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COVID-19 and Workers' Compensation

Considerations for Policymakers

The coronavirus disease 2019 (COVID-19) pandemic has posed incredible challenges to the U.S. workforce. Although many businesses have transitioned employees from on-site work to telework, frontline employees in certain sectors deemed “essential” (e.g., hospitals and other health care facilities, public safety agencies such as police and fire departments, critical infrastructure such as electric and water utilities, or the food supply chain) must continue to work on-site. Depending on the specific public health restrictions in place, many “nonessential” businesses have also operated in a manner that requires employees to work on-site and, in some instances, to have extensive contact with customers, vendors, and suppliers.

Typically, when an employee is injured or becomes ill as a consequence of working,¹ workers' compensation insurance purchased by employers compensates the employee for necessary medical costs and a share of wages lost while they are unable to work. With the exception of Texas, every other state in the United States

requires employers to purchase this insurance if they employ a certain number of individuals.

Labor groups argue that covering losses related to COVID-19 through the workers' compensation system offers protection for vulnerable workers whose jobs put them at higher risk of infection than that of the general public. Business groups argue that given the difficulties in contact tracing and the virus's three- to five-day incubation period, it would be unfair to require insurers to pay benefits (which would ultimately be passed along to employers in the form of higher premiums) to workers who could have contracted the disease outside of work (Kopp, 2020).

The pandemic is now in its second year, and states have made various choices on whether or how to allow workers to seek compensation for a COVID-19 diagnosis through workers' compensation. Although it is still too early for a comprehensive examination of the costs, impacts, and efficacy of these efforts, now is a good time for policymakers to consider all the arguments for and against covering injuries related to COVID-19: States may want to expand or modify workers' ability to file claims as the pandemic

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continues to evolve or establish similar policies for future public health emergencies or pandemics.

In this Perspective, we examine the advantages and disadvantages of expanding workers' compensation benefits to cover costs for frontline workers required to work outside the home who contract COVID-19. We briefly outline the current workers' compensation policy landscape and examine efforts already in place to make it easier for workers to receive benefits. We explore alternatives to workers' compensation. And finally, we discuss questions that policymakers might wish to consider when assessing past efforts and planning for the future.

What Is Workers' Compensation and How Does It Usually Work?

Workers' compensation is sometimes referred to as “the grand bargain” between business and labor interests. Details vary widely among states, but the basic principle remains the same: Workers who are injured or become sick on the job are provided with necessary medical care and cash benefits that offset a portion of lost earnings. In exchange for covering the costs of such compensation and not requiring the employee to prove fault on someone else's part, employers are shielded from lawsuits (with potentially unlimited damages) for injuries that arise in the course of employment.

Although workers' compensation insurance is heavily regulated by the state, it is predominantly financed and administered by the private sector. Employers pay premiums to private or state-backed insurance companies, which then provide injured workers with the benefits for which they are eligible under state law.

In general, workers' compensation insurance is a form of limited liability for employers. In contrast to the tort system, damages that workers might recover are limited to the actual or *economic* damages associated with replacing lost earnings, providing medical care, and supporting vocational rehabilitation. *Noneconomic* damages, such as punitive damages and damages for pain and suffering, are not available through workers' compensation.

Workers' compensation pays employees cash benefits at a set percentage of their pre-injury wages, which varies from state to state. These benefits are exempt from federal income tax and often exempt from state and local taxes. There is generally a waiting period before cash payments begin, and the total benefit amount is usually capped at a predetermined maximum based on average wages in the state.

Medical benefits can be especially valuable to workers because workers' compensation pays for 100 percent of the cost of necessary care, with no co-payments, deductibles, or other patient cost-sharing. Workers' compensation is the primary payer for medical care of covered injuries or illnesses, but benefits are limited solely to the specific injury or illness that a worker has suffered and do not include general medical care.

To receive benefits, an injured worker must be able to show that their injury arose in and out of the course of employment. Although usually this is relatively easy to do for discrete injuries, a common criticism of the workers' compensation system is that the arose-out-of test is far more difficult for cumulative trauma or occupational diseases (e.g., allergic and irritant dermatitis, asthma and chronic obstructive pulmonary disease [COPD], musculoskeletal disorders, hearing loss, and certain cancers).

In recognition of this difficulty, many states have adopted workers' compensation presumption laws that make it easier for workers to qualify for benefits: "The purpose of presumption laws is to supplant the 'arose out of' test and shift the burden of proof onto the employers for certain types of diseases and/or certain types of claimants" (American Academy of Actuaries, 2020).

Although seasonal flu and other *ordinary diseases of life* (i.e., diseases to which the general public is as equally exposed and diseases with symptoms that resolve themselves within a short amount of time with little to no undue complications) are generally considered noncompensable by workers' compensation, the extraordinary nature of the COVID-19 pandemic has caused many state governments to expand presumptive coverage of injuries related to COVID-19. In the next section, we discuss the current standing of these efforts.

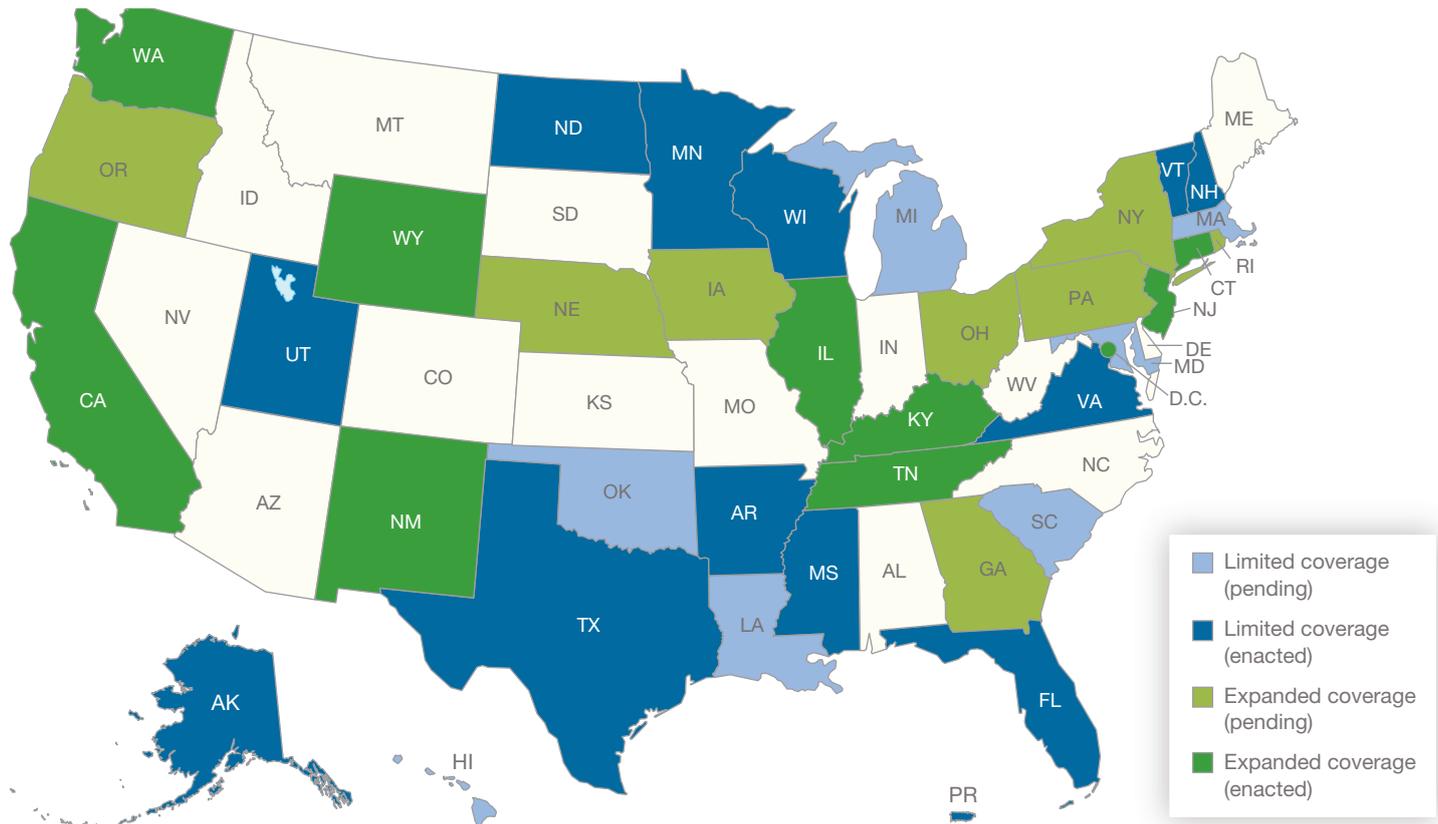
How Are State Policymakers Addressing COVID-19 Through Workers' Compensation?

In the year since the onset of the COVID-19 pandemic in the United States, state policy decisions on how workers' compensation should handle injuries related to COVID-19 and which workers should be covered have varied widely. Many states have expanded workers' ability to seek compensation (either through executive orders or legislation) by establishing *rebuttable presumptions* that shift the burden of proof to employers, who must present evidence that a covered employee did *not* contract COVID-19 in the workplace.

In the case of COVID-19, these rebuttable presumptions are particularly important given the community prevalence of the disease. Because the disease is presumed to have arisen out of the course of employment, claimants face a lower bar to have their claims approved.

As of July 31, 2021, 36 states, the District of Columbia, and Puerto Rico have either implemented or are considering changes to make it easier for some classes of workers who contract COVID-19 while working outside the home to obtain benefits (National Council on Compensation Insurance [NCCI], 2021a; NCCI, 2021b; see Figure 1).

FIGURE 1
Workers' Compensation Presumptions Across the United States as of July 31, 2021



SOURCE: NCCI, 2021b.

NOTE: *Limited coverage* is generally restricted to frontline healthcare workers and first responders. Some states also include corrections and essential childcare workers. *Expanded coverage* is available to a broader segment of employees who are required to work outside the home in essential businesses, including workers in the food supply chain, transportation, essential hospitality, and education.

States have either chosen to offer presumptions to narrow segments of workers (generally frontline health care workers and first responders, although some states also include corrections personnel, active duty state guard personnel, and essential childcare workers) or to offer presumptions to broader segments of workers who are required to work outside the home (including workers in the food supply chain, transportation, essential hospitality, and education, among others). Presumptions for other workers may also be subject to additional conditions, such as the occurrence of an outbreak at the job site.²

In a majority of states that have expanded workers' compensation presumptions, the presumption takes effect upon either a positive COVID-19 test result or physician's diagnosis. In Mississippi, North Dakota, and Washington, the presumption takes effect once a worker is ordered to quarantine by an employer because of suspected COVID-19 exposure.

It is also important to note that in several states, COVID-19 claims for frontline workers are being accepted by payers (allowing workers to receive benefits) even though presumptions specific to COVID-19 have not been adopted.

What Are the Distributional and Efficiency Impacts of Covering COVID-19 Through Workers' Compensation?

Impacts on Workers

Frontline workers face the greatest risk of a positive COVID-19 diagnosis. Registered nurses and physicians, home health aides and nursing home personnel, con-

struction workers, meatpackers and agriculture workers, plumbers and electricians, cashiers, and factory workers, among others, work in conditions conducive to the spread of disease.³

Importantly, data show that

occupational segregation by race leads to differential exposure to the coronavirus among workers . . . essential workers are disproportionately Black, that Black and Hispanic/Latinx essential workers are less likely to be able to work from home than white essential workers, and that essential workers who cannot work from home have lower incomes than those who can work from home. (Dubay et al., 2020, p. 6)

Workers in low-wage jobs without access to extensive sick leave or disability benefits have the greatest risk of financial devastation if they are unable to work. Workers' compensation has the potential to substantially mitigate the financial risks that workers who become sick currently face.

However, a known problem with workers' compensation is that of workers deciding not to file and losing out on benefits that they rightfully deserve. Barriers to claim-filing include unawareness and, more worrisome, the fear of illegal (yet still commonplace) employer retaliation (Miller, 2020). These barriers loom largest for the most-vulnerable workers—those with precarious, nonunionized employment or who may be unaware of their rights because of language or other cultural barriers. States that choose to expand workers' compensation benefits must also dedicate resources toward making sure employees know their rights and are comfortable pursuing potential claims without fear of retaliation. This also includes enforcement of regulations for businesses that engage in retaliatory behavior.

Where Else Can Workers Turn for Wage Replacement or Medical Care?

Outside of workers' compensation benefits, most workers have a limited number of options for replacing lost wages and reimbursing the cost of necessary medical care after a COVID-19 diagnosis.

Federal and state government programs may offer some relief to injured employees. Much of this has come in the form of mandated employee benefits for targeted classes of workers, which may then be reimbursed through federal tax credits. The Families First Coronavirus Response Act, for instance, required employers to offer 80 hours of paid sick leave benefits. However, it applied only to businesses with 500 or fewer employees (thus, major grocery store and retail chains are not required to provide such leave), and the mandate expired at the end of 2020 (29 C.F.R. Part 826). The Family Medical Leave Act (FMLA) allows up to 12 weeks of protected leave,⁴ but it does not offer any financial compensation under federal rules unless a state has expanded benefits. Neither program provides for covering necessary medical care.

Short-term disability programs offer partial wage replacement for workers who exhaust any existing paid sick leave benefits, but it is often not available to low-wage or part-time employees. Several states (California, New York, New Jersey, Rhode Island, and Hawaii) have public or universal short-term disability programs. These programs also provide no medical benefits.

Beyond the programs listed above, the U.S. tort system is sometimes the option of last resort for workers who feel that they have been injured by their employers. Unfortunately, the ability to sue an employer for a work-related injury is extremely limited because of the *exclusive remedy*

doctrine that offers employers liability coverage. Exceptions exist only for cases in which the employee can clearly demonstrate that their employer either *intentionally* or *willfully* engaged in misconduct that caused their injury.

Additionally, tort litigation is often expensive, complex, and extremely time consuming. Successful plaintiffs are unlikely to see compensation until long after the pandemic is past.

Expanding workers' compensation to cover COVID-19 claims has several potential benefits for workers who might otherwise be left without recourse. Many employees may fear losing their jobs if they need to take time off after becoming ill. Guaranteed coverage should, in theory, give workers incentives to stay home if they are sick, thus reducing the potential for continuing spread of the virus while offering compensation for lost wages and medical costs.

Impacts on Employers

Workers' compensation coverage can both provide protections for employers (by prohibiting recovery of noneconomic damages) and ensure that workers are compensated for their risks rather than left without recourse.

Employers *do* face the potential of paying costs for a worker who did not contract COVID-19 while on the clock through higher premiums that may be charged by their workers' compensation insurer. Although economic research has shown that workers—not employers—ultimately pay for mandated benefits like workers' compensation via reduced wages (Gruber and Krueger, 1991), these findings reflect long-run labor market equilibrium; it is plausible that employers will have to pay higher total compensation costs in the short run until wages adjust.

State regulators and policymakers should carefully consider how they can use insurance pricing to incentivize employers who take active measures to increase the safety of their workplace and crack down on those who do not.

Insurance is designed to spread the cost of a loss among employers assigned to specific industry categories. Premium calculations, therefore, need to accurately reflect risks to incentivize employers to purchase insurance.

One approach is to raise insurance premiums for employers with poor safety records—a system known as *experience rating*. In the same way that car insurance rates go up after a driver is found at fault in an accident, workers' compensation premiums go up if a business has a bad track record of injury and illness claims.

The second approach is for insurers to work with their policyholders—employers—to take preventive measures up front. Insurers often incentivize safety investments by offering discounts on workers' compensation premiums. The hypothetical car insurance parallel would be to offer lower rates to customers who own safer cars or who take a defensive driving class. It is easy to imagine this model being updated for the COVID-19 era; instead of machine guards, insurers could help pay for effective personal protective equipment and improved ventilation systems.

Part of the usual justification for insurance pricing is that safe employers should not be forced to cross-subsidize the costs incurred by more-careless employers in the same industry. This makes sense for injury risks that are largely under the employer's control. In the pandemic, however, community spread undercuts this fairness argument: Employers that do everything right still face some possibility that their workers will become sick and file claims.

Workers' compensation actuaries in a majority of states have adopted regulations excluding COVID-19 from experience rating.⁵ State insurance regulators also might consider issuing guidance or (in states with stricter rate regulation) amending rules to encourage premium discounts linked to COVID-19 prevention efforts.

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Impacts on Insurers

The COVID-19 pandemic has, so far, not had dramatic impacts on the profitability of the workers' compensation insurance market (NCCI, 2021c). Far from the dire predictions at the start of the public health emergency, many employees who have contracted COVID-19 have recovered relatively quickly, without the need for long-term, costly medical care or time off from work. And although numerous laws and regulations have been enacted across many states, many of the COVID-19 claims have not ultimately met the requirements for compensability.

Additionally, some observers have noted that overall claims frequency in 2020 declined in many states. A study by the Workers' Compensation Research Institute found that in the second quarter of 2020, "the volume of non-COVID-19 WC [workers' compensation] claims . . . [dropped] by at least 30 percent in the vast majority of the states and by as much as 50 percent in Massachusetts" (Fomenko and Ruser, 2021, p. 8).

If claim volumes and costs rise in the future as the pandemic continues, the market may be able to weather the increases as long as insurers can reflect rising costs in

their rate settings. It will be up to the actuaries and state regulators to allow rate increases if data indicate that these steps are necessary.

The biggest risk that insurers now face is the unknown long-term health implications for people who have recovered from a serious COVID-19 infection. Patients admitted to intensive care units are generally at greater risk of long-term adverse health outcomes. Some experts also anticipate that "in addition to claims for occupational exposure to COVID-19, an influx of post-traumatic stress and mental health claims could also be on the way" (Marsh, 2020, p. 5).

It will take decades to fully understand what, if any, serious long-term side effects patients who have recovered from COVID-19 will face. Insurers face uncertain risk around tail costs, which include the potential for latent claims filed for lifetime medical, permanent disability, or death benefits.

This uncertainty does present a challenge for workers' compensation systems because the premiums collected in a given policy year must be adequate to cover all the costs arising from injuries and illnesses occurring during that year. Longer-term costs, including lifetime medical,

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permanent disability benefits, or death benefits, must be priced into premiums. This approach works reasonably well in normal times but may leave workers' compensation insurers with the risk of large losses in the future should another disease like COVID-19 emerge. These risks are hardly unique to COVID-19, however; unpredictable medical inflation or the development of expensive new therapies present similar uncertainties for any long-term health condition covered by workers' compensation. What makes COVID-19 different is the extent of the uncertainty.

These potential losses may be borne by insurers themselves or by private reinsurance. There is no evidence of disruptions to workers' compensation markets as yet, so it may be that these risks appear modest so far. Policymakers (such as state insurance regulators and federal financial regulators) should continue to monitor conditions in the market for private reinsurance to determine if these tail risks pose a threat to the availability or affordability of workers' compensation coverage.

Further Questions for Policymakers to Consider

As the COVID-19 pandemic continues to affect the U.S. workforce, policymakers might consider the following questions as they examine the costs, impacts, and efficacy of the efforts that have been made so far to offer compensation for workers diagnosed with COVID-19 and as they plan for future public health crises:

1. **Does workers' compensation coverage actually encourage safety measures?** More research should be done on whether or how insurance pricing

incentives have actually led to employers changing workplace safety measures. Also, further study is needed to improve our understanding of whether workers stay home when they are sick because they have workers' compensation benefits or if they are deterred from doing so by waiting periods, complexity, or uncertainty about payment (compared with standard sick leave when available).

2. **Are workers accessing workers' compensation benefits?** Do workers know and understand their options for receiving benefits? Are economically vulnerable workers (who might benefit the most from workers' compensation benefits) filing claims, or are they being deterred by policy complexity, unawareness, or illegal employer retaliation? How many claims are being filed and what percentage of claims is being paid or denied is likely to depend on whether or not states have specific COVID-19 presumptions in place.
3. **Did alternative pandemic response programs help workers?** How effective were various state measures aimed at providing COVID-19-specific sick leave? Did direct government assistance in the form of stimulus payments or expanded unemployment benefits help frontline workers who may have contracted COVID-19 while working?
4. **How is the tort system functioning with regard to COVID-19 claims?** Is the tort system providing any compensation in situations in which COVID-19 has been found to be noncompensable through workers' compensation? How many injury claims have been filed, and how have courts been ruling?

The effects of the COVID-19 pandemic on the U.S. business and labor market will last far beyond an official declaration that the pandemic has ended.

Concluding Thoughts

With any infectious disease, the risk of transmission (among workers or between workers and customers, vendors, or suppliers) increases with each day a sick worker spends on the job and each day a worker has job-required contact with others. Frontline employees are at higher risk of both contracting and spreading COVID-19 because of the need for these employees to interact daily with broad segments of the population.

Using the workers' compensation system to provide medical and wage replacement benefits to frontline workers who contract the disease could offer several advantages. Assured benefits could encourage sick workers to stay at home, and workers' compensation has long been recognized as an effective incentive for employers to proactively promote workplace safety by using insurance pricing to encourage safety investments.

States and insurers can mitigate some of the concerns posed by employers who fear the cost of rising premiums

by excluding COVID-19 claims from experience rating calculations and instead leaning more heavily on premium discounts and other ex ante incentives to encourage workplaces that actively minimize virus-transmission risks. Examples could include putting physical safety measures in place, such as appropriate ventilation systems and other personal protective measures.

The effects of the COVID-19 pandemic on the U.S. business and labor market will last far beyond an official declaration that the pandemic has ended. Policymaking in response to COVID-19 has been fast but chaotic, and it varies widely from state to state. State and federal policymakers should examine the benefits and drawbacks of offering rebuttable presumptions to make it easier for frontline workers to file claims through the workers' compensation system and to inform discussions on whether or not to continue expanding these policies and how to better respond to future widespread public health crises.

Notes

¹ In this paper, we describe all medical conditions that are potentially compensable under the workers' compensation system in the state of interest as *injuries*, even though illnesses, diseases, and nontrauma-related medical problems are included as well.

² In California, for example, anyone working outside the home is eligible for workers' compensation if there is an outbreak. An *outbreak* is defined as four employees (if the employer has 100 employees or fewer) or 4 percent of the number of employees who report to the specific place of employment where they have tested positive for COVID-19 within a rolling 14-day window.

³ Several studies have shown that employees designated as essential or frontline workers have a higher likelihood of receiving a positive COVID-19 diagnosis. (See, for example, Song et al., 2021; Chen et al., 2021; Selden and Berdahl, 2021.)

⁴ FMLA requires that employers maintain employees' health benefits during the leave and restore employees to their same or an equivalent job after the leave is concluded.

⁵ NCCI proposed a rule change omitting COVID-19 claims from experience rating calculations. To date, 34 out of the 36 states (excepting Alaska and Nebraska) within NCCI have approved the rule change. Additionally, all states not covered by NCCI have approved similar rule changes.

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About This Perspective

In this Perspective, we examine the initial efforts and reasoning of policymakers to grant access to workers' compensation benefits to employees who are required to work outside the home during the COVID-19 pandemic. We briefly examine the potential impacts of continuing to expand such access on workers, employers, and insurers. And finally, we pose further questions that policymakers and others may want to consider when assessing past policies and crafting new ones to meet future public health emergencies.

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