



EXECUTIVE SUMMARY

American workers' compensation – a study in disparities and the expanded use of presumption

COVID-19 has presented American workers and employers with a variety of impacts. From its roots as an injury compensation system, American workers' compensation has evolved on a state-by-state basis. Despite some outliers, disease has not been compensable in these systems absent specific evidentiary demonstrations or legislative definitions. The nature of COVID-19 and its challenges have led various states to react legislatively or regulatorily to retroactively amend the social contract that is workers' compensation, and to shift virus costs to employers and insurance carriers retroactively. There remains a specific COVID-19 focus in much of that, but a suggestion of potential generalized expansion of workers' compensation in the long-term.

This paper provides a brief outline of the history and original purposes of state-based workers' compensation systems and offers a deeper look at the evolution of the view and coverage of "occupational" disease within these systems. It includes an in-depth examination of the legal issue of "presumption of compensability" and its implications for a no-fault based system whose design under-girded by the "grand bargain," offered an ostensible equivalent trade-off between an injured employee's right to sue their employer and the employer's right to deny responsibility for injuries that occurred on the job.

The COVID-19 virus event has both expanded the use of presumption, state by state, and raised significant questions and concerns about how or if this expansion will undermine the grand bargain and the core principles that have consistently defined the guard rails of state systems for over 100 years. The paper considers both the micro- and macro-economic impacts of COVID-19 as legislators, politicians, and regulators take actions that extend workers' compensation benefits to typically selected groups of affected workers, some more narrowly and some more broadly. Those impacts include potentially significant implications for interstate competition among states, each of which provides workers' compensation benefits in accordance with the statute within each state.

As we share in our conclusions, the stage is set for workers' compensation in some jurisdictions to face potentially significant cost increases associated with COVID-19 as the presumption is used by some states to provide benefits to cover it under workers' compensation statutes. As states expand their coverage, they will need to raise premiums.

There may be those who characterize this expansion, contrary to recent system criticisms, as a "race to the top." Critics may allege that merely describes the workers' compensation cost of doing business. As COVID-19 plays out over time, the extent and frequency of using the presumption will influence how it and similar presumptions are used for distribution of risk in the future. Stakeholders in the workers' compensation systems would be wise to carefully consider the full ramifications of the continued expansion of the presumption tool before capitulating to its use without a clear, supportable basis for doing so. Overuse of the presumption risks tipping the grand bargain balance away from its creator's original intent and increasingly toward inequity between stakeholders.

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