset of the current pandemic. Due in large part to the causation problem and who was exposed where and when, COVID-19 would not meet the occupational disease standards. For instance, in the following states there is language expressly excluding these types of occurrences from compensable claims entirely:

IOWA

"... A disease which follows from a hazard to which an employee has or would have been equally exposed outside of said occupation is not compensable as an occupational disease." Iowa Code §85A.8

MISSOURI

"... Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable" Mo. Code §287.067

NEW JERSEY

"... An occupational disease is a disease arising out of and in the course of employment, which [is] due in a material degree to causes and conditions which are or were characteristic of or peculiar to a particular trade, occupation, process, or place of employment" N. J. Stat. Ann. § 34:15-31

NORTH CAROLINA

"... excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment." N.C. Code §97-53(13)

OKLAHOMA

"... No compensation shall be payable for any contagious or infectious disease unless contracted in the course and scope of employment ... no compensation shall be payable for any ordinary disease of life to which the general public is exposed" Okla. Code §85A-65(D)(2)&(3)

COVID-19 WORKERS' COMPENSATION PRESUMPTIONS: A SURVEY AND ANALYSIS OF THEIR INDELIBLE IMPACT

OREGON

"... Occupational disease means ... caused by substances or activities to which an employee is not ordinarily subjected or exposed other than during a period of regular actual employment" Ore, Code §656.802

SOUTH CAROLINA

"... No disease shall be considered an occupation disease when it: is a contagious disease resulting from exposure to fellow employees or from a hazard to which the workman would have been equally exposed outside of his employment ... [or] is one of the ordinary diseases of life to which the general public is equally exposed" S.C. Code §42-11-10

These examples show that communicable diseases common amongst the public at large are generally not contemplated as a workers' compensation claim. Insurers, therefore, could generally not have reasonably foreseen, absent a statutory change, that these claims would become meritorious or that regulators could enforce such instances of contraction. This is not to say or infer, however, that diseases contracted as a direct result and proximate cause of employment that led to proven exposure were not or have not been compensated by insurers where warranted.

In fact, the original concepts of occupational disease were just as stated - diseases incurred not incidental to employment, but as a result of that employment causing a disease to which the general population would generally not be exposed. Coal Workers' Pneumoconiosis is a lung disease germane mainly to coal mining; asbestosis is incurred in working with asbestos; and silicosis can be an ailment contracted by someone working with silica. The idea was to compensate workers that contract certain diseases to which they would not be exposed except for their specified employment in these industries.

The focus of this discussion, therefore, is focused on the entire mass-exposed employment pool that makes presumptions of communicable diseases somewhat problematic. To make such presumptions dramatically strays from the foundations of workers' compensation insurance. We do not suggest that meritorious claims should not be paid or compensated. Rather, it is who should bear the brunt of a worldwide pandemic and its associated costs and losses.



PRESUMPTIONS IN GENERAL

Presumptions, or standards of proof, for a workers' compensation claim are not new to the workers' compensation system. A presumption in the law provides that a matter put forth is presumed to be correct and proven unless overcome by other contradicting evidence. Rebuttable presumptions traditionally codified in the states posit that if certain conditions are met, such as exposure and other contraction conditions, a disease will be presumed to have occurred within the course and scope of employment as opposed to general organic mechanisms of the human condition as it ages, experiences life, and is exposed to the world in particular environments.

However, if the employer can rebut the presumption, which is generally very difficult due to essentially having to prove a negative, then the presumption may be disregarded and fail as a matter of proof. Rebuttable presumptions take a significant detour from traditional notions of standards of proof in insurance or other claims that require claimants to prove the causation and resultant injury. Standards for rebutting presumptions can vary widely by jurisdiction and can include a simple preponderance of evidence, credible competing evidence as may be defined in statute, or a higher standard of clear and convincing evidence.

Prior to COVID-19, states enacted rebuttable presumptions for firefighters and other specified first responders due to the potential inherent danger of their profession and increased risk for incurrence of occupational diseases and significant traumatic injury. The presumption for these specified occupations has varied among states, but to some degree and in some jurisdictions included cancer (in some instances specified), lung and respiratory conditions, blood and infectious diseases, heart and vascular conditions, and mental injuries.ⁱⁱⁱ

According to the National Council on Compensation Insurance (NCCI), at least 19 states had some form of presumption for cancer affecting firefighters in their jurisdiction prior to COVID-19.^{iv} Due to many cancers being prevalent in general populations, cancer presumptions in some instances have been controversial, and there have been studies produced that do not show linkage between the occupation and certain cancers, but studies can vary widely.

Additionally, NCCI reports that 18 states additionally had presumptive first responder coverage for lung and respiratory or pulmonary conditions that can include tuberculosis. These claims can also be complex due to the fact that many lung diseases occur in the general population at significant rates. Further, smoking can be a causative factor that clouds exposure and alleged resultant employment-related disease contraction.^v



COVID-19 WORKERS' COMPENSATION PRESUMPTIONS: A SURVEY AND ANALYSIS OF THEIR INDELIBLE IMPACT

Another area of pre-COVID-19 presumptive coverage in at least 12 states includes bloodborne infectious diseases such as HIV or AIDS, hepatitis, tuberculosis, and meningococcal meningitis.^{vi} These presumptions have again been specific to first responders and those with similar specified unique exposure to risk.

An increasing presumptive coverage for firefighters has included heart and vascular conditions, which at least 19 states have codified. Diagnosis of these conditions can also be controversial as the nature of the work can be strenuous and have other exacerbating factors; however, these diseases are prevalent in the general populations, and lifestyles as well as other conditions can obfuscate the real cause of the disease.^{vii}

A growing trend in workers' compensation presumptions prior to COVID-19 includes mental injuries such as post-traumatic stress disorder.^{viii} Traditionally, mental injuries were not deemed compensable in workers' compensation claims. However, a rising trend has seen many states consider mental health claims and presumptions, which can be a cause for concern due to the elements of proof and causation of a mental health claim, especially absent physical trauma. Individuals can react differently to a specific set of stimuli and therefore what may cause a person distress may not cause the slightest concern in another. The long-term impact of these types of alleged injuries is difficult at best to predict, is beyond the scope of this discussion, and can and will most likely be a significant cost driver in workers' compensation in the coming years if sufficient guardrails are not placed around such expansions.

Finally, in some states and to varying degrees, the previously mentioned presumptions have been extended to police and other first responders and medical personnel. Legislation is introduced in many states each year to extend these presumptions to other professions, and some have begun to expand beyond the "first-responder" categories of occupation.

Presumptions in general remain a concern for employers and the insurance industry because of the lack of ability to rebut something that has not had to be proven. Employers and insurers want to compensate injured employees for their contractually compensable claims and assist workers in getting back to work if possible. However, when clear standards are eliminated and overbroad presumptions are placed upon the system, it adds significant and potentially unwarranted costs. Workers' compensation systems have existed for more than a century, and claimants have always been able to submit proof, much of it liberally construed, to prove the legitimacy of a claim. Employers and insurers willingly pay workers' compensation claims that are meritorious and have been underwritten and priced according to the known risk at the time of contractual promise. However, when conditions that have traditionally been absorbed by health insurance and other accident and sickness policies are shifted to the workers' compensation system, a significant disruption occurs that has a significant impact.

Employers are ultimately responsible for workers' compensation claims of their employees and cannot shirk that responsibility – workers' compensation protection is mandatory in 49 states and the District of Columbia.^{ix} Failure to provide coverage for employees can result in direct litigation against the employer for injuries as well as regulatory and legal consequences where mandatory laws are violated. Employers in most states may self-insure or cover their own workers' compensation risk if they meet stringent asset requirements of state regulatory agencies, but in most instances employers purchase policies from insurers to cover their risk.

The price of that insurance must reflect adequate rate structures that are not excessive, but still able to meet the expected losses. Actuarially, presumptions add an additional load to insurers expected payouts. This, in turn, must be borne by the employer based upon their expected loss exposures. Consequently, many times, policymakers who believe they are assisting a segment of the employee population are essentially doing the reverse by increasing rates exponentially across the board. While these measures may be widely popular with constituents in the short term, a real analysis should be done of the cost of placing these exposures upon the employers as opposed to other public policy measures that could address the concern.

COVID-19 & WORKERS' COMPENSATION – REACTIONS TO A PANDEMIC

Amid the onset and initial acute phases of the COVID-19 pandemic, many responses in the U.S. were reactionary efforts to assist business communities and employees who suffered from unemployment due to the government-mandated closure of large segments of the economy. Unfortunately, some of this activity included looking to the insurance industry to assist in the alleviation of this public strain.

Across the country and in Washington D.C., public policymakers pursued what they viewed as well-intended – but what in reality were rash – ideas to assist during the pandemic. A significant and still pending issue is the existential threat of imposing business interruption insurance coverage retroactively when existing contractual policy language does not provide protection from the many instances of COVID-19-related alleged loss. While international, federal, and state authorities did opine that such forced retroactive coverage would cause significant solvency concerns for the industry, litigation threats continue to expose the industry to these risks even though in most situations no premium was obtained for such coverage. Further, estimates for retroactively mandating commercial business interruption coverage for the pandemic showed that one to two months of claims could completely eradicate the reserve capacity of the entire property/casualty insurance industry. While clearly not the same type of coverage, there are some similarities between the concerns raised about proposed and implemented public policy solutions for business interruption and workers' compensation insurance related to COVID-19.

While the threat of retroactive or compulsive coverage of business interruption insurance continues to be debated, workers' compensation has not escaped the grasp of policymakers wanting to force retroactive coverage for the pandemic onto policyholders either. These proposals have typically gone well beyond first responders and have sought to expand coverage presumptions to a host of employee categories, in a fashion that may be the broadest retroactive coverage expansion insurance has seen.

Beginning with executive orders from state governors, then moving onto regulatory bulletins and directives, emergency rulemaking, and finally legislation, there has been no shortage of activity regarding workers' compensation claims during COVID-19.

EXECUTIVE ORDERS

In a series of no less than four executive orders, Arkansas Gov. Asa Hutchinson issued proclamations^x suspending Arkansas law that required contagious or infectious diseases only be compensated if contracted under specific scenarios. Those scenarios for compensation were limited and included: must be in or near a hospital; could not be for exposure to diseases to which the general public are exposed; and existing definitions of restrictions for pulmonary and respiratory accidents. Consequently, where the legislature had spoken and disallowed claims in these areas, the Governor simply undid their action by executive order.

In an executive order from California, Gov. Gavin Newsom issued EO N-62-20, which stated as grounds for justification that “the provision of workers' compensation benefits related to COVID-19, when appropriate, will reduce the spread of COVID-19 and otherwise mitigate the effects of COVID-19 among all Californians.”^{xi} This justification is provided for the order proceeding to institute an incredibly broad expansion of a presumption for all employees. “Any COVID-19-related illness of an employee shall be presumed to arise out of and in the course of the employment for purposes of awarding workers' compensation benefits...”

In Connecticut, Gov. Ned Lamont, who notes in his executive order that he has “issued sixty-two (62) executive orders to suspend or modify statutes and to take other actions necessary to protect public health and safety and to mitigate the effects of the COVID-19 pandemic,” issued number 63 regarding workers' compensation by creating a rebuttable presumption for any employee who files a claim for compensation due to the diagnosis or due to symptoms that were diagnosed as COVID-19

COVID-19 WORKERS' COMPENSATION PRESUMPTIONS: A SURVEY AND ANALYSIS OF THEIR INDELIBLE IMPACT

working outside of the home.^{xii} The order goes on to state that the presumption may only be rebutted by the employer or insurer demonstrating by a preponderance of evidence that the employment of the individual was not the cause of the contraction of the virus.

In another sweeping pronouncement, Kentucky Gov. Andy Beshear issued an executive order that permitted an employee who was simply removed from work by a physician for suspected occupational exposure to COVID-19 to apply for and recover workers' compensation benefits.^{xiii} The Kentucky order went further and provided a list of those employees to which the EO applied including employees of a health care entity, first responders, correction officers, military, child advocacy workers, grocery workers, postal service workers, and child care workers.

Additionally, governors in Michigan,^{xiv} New Hampshire,^{xv} New Mexico,^{xvi} and North Dakota^{xvii} issued similar presumptive authority that ranged from a limited expansion to first responders to nearly the entire state's workforce, including funeral home directors and workers. Many governors issued more than one order and increased those covered with each issuance creating a continual compounding effect.

STATE LEGISLATION

Alaska was one of the first states to pass legislation^{xviii} establishing a presumption concerning COVID-19 and workers' compensation. It stated that firefighters, emergency medical technicians, paramedics, peace officers, and health care providers who contract the disease can claim it as an occupational disease arising out of and in the course of employment if exposed to COVID-19 and the worker obtains a diagnosis or other positive test result.

A few states then went much further than Alaska. New Jersey passed S 2380^{xix} which the governor signed in September. The bill created a rebuttable presumption that could be overcome with a preponderance of evidence that the worker was not exposed to the disease. The bill had at least two critical components that make its ramifications worth noting. First, the definition of who was covered included expansive terminology such as health care workers, public safety workers, and "any essential employee as defined in NJ Executive Order 103 of 2020 and as extended by subsequent Executive Orders." The New Jersey governor issued more than 70 executive orders dealing with COVID-19 matters, which may have effectively extended the presumption to the entire workforce in one of the most populous states in the country. Subsequently, employees of industries covered could include but not be limited to grocery/food, pharmacies, gas stations, hardware and home improvement, banking and financial institutions, pet stores, liquor stores, car dealerships, construction, warehouses, janitorial and custodial, news and media, and child care services to name several. Second, there is no end date or window for its coverage so unlike many other bills dealing with COVID-19, the bill requires coverage for an undetermined period in the future.

Vermont, likewise, passed broad coverage legislation that covered its entire workforce if deemed having an "elevated risk of being exposed to or contracting COVID-19."^{xx} This legislation was passed despite legal cases that required a duty on behalf of claimants in this area: "Where an employee seeks to recover benefits for an occupational disease because of exposure to the general environment to which the rest of the public is also exposed, the employee must present sufficient, credible, objective evidence that will raise the compensation court's determination from one of conjecture to one of cautious reasoned probability."^{xxi}

California also passed extensive presumptive legislation codifying the previously mentioned executive order that includes requiring certification of the viral contraction by medical doctors and ability to contravene the presumption with evidence of measures by the employer to reduce potential transmission of COVID-19 in the workplace as well as other nonoccupational risks. However, the legislation also creates a "disputable" presumption, remains in effect for more than 16 months or until Jan. 1, 2023, as well as specific employer reporting requirements of COVID-19 positive testing to claims administrators for processing.^{xxii}

NAMIC ISSUE ANALYSIS

In Illinois, Workers' Compensation commissioner originally issued an emergency rule to include front-line and deemed-essential workers (which was an extensive list). Businesses, coupled with support from various industries including insurance trades and other stakeholders, filed to enjoin the rulemaking. A county judge issued a temporary restraining order to stop its implementation and then the department subsequently withdrew the rule several days after the ruling.

Undeterred, the Illinois legislature went on to pass HB 2455^{xxiii} that reinstated much of the broad expansion of coverage to the majority of the workforce deemed essential. Covered employees included those working in grocery stores, farmers' markets, pet suppliers, cannabis production and agriculture, cannabis dispensaries, animal shelters, media, newspapers, television, gas stations, payday lenders, hardware stores, all building and construction trades, mail and shipping, educational institutions, laundry services, and critical labor union functions.

Other states that passed bills broadly extending presumptions include Minnesota^{xxiv} and Wyoming. Utah^{xxv} and Wisconsin also passed bills that mainly kept the focus on first responders.

EMERGENCY RULEMAKING

There was also activity on the emergency rulemaking front including activity that was promulgated in a few states including Illinois (withdrawn as discussed above), Michigan,^{xxvi} and Missouri.^{xxvii}

REGULATORY BULLETINS

Insurance regulators who have also weighed in during the crisis. Florida Chief Financial Officer Jimmy Patronis Jr. issued Directive 2020-05,^{xxviii} which relied heavily on the governor's executive order declaring a state of emergency that stated claims from "Frontline State Employees" who tested positive for COVID-19 shall be processed as compensable as an occupational disease. The directive included first responders, corrections officers, state employees working in health care fields, child safety investigators, and members of the Florida National Guard. There have also been a number of general pronouncements that insurers are expected to pay claims related to COVID whether they have a contractual obligation to do so or not.

FEDERAL ACTIVITY

There have been a few proposals discussed in the halls of Congress concerning these issues, but they have not become law as of the end of 2020. These bills include:

- H.R. 6656^{xxix} – Coronavirus Workers' Compensation for TSA Employees Act – would provide a presumption for federally employed transportation security administration employees
- H.R. 7341^{xxx} – would extend a presumption to all federal employees
- S. 3910^{xxxi} – would establish a presumption for certain firefighters who are federal employees who contract COVID-19 in fighting "wildland" fires

COVID-19 WORKERS' COMPENSATION PRESUMPTIONS: A SURVEY AND ANALYSIS OF THEIR INDELIBLE IMPACT

ANALYSIS AND DISCUSSION OF COVID-19 PRESUMPTION ACTIVITY

When reviewing the activity mentioned, which is by no means exhaustive nor the likely totality of what may occur before the COVID-19 pandemic is over, there is cause for concern and a plethora of issues to resolve. This includes reviewing laws, orders, and regulations already on the books, as well as further actions being contemplated currently or in the future.

EXECUTIVE/EMERGENCY ORDERS

A question that will still have to be debated long beyond when COVID-19 becomes a treatable and manageable communicable disease will be the effects of emergency orders and the authority of governors to act within declared states of emergency under their police powers. Many will argue that legitimate use of this power calls for actions such as presumption creations or expansions of law due to the exigency of the circumstances. "The broad powers granted to the Governor in the Emergency Code are firmly grounded in the [Pennsylvania] Commonwealth's police power This Court has defined the Commonwealth's police power as the power to 'promote the public health, morals or safety and the general well-being of the community ... the police power [is] the state's 'inherent power of a body politic to enact and enforce laws for the protection of the general welfare,' and thus, it is both one of the 'most essential powers of the government' and its 'least limitable power.'"^{xxxii} The prior quotes come from the Pennsylvania Supreme Court in the *Friends of Danny DeVito, et al. v. Tom Wolf, Governor, et al.* case and references a challenge by certain businesses to Pennsylvania Gov. Tom Wolf's executive order compelling closure of the physical operations of all non-life-sustaining businesses to reduce the spread of the coronavirus. The court ruled in this case that COVID-19 fell within the enumerated emergency authority for "natural disasters" and thereby the action was contemplated by the constitutional framers to be within the governor's authority.

However, it must be considered how far gubernatorial authority goes and whether these edicts can go beyond the intended wide discretionary authority given to state officials in a health crisis. The separation of powers doctrine found in the U.S. and state constitutions make Congress and the state legislatures the appropriate branches of government to make laws. While governors must be able to respond to natural disasters and unforeseen events, their activities should remain linked to attempting to mitigate existing harm as opposed to permanently legislating, in this case in the field of insurance recoveries. Many times, the ramifications of such expedited activity cannot be fully discerned and can create unintended consequences.



NAMIC ISSUE ANALYSIS

Executive and emergency orders will inevitably end and with that so should end the extraordinary powers. However, the effects of the state orders, especially in insurance claims such as workers' compensation, may persist for decades or more, which is contrary to the temporary nature of such activity. While some legislatures have moved forward with passing bills that purport to ratify or legitimize the substantive conduct taken in emergency orders, legislatures must not abdicate their governing role by allowing protracted, expansive, and sometimes arbitrary decisions to be made by governors in crisis. If they do it will open the door to further usurpation of the legislative function by the executive, contrary to its constitutional responsibilities.^{xxxiii} Very few, if any, want to restrict a governor's ability to respond to a disaster in a timely and efficient fashion; however, it must be discerned when actions to ostensibly address a disaster exceed the legitimate scope and authority of the governor's police powers.

Additionally, while state legislatures have attempted to put limitations on the ability of governors to utilize such powers,^{xxxiv} nothing has stopped governors from extending the orders, issuing new ones, and otherwise circumventing the intent and will of legislatures in some instances. On Oct. 2, 2020, the Michigan Supreme Court issued a decision that held the law upon which Gov. Gretchen Whitmer relied to extend a declared state of emergency and issued related executive orders was unconstitutional.^{xxxv} The majority of the court stated that the law delegated to the executive branch powers of the legislature and allowed the executive branch to exercise those powers indefinitely. The court mentioned the lack of precise constraints on the significant delegation of power in the law. Its ruling affects several executive orders including one concerning rebuttable presumptions. Further, the United States Justice Department and Attorney General William Barr additionally weighed in on such activity by stating that the Justice Department "will consider taking legal action against governors who continue to impose stringent rules for dealing with coronavirus that infringe upon constitutional rights even after the crisis subsides in their states."^{xxxvi}

It should further be noted that use of emergency police powers to address imminent harm to the public calls into question the validity of the conscription of industry. That it is the government that has acted to take extraordinary steps to attempt to manage the spread of the coronavirus demonstrates that this is a public crisis that is being addressed. Governments need workers to remain employed and actively engaged to keep economies moving, people fed, cars fueled, health issues treated, and order restored. Consequently, by issuance of emergency orders or subsequent legislation as discussed herein, the public officials have announced to their constituencies and the public at large that they are taking charge of a situation for the public welfare of everyone. It is problematic to then turn around and demand the private sector, or just certain industries, pay for their actions and the exigent needs of society during a pandemic.

CONSTITUTIONAL PRINCIPLES AND RETROACTIVITY

Most of the provisions concerning presumption in the COVID-19 cases have been retroactive to when contraction was first realized. Most of the executive orders and legislation provide claim opportunity windows from a few months to over a year, while some do not have an end date.

The Contracts Clause, Article I, Section 10 of the United States Constitution, provides that "[n]o State shall ... pass any ... Law impairing the Obligations of Contracts." The right to legally contract and have that contract upheld by state/federal governments is imperative to interstate commerce and the ability to operate in a civilized democracy. Federal and state constitutional framers included this concept to stabilize commerce, but the types of retroactivity pursued by some states in the COVID-19 crisis exhibit the exact type of conduct against which individuals and businesses were originally intended to be constitutionally protected. An insurance contract provides specified coverages when specific contingencies are met for a premium reflective of those exposure risks. Instituting coverage after the fact for claims not previously contemplated is disrupting the contractual promise and causing significant disruption to the market. Further, treating insurers as bottomless contingency funds is risky at best.

COVID-19 WORKERS' COMPENSATION PRESUMPTIONS: A SURVEY AND ANALYSIS OF THEIR INDELIBLE IMPACT

As to limitations upon the federal government, the Fifth Amendment to the United States Constitution provides, in part, that “[n]o person shall ... be deprived of life, liberty, or property, without due process of law” Further, as to limitations upon the state governments, the Due Process Clause of the Fourteenth Amendment states, in part, that “[n]o State shall ... deprive any person of life, liberty, or property, without due process of law.”

In concert with due process is the Takings Clause of the Fifth Amendment to the United States Constitution, which guarantees that private property shall not “be taken for public use, without just compensation.” The United States Supreme Court has noted that state legislatures are prevented from depriving persons of property rights except for public use necessitating payment of just compensation.^{xxxvii} The purpose behind the provision, in part, is to “prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”^{xxxviii}

Further, the United States Supreme Court has stated that retroactivity of extra-contractual obligations can “improperly place a severe [and] disproportionate” burden on entities. While some may question the efficacy of Takings Clause cases due to precedential decisions, the Supreme Court has issued several decisions in the last few years that can support the supposition that a regulatory confiscatory taking of personal property can amount to a per se taking especially when tied to the ability to operate at all, for example the ability to obtain a license.^{xxxix} For the most part, admitted insurers seek and obtain certificates of authority to operate within states conditioned upon compliance with applicable laws and regulations.

Parallel provisions in state constitutions may provide even more robust and anti-retroactive language that could be used to cause such COVID-19 expansions to fail under scrutiny.^{xl} When coupled in some instances with the lack of an end to the time window of exposure, the constitutional infringements can continue on indefinitely, which clearly is not what the framers, federally or in the states, envisioned in granting such authority.

Additionally, the inconsistent patchwork of workers chosen to either be included or excluded from these pronouncements leaves a great deal of room for charges of arbitrary activity as well as abuse of discretion of the authority granted policymakers. Moreover, the presumptions, in and of themselves, are an incubator for litigation that begs challenges to these fundamental concepts of United States jurisprudence and the underpinnings of our democracy, which should not be encouraged, especially when there are already pre-COVID-19 laws in place to address occupational disease.

However, any challenge of public authority, whether it be by a facial or “as applied” challenge, has consequences. Legal actions are costly and can meander through court systems for many years without resolution. Governors and legislatures do not like to be challenged on their actions and so subsequent governmental relations with public officials must be factored into the equation. The business/employer community should be active in sharing its concerns with such proposals to show the costs that they are being forced to bear. Ultimately, opposition and subsequent challenges should not be undertaken lightly, but just as, if not more, important are the long-term considerations of retroactively absorbing enormous amounts of liability.

RATES AND UNDERWRITING

Insurance rating for the most part is prospective in nature. While previous loss experience is considered, to some extent insurers must predict losses that may occur and actuarially account for those foreseeable risks in their rates. Insurers must be able to actively underwrite and price for risk they may have to pay in the future. Workers' compensation is an especially risky undertaking because the claims are long term in several respects. First, there are no policy limits on workers' compensation claims so losses can be fairly open-ended. Also, there can be a delay in onset of an occupational disease and when a claim does develop. Further, the unlimited exposure of essentially permanent disability claims as well as survivor benefits potentially can be paid to the respective claimant for decades in the future. Any destabilization of factors affecting price calculations can be detrimental to a large degree. Pricing and reserving therefore, are inherently based on a long-term view.

NAMIC ISSUE ANALYSIS

When a risk is imposed retroactively therefore, it does not allow for appropriate premium to be obtained. When prospective legislation is passed that affects the industry, insurers in theory have time to factor into their rates the exposure caused by new public policy measures. By law in every state, rates must be adequate, not excessive, and not unfairly discriminatory. Consequently, simply imposing liability retroactively may cause the rate of the insurer to instantaneously become inadequate and therefore possibly illegal under state regulatory schemes, all by the stroke of a pen. Coupled with the fact that many states prevent price increases based on perceived one-time events or based on other look-back provisions, insurers are basically being forced to absorb these losses on behalf of and caused by the state's response to the public pandemic. These underwriting restrictions do not consider future COVID-19 outbreaks and further loss potential for insurers. This economic "squeeze" by imposing ex post facto risk onto insurers and not allowing the pandemic experience to be reflected in future rates can have unintended implications for insurer operations. For example, it was made clear and supported by international, federal, and state regulators that forced retroactive business interruption insurance could pose an existential threat for the entire property/casualty industry.^{xii}

Given the experience of COVID-19 in the United States, we should be wary of public policies that cause additional rate pressure on consumers, especially struggling businesses. When adding cost drivers like presumptions, rates that may have been steady or declining due to lower frequency of claims can easily turn around and head in the other direction. While it is too soon to determine the effects of COVID-19 on workers' compensation insurance, especially due to reduced payrolls caused by the virus and governmental responses, there has been some dramatic research concerning presumption impact. The National Council on Compensation Insurance introduced a tool that can broadly estimate impacts based upon sliding scale factors such as infection rate, report rate, hospitalization rate, critical care rate, fatal rate, compensability rate, average fatal indemnity benefit, average salary, pure premium factor, claim frequency, wage replacement severity, medical severity, nonfatal total severity, and many other estimates.^{xiii}

Estimates of the cost of presumptions to workers' compensation systems have ranged from hundreds of millions to billions of dollars. Concerning one proposal in California that would impose a conclusive presumption that would be essentially un-rebuttable, the Workers' Compensation Insurance Rating Bureau of California estimated the presumption could result in annual costs of \$2.2 billion to \$33.6 billion with an approximate midrange estimate of \$11.2 billion.^{xiii} A limited-term workers' compensation presumption estimate subsequently reduced the amounts to a revised nearly \$2 billion. A similar provision in New York that would make most if not all workers eligible for benefits without testing positive for the illness would result in a cost exceeding \$31 billion. A comparison of current losses in the state ran \$8.7 billion annually.^{xiv}

The insurance industry is well-capitalized and can withstand claims that it has underwritten within the current confines of the law. Insurers want positive outcomes for all policyholders and have worked with them to achieve relief in many instances



COVID-19 WORKERS' COMPENSATION PRESUMPTIONS: A SURVEY AND ANALYSIS OF THEIR INDELIBLE IMPACT

during this pandemic. However, when laws or rules are changed after the fact, problems can develop. Inability to price for risk due to retroactivity and hasty actions of public officials can most certainly disrupt insurer activity. This is not to mention other regulatory activity affecting commercial insurance in general, including nonrenewal or cancellation of policy moratoriums, enforced premium holidays for policyholders, and, in some instances, mandatory premium abatement or return of premium.

At this stage, it is too soon for preliminary numbers on ultimate claim exposure to reveal any significant results. It is anticipated that many claims were delayed including treatment within existing claims during the acute onset and subsequent spread of the COVID-19 virus. As the economy moves forward and re-opens, that claim activity and loss trending will inevitably increase. Further, scientific studies concerning the effects of the pandemic are still in their infancy. As further health developments play out on the national stage, claim loss development will be affected accordingly.

It also premature to ascertain losses, as claims are at best in their infancy and have not had significant rulings concerning compensability or indemnification for loss, much less permanent impairment. Appellate decisions will weigh heavily on loss scenarios and discernment of the vagaries created by swift action taken by states in many instances to address concerns. Additionally, in those states that permit bad faith causes of action against insurers for failing to pay claims subjectively deemed appropriate, premature settlements or payments of claims due to this exposure will likely result in a spike in loss activity.

While workers' compensation systems have generally, with exceptions, been experiencing rate decreases due to lower frequency of injury, significant headwinds have developed prior to and during COVID-19 that must be further explored. Severity of claims including wage indemnification and medical costs continue to remain the same or increase. Interest rate environments remain extremely low, impacting investment ratios in the negative that can fail to assist or offset underwriting concerns. Litigation and regulatory risks continue to impact the line in each and every state that can create more rate pressure. Ultimately, as unemployment continues due to the pandemic, those paying premiums into the insurance pools for coverage may be reduced causing others to pay more for similar coverage. Bankruptcies of businesses due to COVID-19 will exacerbate this concern as well by reducing the number of those paying premiums for coverage.

REBUTTING A PRESUMPTION

Standards of proof for most claims in the United States have traditionally held that the burden of proving a claim is upon the claimant. This makes sense for a host of reasons as the person seeking indemnification, damages, monetary recompense, or other alleged and perceived recourse should have to prove they are eligible and entitled to such benefits. Presumptions assume all these burdens have been met and then require employers, and ultimately their insurers that have essentially no advanced notice a claim is coming, to now prove the person did not obtain what is already presumed after the fact. It is very difficult to investigate and rebut what is presumed in the law to be correct or disprove a negative premise.

Additionally, presumptions will most likely encourage litigation that seeks to get around grand bargain and exclusive remedy provisions. In addition to the interpretive litigation that ambiguous and broad public policy like presumptions create, states additionally have provisions that allow for litigation if there is deliberate indifference, intent, or exposure of an employee to a known hazard. Employers may be sued for intentionally exposing employees to these risks and such allegations may allow for damages outside of the workers' compensation exclusive remedy. When state officials expand presumptions, employers may be subject to these types of deliberate lawsuits since the fact of employment-related exposure to COVID-19 has already been presumed. This would of course exacerbate a difficult situation and possibly provide additional payouts to claimants who, due to the grand bargain and exclusive remedy, should have only utilized the workers' compensation system. Permitting or encouraging these types of recoveries circumvent workers' compensation, destabilize the marketplace, and disrupt the workers' compensation dynamic.

NAMIC ISSUE ANALYSIS

There is the further concern that expansive presumptions incentivize moral and morale hazards, especially in the post-COVID-19 era. Moral hazard involves incentivization for fraud. With the COVID-19 crisis and unemployment concerns, broad coverages for a host of employees encourage false claims to be made to obtain indemnity and wage replacement as opposed to unemployment insurance. Morale hazard deals with the concern that broad allowance of claims disincentivizes employees to be ultra-cautious in their activities at home and in other non-employment environments as well as while on the job.

CERTIFICATION AND COST-SHIFTING

Another significant concern of the COVID-19 presumption is cost-shifting. The ultimate example of cost-shifting would be taking an incalculable pandemic and its associated costs and placing them onto one industry sector – like the property/casualty insurance industry. Public officials and the public benefit greatly from employees working on front lines, in grocery stores, and so on. This pandemic is a public health disaster and the responses to and activity during it should, in turn, be borne by the entire public who benefits from those actions.

There are simpler and smaller examples of cost-shifting as well – health coverages in many instances should be compensating for virus-related losses due to the inability to ascertain how the virus was actually contracted. Health coverage is not a similar system to workers' compensation due to the nature of coverage. Health insurance may have co-pays and co-insurance, so the claimant is obtaining and paying for care that they believe is necessary. Workers' compensation generally pays first dollar for every claimant regardless of situation. Further, because some of these benefits paid in workers' compensation systems can be for life, individuals may forego retirement and obtaining pensions or Social Security benefits in lieu of filing claims due to the lower presumption threshold standard. Further, the use of Medicare may be diminished especially since the Centers for Medicare and Medicaid Services has a very robust subrogation against other entities for conditional payments especially workers' compensation carriers.^{xiv} Therefore, these policies divert responsibility away from potentially valid payer resources.

Discernment of contraction of communicable diseases poses additional barriers when workers are exposed to spouses, family members, and at church or other social functions, grocery and retail shopping, and other exposures that can be the root cause of contraction and a burden shift away from the responsible root cause of the inception.

The certification of COVID-19 contraction or lack thereof also creates a problem. Communicable diseases by nature are broadly contracted due to exposures that cannot be pinpointed with any type of specificity. Many of the COVID-19 edicts are vague about the actual certification of COVID-19 contraction and some only discuss symptoms. These types of open-ended exposures with lack of specificity encourage claims that could be borne by the individual, their health insurer, or other entities rather than be placed solely and disproportionately on the workers' compensation insurer. Coupled with broad exposure windows, the lack of certification of actual contraction of COVID-19 creates an enormous load for any entity to bear.

Employers should not have unlimited exposure concerning the virus in the workplace especially if Centers for Disease Control and Occupational Safety and Health Administration guidelines were followed by the employer. The CDC issued "Interim Guidance for Businesses and Employers responding to Coronavirus Diseases 2019 (COVID-19)" in the early weeks after the U.S. COVID-19 onset.^{xvi} Further the United States Department of Labor issued, among other material, "Guidance on Preparing Workplaces for COVID-19".^{xvii} This guidance as well as similar publications should provide a liability safe harbor for employers which has in fact been discussed in some legislative proposals. There should be liability protections for those companies that incentivize good conduct which should also serve to summarily overcome rebuttable presumptions of any COVID-19 contraction or other indirect or ancillary exposures.

Further, there should not be double recoveries in these uncertain times as funds need to be directed to where they are

COVID-19 WORKERS' COMPENSATION PRESUMPTIONS: A SURVEY AND ANALYSIS OF THEIR INDELIBLE IMPACT

vitaly needed. Double recoveries occur when a claimant receives the same benefit or payment for a loss from two separate sources. The claimant only has the one proven amount of loss and therefore should only be entitled to payment for the same once. Offsets and subrogation – which are not uncommon in workers' compensation systems – should be considered in any legislation to specifically reduce any recovery by resources obtained from the employer, such as sick leave, federal relief funds, stimulus, or other payments, and any other federal or state benefits paid in this regard.

FUTURE CONSIDERATIONS

When reviewing the current workers' compensation landscape, it unfortunately appears that legislatures may continue to attempt to proactively pass COVID-like prophylactic measures in coming years. Without discounting the multitude of losses due to COVID-19, pandemic communicable diseases are now a significant disruption in workers' compensation systems. Policymakers have to consider that their mandates for essentially free coverage for these public health crises cannot endure forever. Insurers forced to price for mandated coverages must charge adequate rates by law. Ultimately, public policy decisions in this realm may impact affordability and availability for already severely impacted businesses that ultimately employ potential work-related claimants. There should be more consideration of the potential for the destabilization of workers' compensation markets as well as solvency and existing claim reserve impacts before moving forward with these well-intended but often misguided reform efforts.

And we have witnessed public officials exercise proper restraint and not impose excessive parameters on employers and insurers during this pandemic crisis. In some instances, the creation of state funds has been discussed. Similarly, in the business interruption insurance area, a number of proposals have been put forth including a NAMIC-backed proposal for the Business Continuity Protection Plan that provides parametric, government-backed, financial assistance during a pandemic. Others have suggested a Terrorism Risk Insurance Act model such as the Pandemic Risk Insurance Act, H.R. 7411, and a government back-stop solution. A few large insurers have also put forth suggestions based on their own or other risk transference models. None presently includes workers' compensation in the discussion. However, the Business Continuity Coalition – a group comprised of many large industries – has advocated for additional lines such as workers' compensation to be included in any discussion of a prospective federal solution.

Public fund creation, however, should not simply result in the diversion of legitimate insurer operations and underwriting to serve public purposes. Reasonable resolutions that include a public solution to these challenges will be needed. The concept of "Hero" pay for front line workers, hazard pay, or other incentivized pay should be expanded to possibly cover workers injured by a pandemic and any health-related sequelae. The funding for these programs, however, should come from the public coffers as all benefit from these workers' sacrifice. Employers and insurers should not bear the costs of keeping economies afloat during pandemic catastrophes – retroactively mandating coverage creates an accumulation of risk that might not be sustainable either in the current crisis or the next. Further, governments should incentivize employment in pandemics rather than create overly prescriptive policies that may increase the unemployed populations.

We must ensure that in the future, when the devastating effects of the pandemic are fully known, a retrospective review will not paint a picture of an abdication of public responsibility through a shifting of the costs onto the private sector.

NAMIC ISSUE ANALYSIS

ENDNOTES

ⁱ This paper should not be interpreted as providing legal advice, creating an attorney-client relationship, or substitution for review, research, and analysis of any statutes, cases, rules, regulations, pending bills, or other activity referenced herein. Further, the paper in many instances provides information to understand context but should not be considered exhaustive in reference to subjects or other thought in the area. All references are subject to change.

ⁱⁱ For a recent updated overview of these principles, see “Workers’ Compensation: Overview and Issues,” Scott D. Szymendera, Congressional Research Service, Version 10 – Updated Feb. 18, 2020 https://www.everycrsreport.com/files/20200218_R44580_13b512c73283c15d8265731f650541828fc4e973.pdf

ⁱⁱⁱ See NCCI Research Brief, “Presumptive Coverage for Firefighters and Other First Responders,” Racicot and Spidell, November 2018, <https://www.ncci.com/Articles/Documents/Insights-Research-Brief-Presumptive-Coverage.pdf>

^{iv} See endnote iii at pages 3-4.

^v See endnote iii at pages 5-6.

^{vi} See endnote iii at page 6.

^{vii} See endnote iii at pages 6-7.

^{viii} See endnote iii at page 7.

^{ix} Workers’ Compensation is not mandatory in Texas. Oklahoma has also had initiatives to remove the mandatory nature and provide opt-out ability. However, that law was determined to be unconstitutional. See e.g.- <https://www.insurancejournal.com/news/southcentral/2016/09/14/426439.htm>

^x https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-19_.pdf

^{xi} <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.6.20-EO-N-62-20-text.pdf>

^{xii} <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7JJJ.pdf>

^{xiii} https://governor.ky.gov/attachments/20200409_Executive-Order_2020-277_Workers-Compensation.pdf

^{xiv} https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-532255-,00.html

^{xv} <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/emergency-order-36.pdf>

^{xvi} <https://www.governor.state.nm.us/wp-content/uploads/2020/04/Executive-Order-2020-025.pdf>

^{xvii} <https://www.governor.nd.gov/sites/www/files/documents/executive-orders/Executive%20Order%202020-12%20WSI%20extension%20for%201st%20responders.pdf>

^{xviii} <http://www.akleg.gov/PDF/31/Bills/SB0241Z.PDF>

^{xix} https://www.njleg.state.nj.us/2020/Bills/S2500/2380_11.HTM

^{xx} <https://legislature.vermont.gov/Documents/2020/Docs/ACTS/ACT150/ACT150%20As%20Enacted.pdf>

^{xxi} Laffey v. City of New Jersey, 289 N.J. Super. 292; 673 A.2d 838; 1996 N.J. Super. LEXIS 154 (N.J. Super. 1996).

^{xxii} https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB1159

^{xxiii} <https://www.ilga.gov/legislation/fulltext.asp?DocName=10100HB2455enr&GA=101&SessionId=109&DocTypeId=HB&LegID=118463&DocNum=2455&GAID=15&SpecSess=1&Session=0>

^{xxiv} <http://wdoc.house.leg.state.mn.us/leg/LS91/HF4537.0.pdf>

^{xxv} <https://le.utah.gov/~2020S3/bills/static/HB3007.html>; <https://le.utah.gov/~2020S5/bills/static/HB5006.html>

^{xxvi} https://www.michigan.gov/documents/lara/Workers_Disability_Compensation_Agency_COVID-19_First_Responder_ER_684245_7.pdf

^{xxvii} https://labor.mo.gov/sites/labor/files/8_CSR_50-5.005_Emergency_Final.pdf

^{xxviii} <https://www.myfloridacfo.com/coronavirus/documents/CFO-Directive-20-05.pdf>

^{xxix} <https://www.congress.gov/bill/116th-congress/house-bill/6656/text?q=%7B%22search%22%3A%5B%22hr6656%22%5D%7D&r=1&s=1>

^{xxx} <https://www.congress.gov/bill/116th-congress/house-bill/7341/text?q=%7B%22search%22%3A%5B%22hr7341%22%5D%7D&r=1&s=1>

^{xxxi} <https://www.congress.gov/bill/116th-congress/senate-bill/3910/text?q=%7B%22search%22%3A%5B%22s3910%22%5D%7D&r=1&s=1>

^{xxxii} See Friends of Danny DeVito, et al. v. Tom Wolf, Governor, et al., No. 68 MM 2020, Supreme Court of Pennsylvania (Middle District) (2020).

COVID-19 WORKERS' COMPENSATION PRESUMPTIONS: A SURVEY AND ANALYSIS OF THEIR INDELIBLE IMPACT

- ^{xxxiii} See e.g. *Wisconsin Legislature v. Secretary-Designee Andrea Palm, et al. Officials of the Wisconsin Department of Health Services*, Case No. 2020AP785-OA, 2020 WI 42, Supreme Court of Wisconsin (2020) finding that health official's stay-at-home order including criminal penalties did not follow Wisconsin law for emergency situations including rulemaking by an administrative agency even due to COVID-19 pandemic onset. "...[T]he judiciary cannot dispense with constitutional principles, even in response to a dire emergency. Indeed, it is in the midst of emergencies that constraints on government power are most important." At Paragraph 73.
- ^{xxxiv} See e.g. <https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx>
- ^{xxxv} <https://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/Recent%20Opinions/20-21%20Term%20Opinions/In%20re%20Certified%20Questions-OP.pdf>
- ^{xxxvi} <https://www.bloomberg.com/news/articles/2020-04-21/barr-says-doj-may-act-against-governors-with-strict-virus-limits>
- ^{xxxvii} *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).
- ^{xxxviii} *Eastern Enters. V. Apfel*, 524 U.S. 498 (1998).
- ^{xxxix} See "Check Your Rights at the Door: Rethinking Confiscatory Regulation," Wake, Luke (August 14, 2019.) <https://ssrn.com/abstract=3437488>. "Yet most regulatory impositions will survive constitutional scrutiny. Accordingly, this article seeks to demarcate the line between 'confiscatory regulation' that is vulnerable to challenge and the broader realm of economic regulation that must survive. I argue that this demarcation is firmly rooted in settled takings doctrine, which distinguishes between use restrictions and physical appropriations of private property. Accordingly, since *Horne* makes clear that all forms of property are protected on equal terms, the Takings Clause generally forbids government from conditioning the right to engage in commerce on a requirement to hand-over identified commodities, products, monies, or any other asset. Absent an affirmative defense, such regulation must be enjoined — or, otherwise, "just compensation" must be paid."
- ^{xl} See "Constitutional Constraints on Retroactive Civil Legislation: The Hollow Promises of the Federal Constitution and Unrealized Potential of State Constitutions," Usman, Nevada Law Journal, Vol. 14:63 (2014).
- ^{xli} <https://www.businesswire.com/news/home/20200505005723/en/Best%E2%80%99s-Commentary-Two-Months-of-Retroactive-Business-Interruption-Coverage-Could-Wipe-Out-Half-of-Insurers%E2%80%99-Capital>
- ^{xlii} <https://www.ncci.com/SecureDocuments/COVID-19-Scenarios.html>
- ^{xliiii} https://www.wcirb.com/sites/default/files/documents/wcirb_april_2020_cost_evaluation_of_conclusive_covid-19_presumption.pdf
- ^{xliiii} <https://www.nycirb.org/officialdocs/legislative-analysis-covid.pdf>
- ^{xlv} <https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Attorney-Services/Conditional-Payment-Information/Conditional-Payment-Information>
- ^{xlvi} <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>
- ^{xlvii} <https://www.osha.gov/Publications/OSHA3990.pdf>

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