

## Key Points

- Although the specific eligible occupational diseases vary by state, most state workers' compensation laws make it clear that "ordinary diseases of life" (i.e., to which the general public is equally exposed) are not compensable.
- However, many states also have workers' compensation "presumption" laws pertaining to certain occupational diseases and specific employment exposures. Presumption laws have been applied primarily to certain employees of local public entities such as first responders—firefighters, police officers, and emergency medical technicians—as well as to certain state and federal employees.
- Workers' compensation presumption laws, by making it easier to qualify for the benefits, may serve to shift costs from other benefit systems (e.g., health insurance, pensions, Social Security Disability Insurance, Medicare, etc.).
- In recent months, many state governments either issued executive orders or proposed and enacted legislation that pertains to presumptive coverage of COVID-19-related claims, expanding not only the diseases/injuries experienced during employment, but also to whom the presumptions apply.
- COVID-19 and emerging trends in presumption raise some important questions for actuaries and other stakeholders.



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# Presumptive Benefits in Workers' Compensation

## Emerging Issues Before and After COVID-19

JUNE 2020

## Background

### What does workers' compensation presumption mean?

In order to receive workers' compensation ("WC") benefits, an injured worker must demonstrate that his/her injury (regardless of fault) arose out of and in the course of employment. This is relatively easy to prove for most injuries, but for cumulative trauma or occupational disease cases, the "arose out of" test may be more difficult. Although the specific eligible occupational diseases vary by state, most state laws make it clear that: a) "ordinary diseases of life" (i.e., to which the general public is equally exposed) are not compensable; b) WC claims must be supported by medical evidence; and c) the disease must be attributed to work.

However, many states also have workers' compensation "presumption" laws pertaining to certain occupational diseases and specific employment exposures. 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. Presumption laws have been applied primarily to certain employees of local public entities (e.g., cities, counties, schools, water/fire districts, etc.), such as first responders—firefighters, police officers, and emergency medical technicians—as well as to certain state and federal employees. In some limited cases, such as was the case with the 9/11 catastrophe, they may also apply to private-sector workers and volunteers.

Presumption statutes address the concern that the manifestation of certain diseases in these workers is more likely given the physical and emotional challenges of their work but causation as arising directly from work may be difficult to prove. For example, firefighters are exposed to smoke and heat, and these toxins can damage their lungs. There is also evidence that firefighters' cancer rates are much higher than those of the general public.<sup>1</sup> While causality has not been definitively determined, legislators in certain states have put presumption laws in place to address these kinds of specific diseases among first responders.

The claimant must first establish that the presumption applies, and that the condition manifested itself or developed during the time he/she was employed, or up to a certain time after retirement. Under a presumption law, once the worker meets the requisite criteria, the injury is presumed to be work-related.

States have historically classified these workers' compensation occupational disease presumptions as "rebuttable," giving the employer a chance to argue against the presumption. The employer may only rebut the presumption by proving the injury is a result of a non-work event, which can make overcoming the presumption of compensability quite difficult. In certain limited circumstances, the employer may be unable to rebut the compensability of a claim.

### How do these laws vary by state?

The workers' compensation system is state-based; the various states administer it differently. In some states, certain workers' compensation presumptive benefits are not even administered by the workers' compensation system (e.g., heart and hypertension benefits in Connecticut).<sup>2</sup> As a result, if you've seen one set of presumptive benefits, you've seen exactly one. Presumptive benefits can also be impacted by non-presumptive rules and benefits that vary by state. Below we discuss some of the ways in which presumptive benefits currently apply.

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<sup>1</sup> Daniels, Kubale, Yii, et al.; "Mortality and cancer incidence in a pooled cohort of US firefighters from San Francisco, Chicago and Philadelphia (1950–2009)"; *Occup Environ Med*; October 14, 2013.

<sup>2</sup> CT Sec 7-433c.

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## What occupations are covered by presumptions?

Firefighters are often an occupation with additional coverage presumptions. As of the end of April 2020, a total of 33 states cover firefighters for one or more cancers under workers' compensation as a result of presumption legislation.<sup>3</sup>

Another common occupational group for presumption legislation is public safety. For example, Maine and Florida have presumption laws that include police officers, corrections officers, and emergency medical technicians. California has presumption laws that address exposures specific to a range of duties (e.g., peace officers, correctional officers, lifeguards, etc.).<sup>4</sup> In federal WC law, there are also examples of a presumption of compensability, notably for coal mine workers with over 15 years of work exposure and Black Lung disease.<sup>5</sup> In addition, certain federal employees are covered by an asbestos presumption.<sup>6</sup>

## What injuries or diseases are classified as presumptive?

Workers' compensation presumptive statutes and regulations were originally written to address diseases such as cancer, lung and respiratory conditions, blood and infectious diseases, and heart and vascular conditions. The language pertaining to the injuries/diseases varies considerably by state. In the case of firefighters, in 20 of the 33 states with a cancer presumption, state law contains broad or non-specific language that can be interpreted to address any cancer experienced by a firefighter. In the other 13 states, only certain specific and named cancers are included in the presumption, most commonly leukemia (12 states), brain cancer (10 states), bladder cancer (9 states), non-Hodgkin's lymphoma (9 states), and gastrointestinal cancer (8 states).<sup>7</sup>

Other injuries such as gastrointestinal conditions and orthopedic conditions caused by cumulative trauma (back, neck, knees, etc.) are not included under these presumptive laws.<sup>8</sup>

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<sup>3</sup> "Occupational Cancer Legislation," First Responder Center for Excellence; [Presumptive Legislation](#).

<sup>4</sup> Fawn Racicot and Bruce Spidell; "Presumptive Coverage for Firefighters and Other First Responders"; NCCI; November 2018.

<sup>5</sup> "[Important Notice Regarding Recent Changes in the Black Lung Benefits Act](#)"; U.S. Department of Labor; Office of Workers' Compensation Programs.

<sup>6</sup> EEOICPA Bulletin NO. 19-03.

<sup>7</sup> "Occupational Cancer Legislation," op. cit.

<sup>8</sup> Robert J. Sherwin; "[Presumptive Injuries: What are They and How Long Do They Apply?](#)"; Los Angeles Firemen's Relief Association; March 31, 2017.

## Who is eligible?

State statutes determine eligibility parameters for presumptive benefits. Eligibility restrictions may include criteria such as minimum service requirements, time limitations, age restrictions, and health evaluations. For instance:

- Minimum service requirements specify that individuals under included occupations must have served for a minimum number of years to qualify for the presumption. This minimum varies anywhere from two to twelve years.<sup>9</sup>
- Time limitations may exist with respect to the number of years following retirement or termination in which a former employee can file a claim where the presumption would apply. This limitation can be specified as a set number of years post-separation or can vary depending on tenure.
- States may also place restrictions on the age under which the injury/disease is presumed to be work-related. For example, Arizona's presumption expires at the age of 65.<sup>10</sup>
- Presumptive laws may also require that individuals working in included occupations must submit to pre-employment or other ongoing health evaluations in order for the presumption to apply if circumstances give rise to it. The goal of a health evaluation is to prove absence of the disease or illness, prior to any presumed contraction through work.
- Some states such as Vermont also have restrictions regarding the use of tobacco products in order for certain presumptions to apply.<sup>11</sup>

## How is the claim rebuttable by the employer?

As noted, claims covered under presumptive statutes and regulations are typically “rebuttable,” allowing the employer to argue that the claim was caused by conditions experienced outside the course of employment.

Language of the rebuttal standards differs among states, with some specifically mentioning potential external causes that could have led to the injury/disease, and others requiring “substantial evidence” to be presented.

In the case of a conclusive, or non-rebuttable presumption, the employer may not have recourse to debate causation. Whether rebuttable or not, often there are also time restrictions for a presumption claim to be accepted or denied.

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<sup>9</sup> Racicot and Spidell, *op. cit.*

<sup>10</sup> AZ § 23-901.01.

<sup>11</sup> Racicot and Spidell, *op. cit.*

## What are the cost elements of workers' compensation presumptions?

Each of the aspects of state regulation discussed above directly drive the cost associated with presumptive benefits. That is, decisions on who is included, what diseases are considered presumptive, eligibility requirements for presumptive coverage, extent of the ability of the employer to rebut and length of presumptive coverage (i.e., time period receiving benefits) create wide variation in the cost of presumptive benefits.

These claims are complex and often litigated, incurring high legal expenses for insurers and claimants and sometimes playing out in a very public way with significant media attention (e.g., in the case of mass shootings and natural disasters). Such claims are generally viewed as relatively low-frequency, high-severity in nature, creating a potentially wide spectrum of costs that are difficult to estimate and can potentially impose significant overall costs on these classes of business in the workers' compensation system.

In addition to these factors, there are other challenges in estimating the cost of presumption claims including:

- Estimated frequency of claims—for example, several studies have varying conclusions about how often firefighters will contract cancer, making it difficult to predict claims frequency.
- Ambiguity in the presumption law language—it can be difficult to determine whether a claim would have been paid out regardless of the presumption standard.
- Latency—presumption claims may have a long latency period, which significantly impacts cost trajectories.
- Interaction with other benefits (e.g., health, pension) can be difficult to carve out.
- The treatment of volunteers, who make up the vast majority of firefighters in a number of states. Some states prohibit volunteers from being included under presumption, and workers' compensation coverage is not always required for volunteer firefighters. Because they typically have different work schedules and exposure to loss, measuring the volunteer exposure is problematic.
- Sunset laws, as regards the limitation in which a claim can be reported. For example, for a claim to be presumed occupational in Pennsylvania, it must be reported within 300 weeks of the last date of employment. While the claimant can receive benefits for up to 600 weeks, if the claim is reported after 300 weeks, the presumption does not apply.<sup>12</sup>

Because state presumption laws vary so widely, and these additional complexities in estimating costs exist, there is no singular projection tool that can be used to estimate the cost of a presumptive benefit.

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<sup>12</sup> PA 2011 Act 46.

Much of the presumption risk for public safety and first responders in the United States is self-insured by larger local public entities or covered by an intergovernmental risk pool. Given the propensity of public entities to self-insure, the National Council on Compensation Insurance (NCCI), a workers' compensation industry rating advisory organization, does not have access to complete data and may not be able to sufficiently ascertain state and industry cost trends. NCCI has indicated that presumption laws are increasing workers' compensation costs,<sup>13</sup> but it cannot reliably estimate the extent of such increases due to data limitations and uncertainties noted above.<sup>14</sup> The Association of Governmental Risk Pools, whose charge is to support its pool members in all of their operations, is not a data gathering / rate advisory body. As a result, summarized cost estimates are nonexistent.<sup>15</sup> There is no singular or centralized source of presumption claims data that could be readily accessed for further analysis.

### Other cost considerations

Workers' compensation presumption laws, by making it easier to qualify for the benefits, may serve to shift costs from other benefit systems (e.g., health insurance, pensions, Social Security Disability Insurance, Medicare, etc.). Workers' compensation benefits are typically primary to other benefit systems. Medicare is not supposed to pay for persons over 65 who incurred a compensable injury on the job; likewise, Social Security offsets exist to avoid duplication of benefits.

Workers' compensation does not have a deductible or co-pay like health insurance, and it provides unlimited medical coverage. In some cases, care may be directed at least in part under workers' compensation, with some provider restrictions allowed.

Workers' compensation also provides partial wage loss benefits, and these can last a lifetime if they are deemed a "permanent total" impairment injury. For these reasons, an employee who is choosing between filing a workers' compensation claim and receiving a permanent total disability wage loss benefit and unlimited medical coverage vs. retiring due to injury/disease and collecting a pension and Social Security, may choose to go through the extra effort of filing the workers' compensation claim.

Coordination of benefits complications can sometimes arise, such as the determination of "line of duty status." Some states, such as New York post-9/11, and the federal government, provide health, disability, and/or pension benefits to victims and/or their dependents if the first responder died in the line of duty. Therefore, determination of deaths as "work-related" under workers' compensation can have far reaching systemic impacts.

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<sup>13</sup> Racicot and Spidell, *op. cit.*

<sup>14</sup> *Ibid.*

<sup>15</sup> It is noteworthy that The Firefighter Cancer Registry Act was signed into law by President Donald Trump on July 7, 2018.

This law will require the Centers for Disease Control and Prevention to collect data on the incidence of certain cancers in firefighters.

Presumption laws can also raise politically charged topics. Associations and unions representing first responders are vocal advocates for these types of benefits. Lawmakers and stakeholders such as local public officials, insurers, and the legal profession, among others, are actively involved in how these laws are developed. While presumption laws can simplify the adjudication of legitimate claims, concerns have been voiced that they create a group of injured workers with a lower threshold to prove compensability than the general public. All else equal, this treatment may lead to providing benefits (e.g., wages) that would otherwise not be provided.

These benefits are generally viewed as retroactive in nature. While it can be argued as to whether these claims would be brought regardless of the presumption, insurers would have to seek increased rates once the impact of state benefit level changes have been estimated. Policyholders would then incur unexpected rate increases upon renewal.

We note that commercial workers' compensation experience was very favorable in the latter part of the 2010s.<sup>16</sup> This points to a situation where it is harder to argue that the historical costs of these presumptions have overburdened the workers' compensation system. But will this change in the future?

## Recent Developments

### Post-traumatic stress disorder

In the two decades since 9/11, mental injuries such as post-traumatic stress disorder (PTSD) have received significant attention. According to the Substance Abuse and Mental Health Services Administration (SAMHSA), an estimated 30% of first responders develop behavioral health conditions such as depression or PTSD.<sup>17</sup>

As of October 2019, irrespective of presumption laws, nine states provide workers' compensation coverage for injuries without physical evidence, like PTSD. Thirteen states do not provide for so-called "mental-only" injuries. The remaining states cover injuries without physical evidence in limited circumstances (such as a sudden or unusual incident, or just for first responders).<sup>18</sup>

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<sup>16</sup> NCCI Insights; "2019 Workers Compensation Financial Results Update"; NCCI; [Financial Results Update](#).

<sup>17</sup> "First Responders: Behavioral Health Concerns, Emergency Response, and Trauma"; *Disaster Technical Assistance Center Supplemental Research Bulletin*; Substance Abuse and Mental Health Services Administration; May 2018.

<sup>18</sup> Gerber & Holder Workers' Compensation Attorneys; "[Work-Related PTSD: A State-By-State Breakdown of Workers' Compensation Laws](#)."

Of the 37 states that cover some form of PTSD benefits under workers' compensation, 10 states currently include PTSD as a qualifying presumption injury type.<sup>19</sup> Similar to presumptive laws pertaining to other occupational injuries/diseases, statutory language about what type of claim is covered varies widely by state. All the states with PTSD presumptive regulations consider firefighters, police officers, and emergency medical technicians covered employees under their presumption laws.

Among these states, the prerequisites for coverage vary significantly.<sup>20</sup> For example, Vermont's PTSD legislation requires a PTSD diagnosis within three years of the last active date of employment, while Washington has a service requirement of 10 years. The definition of PTSD also varies. Nevada defines PTSD as "mental injury caused by extreme stress in time of danger," while Washington requires that the PTSD diagnosis meets the definition of PTSD as defined by the American Psychiatric Association. In nearly all states, the diagnosis must be performed by a licensed psychiatrist.<sup>21</sup>

In addition to the restrictions described above, the definition of the event that contributed to the PTSD diagnosis also varies by state. Some states, such as Idaho, have a broad definition that the event arose "out of and in the course of the first responder's employment." Other states such as Connecticut and Florida have listed specific events that lead to the triggering of the PTSD presumption. In all states with PTSD as a presumptive injury, the PTSD presumption can be rebutted by the employer with substantial evidence.<sup>22</sup>

Recent legislative activity suggests a continued growth in PTSD legislation going forward. It has been noted that in 2019, at least 26 states considered new legislation addressing workers' compensation coverage for PTSD and other mental-only injuries for first responders.<sup>23</sup> In October 2019, California was the most recent state to pass PTSD presumption legislation,<sup>24</sup> and is also considering new proposals to expand the classifications of occupations that are eligible for the PTSD presumption.<sup>25</sup>

With the lack of available data, the frequency and severity of these claims are largely unknown. As more presumptive legislation is being proposed, there will be continued additional cost pressure in the workers' compensation system due to PTSD.

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19 CA SB 542, CT Public Act No. 19-17, FL 112.1815, ID SB No. 128, ME MRS Title 39-A, Chapter 5, MN 176.011, NV AB492, OR SB507, VT Title 21 Chapter 9, WA House Bill 193.

20 Ibid.

21 Ibid.

22 Ibid.

23 NCCI; "Regulatory and Legislation Trends Report"; 2019.

24 CA SB 542.

25 Angela Childers; "California expands firefighter list for PTSD presumption"; *Business Insurance*; [PTSD presumption workers](#).



## The current pandemic (as of May 2020)

The ongoing COVID-19 pandemic has dramatically changed the way that we generally conduct business. With the majority of states having issued orders to close all nonessential businesses, many Americans have been either working from home, or have been either furloughed or laid off. These widespread changes will undoubtedly affect both the frequency and severity of all workers' compensation claims, not just those related to exposure to COVID-19.

In recent months, many state governments either issued executive orders or proposed and enacted legislation that pertains to presumptive coverage of COVID-19-related claims. Legislators are concerned that many employees working through the pandemic will be denied workers' compensation benefits if exposed on the job to COVID-19, leading to presumptive legislation to expand not only the diseases/injuries experienced during employment, but also to whom the presumptions apply and whether the presumption should be "irrebuttable" (or conclusive).

On April 7, Minnesota enacted new presumptive legislation related to COVID-19.<sup>26</sup> This law pertained specifically to police officers, firefighters, paramedics, emergency medical technicians, nurses, and health care workers unable to work, either due to the diagnosis of COVID-19 or due to symptoms that were later diagnosed as COVID-19, starting on or after April 8. Under this legislation, the diagnosis of COVID-19 must be confirmed by a positive laboratory test. This law is not retroactive; therefore those who were unable to work due to contracting COVID-19 prior to April 8 are not entitled to the presumption. Similar to other workers' compensation presumptive laws, the employer has the ability to rebut the claim, but only if the employer can show that the employment "was not a direct cause of the disease." Minnesota's COVID-19 legislation is very similar to presumptive laws for other injuries/diseases pertaining mainly to first responders.

On April 9, Kentucky's governor issued an executive order to require commercial insurance carriers and self-insurers to provide temporary total disability benefits not only to first responders, but to many other essential workers, including grocery store workers. The worker is entitled to the benefits "even if the employer denies the liability of the claim." The claim must be considered "occupational," implying that "there must be a causal connection between the conditions under which the work is performed and COVID-19."<sup>27</sup>

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<sup>26</sup> MN HF 4537.

<sup>27</sup> KY 2020-277.

Illinois issued a more expansive emergency rule in April in that it provides temporary total disability benefits to all “front-line” workers. Illinois’ emergency rule includes nearly all essential workers, including occupations such as restaurant workers, gas station attendants, and hardware supply store employees.<sup>28</sup> However, in the weeks following, the Illinois Workers’ Compensation Commission voted to repeal the rule, due to significant backlash and a lawsuit from manufacturing and trade groups.

As the pandemic continues to unfold, more states are proposing legislation that expands typical presumptive benefits. Measures in Minnesota, Kentucky, and Illinois appear to only include benefits when workers are out of work due to the contraction of COVID-19. In Louisiana, however, a recently proposed bill would not only provide benefits to essential workers for when they are unable to work, but also to “the dependents of an essential worker whose death is caused by COVID-19.” The benefits will be “the same as if said essential worker received personal injury by accident arising out of and in the course of employment.”<sup>29</sup> Louisiana’s proposed bill would not only impact the frequency of claims due to COVID-19 exposure, but would undoubtedly increase the severity of these claims as well. It is likely that more states will issue executive orders or propose legislation to address the impacts of COVID-19. On May 6, California’s governor signed an executive order to create a rebuttable presumption applying to essential employees who contract COVID-19 in the course of employment.<sup>30</sup>

While states make efforts to provide workers’ compensation benefits for these workers, certain rating advisory organizations have also attempted to project the potential cost impact of these decisions. In late March, prior to the executive orders and legislation regarding COVID-19 presumption, the New York Compensation Insurance Rating Board conducted a legislative study of the potential costs to the system if COVID-19 exposure were to be classified as an occupational disease. For the non-health care workers in the state, assuming 100% presumption, they concluded that COVID-19 would cost the state’s workers’ compensation system over \$31 billion, which is more than triple the state’s current annual workers’ compensation losses.<sup>31</sup> Similarly, the Workers’ Compensation Insurance Rating Bureau (WCIRB) of California performed a study of COVID-19 claims for “front line workers,” which includes “health care workers, firefighters, emergency medical services and rescue workers, front line law enforcement officers and other essential critical infrastructure (ECI) employees.” The WCIRB further assumed that all claims filed were under a conclusive legal presumption of compensability. In April 2020, the WCIRB concluded that the “annual cost of COVID-19 claims on ECI workers under

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28 IL Workers’ Compensation Commission Part 9030.

29 LA SB 475.

30 CA Executive Order N-62-20.

31 NYCIRB; “Potential Cost Impact of the COVID-19 Virus Exposure Compensability Proposal”; March 27, 2020.

a conclusive presumption ranges from \$2.2 billion to \$33.6 billion with an approximate mid-range estimate of \$11.2 billion, which is equal to 61% of the annual estimated cost of the total workers' compensation system prior to the impact of the pandemic.”<sup>32</sup>

In early May 2020, California Gov. Newsom issued an executive order providing for a rebuttable presumption of compensability for all workers directed by their employer to work outside the home from March 19, 2020, to July 5, 2020. In late May 2020, the WCIRB estimated the range of impacts of this executive order to be \$0.6 billion to \$2.0 billion, with a midrange estimate of \$1.2 billion.<sup>33</sup> Such a dramatic range in cost estimates is indicative of the impact of key assumptions, such as duration of the presumption, rebuttable versus conclusive presumption, and the subset of employees subject to the presumption. It is also indicative of the high degree of uncertainty in modeling of the virus itself (e.g., chances of infection, symptoms, hospitalization, etc.). This results in significant uncertainty in the projection of COVID-19's impact on insurance costs.

Subsequent to the studies performed in New York and California, NCCI issued a white paper<sup>34</sup> in late April detailing the estimated impact of COVID-19 on WC losses in states where NCCI provides ratemaking services. The estimated cost impact of COVID-19 solely on first responders ranged from \$0.1 billion to \$1.9 billion. NCCI's estimated annual losses for first responders prior to COVID-19 were approximately \$1.1 billion, suggesting that the impact of COVID-19 could potentially increase workers' compensation costs for first responders by up to 170%. If health care workers are included with first responders, the impact ranges from \$1.0 billion to \$16.2 billion, which represents an increase of workers' compensation costs up to 550% of the pre-COVID-19 estimate (\$3.0 billion).

NCCI also provided impact estimates for all essential workers ranging from \$2.7 billion to \$81.5 billion. The pre-COVID-19 loss estimate on all essential workers was \$32.1 billion, suggesting an additional impact of COVID-19 from 8% to 254% of the initial estimate.

The wide ranges of estimates are indicative of the uncertainty inherent in both the number of required modeling assumptions and their assumed values (parameters). NCCI utilized various assumptions for claims frequency (e.g., infection rate [percentage of workers who contract COVID-19], report rate of those infected, compensability rate [percentage of symptomatic cases entitled to workers' compensation benefits], and claims severity [e.g., hospitalization rate, critical care rate, and fatality rate]). The model produced estimates based on a range of parameters for each of these assumptions.

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<sup>32</sup> WCIRB CA; “Cost Evaluation of Potential Conclusive COVID-19 Presumption in California Workers' Compensation”; April 2020.

<sup>33</sup> WCIRB CA; “Evaluation of Cost Impact of Governor Newsom's Executive Order on Rebuttable Presumption for California COVID-19 Workers' Compensation Claims”; May 2020.

<sup>34</sup> NCCI; “COVID-19 and Workers Compensation: Modeling Potential Impacts”; NCCI Research Brief; April 2020.

The compensability rate will vary directly to the extent states have enacted rules or legislation for a COVID-19 workers' compensation presumption. The NCCI advises that its model allows each state to tailor its assumptions based on the occupations to which the presumption applies. It is reasonable to expect that the specifics of the COVID-19 pandemic will make it harder for employers to rebut a presumption. Under a number of these recently enacted laws and regulations, there only needs to be a causal link between the injured worker's employment and his/her contraction of COVID-19. It will arguably be more difficult to prove that the disease was contracted outside of the workplace. Legal expenses will likely be significant, which is one of the contributors to the significant cost estimates detailed in the studies described above.

Following the proposed presumptive legislation in New York to provide workers' compensation benefits to all essential workers, The Business Council of New York State issued a memo opposing the law. The Business Council explained that this law would result in "the bankrupting of commercial workers' compensation carriers, the State Insurance Fund and self-insured employers."<sup>35</sup> With more occupations entitled to presumption laws, cost increases could indeed continue to become more and more significant.

As of this writing, states have begun relaxing social distancing restrictions and allowing certain businesses to reopen, again with restrictions. There is also discussion in Congress regarding proposals to provide employers immunity from liability in the face of a potential increase in employee lawsuits for tort claims relating to the COVID-19 pandemic. The presence of presumption laws or orders in a state may serve to limit these tort actions. As events unfold, there will be significant uncertainty as to how the COVID-19 virus will impact each state's citizens and economies, litigation activity, and the demand for presumptive legislation.

All of the above analyses and comments document the significant level of cost uncertainty that the workers' compensation system faces due to the impact of COVID-19. Historically, the entities most impacted by presumption were local government agencies. However, expansion of presumptive benefits will also affect private employers and their commercial insurance carriers, state funds, and residual markets. Ultimately, these cost increases would impact policyholders and other state and local taxpayers.

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<sup>35</sup> ["Creation of Presumption of Occupational Illness for COVID-19 for Workers' Compensation"](#); The Business Council of New York State; March 23, 2020.

# Looking Ahead

## What does the future hold?

Workers' compensation presumption laws have been in place for decades. We have more recently seen the expansion of the types of injuries/diseases subject to presumption laws through the inclusion of "mental-only" injuries such as PTSD in the wake of 9/11. COVID-19 has not only expanded this to include communicable diseases and the idea of a conclusive presumption, but has also led to the expansion of the concept beyond the public sector. Workers' compensation costs related to COVID-19 could be significant, and while these costs would vary dramatically across segments of the included populations, additional presumptive laws would likely increase these costs. Given the variations in states' approaches to presumption, and the data gathering limitations, it is difficult to accurately track or estimate how the impact of presumption on workers' compensation costs will unfold system-wide. State-by-state analysis, if possible, could be more effective, but it still faces significant limitations.

Therefore, COVID-19 and emerging trends in presumption raise some important questions for actuaries, and other stakeholders such as:

- State legislators
  - Will we see proposed legislation to expand presumptive benefits to include:
    - a) broader categories of presumptive diseases (e.g., stress, anxiety, etc.)
    - b) other private-sector jobs (e.g., daycare, pharmacy, delivery workers, gas station attendants, etc.)?
  - Will advocacy for new rules / laws continue to expand presumption eligibility?
  - Will COVID-19 presumption issues create more social and political contention, given the virus' varying impact across (and even within) states?
- Workers' compensation insurance system
  - What will be the extent of cost shifting to workers' compensation loss costs, and what effect will this have on premium levels?
  - As COVID-19 claims mount, will traditional insurance companies restrict writing workers' compensation coverage for the most-affected classes, leading more public entities to absorb these risks? Or might this action be delayed in light of fewer non-COVID-19 WC claims in the near term?
  - Many carriers that write workers' compensation also write liability insurance, which has been negatively impacted by rising loss cost trends in the last few years (sometimes referred to as "social inflation"). Will the broadening of workers' compensation presumption laws accelerate this trend?

- Public entities and society at large
  - Will there be indirect impacts of presumption cost increases on other services that municipalities provide?
  - Will there be increased momentum for other state mandates (requiring local governments to expand or modify other activities at an increased cost to such governments)?
  - How will states and local municipalities balance the rights and financial obligations of employers, employees, and the population at large? This balancing is especially important because, fundamentally, the costs associated with any injury or disease, presumptive or not will be borne whether by the health insurance system, workers' compensation system, or society at large. The decisions being made now may establish where these costs will lie.

It is clear that presumptive benefits continue to gain momentum, and that these benefits could have significant cost impacts. As of June 1, 10 states have already implemented some form of WC presumption laws or executive orders related to COVID-19, while another 11 states have proposed legislation or orders being considered.<sup>36</sup> As the COVID-19 pandemic continues to unfold, insurers and other stakeholders should pay very close attention to these changing presumptions and check with local jurisdictions to assess state-specific impacts. Understanding these cost impacts across the multiple benefit systems can allow us to better manage the many societal, public policy and economic forces in play as we move forward. The American Academy of Actuaries is ready to assist in this important public policy issue.

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<sup>36</sup> [“Orders and Other Authority or Guidance to Provide Workers’ Compensation \(WC\) Coverage for COVID-19”](#); Ogletree Deakins; June 15, 2020.

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