

Striking a New Grand Bargain: Workers' Compensation as a Pandemic Social Safety Net

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I. INTRODUCTION

As COVID-19 continues to disrupt the workplace, legal analysts struggle to predict how infected laborers' claims will fare in workers' compensation systems.¹ Workers' compensation systems vary across states, but their purpose is the same—to give employees who are injured through the everyday completion of their jobs access to surefire compensation.² States require almost all private employers to carry workers' compensation insurance, and workers' compensation is usually an injured employee's sole remedy. When injured on the job, the employee trades her ability to bring a potentially more lucrative tort action for the assured benefits of workers' compensation.³ This trade is often referred to as the “Grand Bargain.”

In addition to mandating workers' compensation benefits for employees injured in workplace accidents, all states require that employers provide workers' compensation for occupational diseases—illnesses arising from dangerous working conditions.⁴ Although the minutiae of workers' compensation laws vary by state, modern claims generally proceed as follows: An employee who has been injured during the course of employment must notify her employer that she believes she is entitled to workers' compensation. The employer then provides the employee

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¹ See, e.g., Brodie Butland, *Liability for Employees' COVID-19 Exposure Is Hard to Gauge*, LAW360 (Apr. 23, 2020), <https://www.law360.com/articles/1265657/liability-for-employees-covid-19-exposure-is-hard-to-gauge> [<https://perma.cc/JL6A-UFZX>].

² See Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900–1930*, 41 J.L. & ECON. 305, 307–10 (1998).

³ See Butland, *supra* note 1.

⁴ JACK B. HOOD ET AL., WORKERS' COMPENSATION AND EMPLOYEE PROTECTION LAWS IN A NUTSHELL 150 (6th ed. 2017).

with paperwork to report the claim to the workers' compensation insurance provider and, depending on state law, a form for reporting the injury to the applicable state workers' compensation board. From there, the employer is generally responsible for collecting the employee's forms and medical documents and filing the claim. The workers' compensation insurance provider—whether public or private—then considers the claim and reports its payout decision to the employer, employee, and state workers' compensation board. Certain individuals, such as firefighters and first responders, are often extended a rebuttable presumption of coverage under state law for injuries and diseases which are prevalent in their line of work.

In the context of occupational diseases, the receipt of benefits generally hinges on whether the employment exposure caused or meaningfully contributed to the disease the employee contracts.⁵ Some states categorically bar compensation for diseases to which the general public is exposed,⁶ while others allow an employee to recover workers' compensation as long as she can demonstrate that her occupation posed a greater hazard regarding the disease in question than the average occupation.⁷ Some states fall between these poles. In Florida, for instance, an employee cannot recover for an occupational disease to which the general public has been exposed unless she can show that the disease's incidence rate is substantially higher for those in her occupation.⁸ The federal government also provides its employees with occupational disease coverage upon a showing that the disease occurred at work.⁹

Just as preexisting state occupational disease laws vary, state policy responses in the wake of COVID-19 differ.¹⁰ According to the National Conference of State Legislatures, as of December 9, 2020, seventeen states had explicitly extended COVID-19 workers' compensation coverage to select occupations.¹¹ In some of these states, an individual working in any profession the state deems essential who catches COVID-19 is presumed to have caught the disease through her employment, though her employer can provide evidence to the contrary.¹² The

⁵ *Id.* at 152.

⁶ ARK. CODE ANN. § 11-9-601(e)(3)(A) (2020).

⁷ *See, e.g.*, *Anderson v. General Motors Corp.*, 442 A.2d 1359, 1360 (Del. 1982) (noting that the amount of dust and fumes that the plaintiff inhaled during the course of his employment should be compared to the amount an average worker in the economy generally inhales in determining whether the resulting disease is compensable).

⁸ FLA. STAT. § 440.151(2) (2020).

⁹ Federal Employees Compensation Act, 5 U.S.C. § 8101 (2020).

¹⁰ *See generally* Josh Cunningham, *COVID-19: Workers' Compensation*, NAT'L CONF. OF STATE LEGISLATURES (Dec. 9, 2020), <https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx> [<https://perma.cc/F48T-R76W>].

¹¹ *Id.*

¹² *Id.*; *see also* Part II.A, *infra*.

federal government also adopted emergency presumptions of coverage for certain employees following the outbreak of COVID-19.¹³ Other states took a more measured approach, covering only first responders and health care workers.¹⁴ Still, the majority of states have not extended a presumption of coverage to anyone.¹⁵

Between ambiguous state laws and varied responses to the COVID-19 outbreak, it is unclear whether workers' compensation covers a meaningful number of laborers who contracted the virus while working outside their homes.¹⁶ The exact scope and impact of COVID-19 workers' compensation claims are difficult to quantify—the National Council on Compensation Insurance estimated that the additional burden caused by COVID-19 claims could be as small as \$2.7 billion or as large as \$81.5 billion, depending on how many claims employees eventually file.¹⁷ Despite the fact that health care and grocery store employee claim frequency has increased compared to 2019, the overall strain on the workers' compensation system may be smaller than first anticipated.¹⁸ This is likely because many employees are no longer going to work or have lost their jobs in the fallout of the pandemic.¹⁹

This Comment will proceed as follows: Part II divides states and the federal government into four distinct groups, ranging from those most likely to cover COVID-19 workers' compensation claims to those least likely. This categorization and analysis of state workers' compensation policies in response to COVID-19 marks a novel contribution to legal scholarship. Because policies vary so markedly across states and remain unclear in much of the country, it is impossible to articulate a policy which competently balances workers' interests against those of insurers and employers without first scrutinizing existing state policy. Part III begins by outlining the history of workers' compensation, which arose out of an early 1900s agreement between employers, laborers, and

¹³ *Claims Under the Federal Employees' Compensation Act Due to the 2019 Novel Coronavirus (COVID-19)*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/owcp/dfec/InfoFECACoverageCoronavirus> [<https://perma.cc/5GNN-83NJ>] (last accessed Feb. 14, 2021) [hereinafter "DOL, *Claims Under the FECA*"].

¹⁴ *See, e.g.*, MINN. STAT. § 176.011 subdiv. 15(f) (2020).

¹⁵ *See* Cunningham, *supra* note 10.

¹⁶ *See, e.g.*, *COVID-19 and Workers Compensation: What You Need to Know*, NAT'L COUNCIL ON COMP. INS. (Oct. 8, 2020), <https://www.ncci.com/Articles/Pages/Insights-Coronavirus-FAQs.aspx#> [<https://perma.cc/3YSL-PRLF>] ("There are occupational groups that arguably would have a higher probability for exposure such as healthcare workers. However, even in those cases, there may be uncertainty as to whether the disease is compensable.")

¹⁷ NAT'L COUNCIL ON COMP. INS., *COVID-19 AND WORKERS COMPENSATION: MODELING POTENTIAL IMPACTS 2* (Apr. 2020), <https://www.ncci.com/articles/documents/insights-covid-19-workerscomp-modeling-potential-impacts.pdf> [<https://perma.cc/S4N4-7PXL>].

¹⁸ MARSH, *COVID-19'S IMPACT ON WORKERS' COMPENSATION MARKET IS MINIMAL, BUT CHALLENGES PERSIST* 3–4 (2020).

¹⁹ *Id.* at 3.

state governments that has come to be known as the “Grand Bargain.”²⁰ This Part contends that—in light of the economic and social conditions originally inspiring workers’ compensation—states should strike a new Grand Bargain by adopting a *selective coverage* occupational disease policy in preparation for the next pandemic. A selective coverage approach singles out specific professionals vital to the continuation of society amid a pandemic. Should these workers fall ill, the policy establishes a presumption that they contracted the virus during the course of their employment. In Part IV, this Comment offers an economic justification for the selective coverage approach. It concludes by noting that, regardless of the approach that a state ultimately adopts, all states should more explicitly define how their workers’ compensation systems handle pandemics moving forward.

II. STATE APPROACHES TO COVID-19 WORKERS’ COMPENSATION: A CONTINUUM OF COVERAGE

Legal analysts have had difficulty determining whether most state workers’ compensation and occupational disease statutes will cover COVID-19 cases.²¹ The statutes are often vague²² and have not been tested with a disease as widespread and contagious as COVID-19. While some states have adopted legislative policy changes or executive orders altering the landscape of their workers’ compensation coverage following the COVID-19 outbreak,²³ others have left their workers’ compensation systems unaltered.²⁴ After analyzing both preexisting occupational disease laws and recent changes intended to expand the range of coverage, four distinct categories of state policy emerge. The categories range from states which are most likely to cover a large number of workers who contract COVID-19 to states where workers’ compensation coverage for COVID-19 is outright impossible.

First, in *likely coverage* states, some combination of existing occupational disease law and emergency response to COVID-19 makes coverage for many infected employees likely. Second are *selective coverage*

²⁰ See Bob Burke, *The Evolution of Workers’ Compensation Law in Oklahoma: Is the Grand Bargain Still Alive?*, 41 OKLA. CITY UNIV. L. REV. 337, 342 (2016).

²¹ See, e.g., Butland, *supra* note 1.

²² Many states, recognizing the lack of clarity in their workers’ compensation or occupational disease statutes, have also published schedules of representative occupational diseases. While not generally exhaustive, these lists are intended to bring clarity to the vague statutes. See, e.g., OHIO REV. CODE ANN. § 4123.68 (LexisNexis 2020).

²³ See, e.g., Ark. Exec. Order No. 20-35 (June 15, 2020), https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-35.pdf [<https://perma.cc/7ZT4-MS6>] (expanding Arkansas’s definition of occupational diseases to include COVID-19).

²⁴ See, e.g., S.B. 8007, 111th Gen. Assemb., 2d Extraordinary Sess. (Tenn. 2020) (failed in Senate Commerce and Labor Committee) (attempting to classify COVID-19 as an occupational disease).

states, in which certain professionals—usually first responders and health care workers—are expressly presumed to enjoy workers’ compensation coverage while other workers’ coverage status remains uncertain or unlikely. Third are *uncertain coverage* states, which have not adopted emergency measures extending a presumption of coverage to anyone following the outbreak of COVID-19 and whose statutes could plausibly—though by no means certainly—extend coverage to some infected workers. Finally, *unlikely coverage* states have statutory provisions that make COVID-19 coverage doubtful or altogether inaccessible.

The categorization of state policy along this spectrum is largely based upon a textualist reading of state statutes. Many workers’ compensation statutes appear too vague to allow for an accurate prediction of how the lion’s share of COVID-19 claims will fare,²⁵ and substantially similar language can be interpreted differently across state borders. It remains to be seen how workers’ compensation claims for COVID-19 will actually fare across state lines, but a meaningful spectrum of coverage still exists regardless of the individual statutes selected for examination. The following examples within each category offer a textual range of state policy along a continuum of most to least likely to provide meaningful coverage to workers.

A. Likely Coverage States

Likely coverage states provide the most widespread access to workers’ compensation benefits to those who have contracted COVID-19 while working outside their homes. Most commonly, states fall into the likely coverage category due to their emergency policy responses in the wake of the COVID-19 outbreak rather than their pre-pandemic statutory provisions.

Many of these states have responded to the pandemic by establishing a rebuttable presumption that essential workers who fall ill with the virus did so while working, entitling them to benefits.²⁶ States have accomplished this through statutory changes,²⁷ regulatory responses,²⁸ and executive orders.²⁹ Connecticut’s governor, for instance, issued an executive order establishing a rebuttable presumption that essential

²⁵ See, e.g., *id.*

²⁶ See, e.g., Conn. Exec. Order No. 7JJJ (July 24, 2020), <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7JJJ.pdf> [<https://perma.cc/2UPS-MVCJ>].

²⁷ See, e.g., 820 ILL. COMP. STAT. ANN. 310/1(g) (LexisNexis 2020).

²⁸ See, e.g., Fla. Dep’t of Fin. Servs., Chief Fin. Officer Directive 2020-05 (Mar. 30, 2020), <https://www.myfloridacfo.com/coronavirus/documents/CFO-Directive-20-05.pdf> [<https://perma.cc/257F-WZ6D>].

²⁹ See, e.g., Conn. Exec. Order No. 7JJJ, *supra* note 26.

workers who contracted COVID-19 between March 10 and May 20, 2020, did so in the course of their employment.³⁰ Employers and insurance companies may challenge this presumption, but to do so successfully they must prove to a state workers' compensation commissioner (by a preponderance of the evidence) that the individual's employment was not the cause of her contracting COVID-19.³¹ California adopted a similarly time-sensitive executive order.³² The Illinois legislature passed a more lasting statute with a similar effect: all essential workers who contracted COVID-19 while employed outside the home enjoy the presumption of coverage.³³ This statute is especially notable due to the absence of a defined time period in which the infection had to occur in order to be compensable.³⁴

Not all states expanding access to workers' compensation for COVID-19 patients have done so through a presumption of coverage. Arkansas has explicitly changed its definition of "occupational disease" for the duration of its declared state of emergency to include COVID-19. The state also softened the requirements for an employee to succeed on a COVID-19-related compensation claim.³⁵ While this executive order does not extend a presumption of coverage to at-risk workers, it does bring COVID-19 within the statutory framework of workers' compensation.³⁶ This allows those who can show that a workplace exposure "may be found to have been the major cause" of the illness to recover.³⁷ Though this protection is less definite than an express presumption of coverage, employees may now file a COVID-19 workers' compensation claim if their employer had knowledge that it was "possible or likely" that the employee may contract the disease during the normal course of the employee's job performance³⁸—this would not have been permitted under Arkansas's preexisting statute.³⁹ Although it is difficult to forecast exactly how many workers will be able to bring a successful claim under this revised standard, employers likely know that in-person work carries concomitant risk of exposure.

³⁰ *Id.*

³¹ *Id.*

³² See Cal. Exec. Order No. 62-20 (May 6, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.6.20-EO-N-62-20-text.pdf> [<https://perma.cc/AZ4C-9KVA>].

³³ 820 ILL. COMP. STAT. ANN. 310/1(g) (LexisNexis 2020).

³⁴ *Id.*

³⁵ Ark. Exec. Order No. 20-35 (June 15, 2020), https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-35.pdf [<https://perma.cc/MHU5-TBKQ>].

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ ARK. CODE ANN. § 11-9-601(g) (absolving employers from compensating workers who contract occupational diseases unless the disease contracted is peculiar to the employment).

Employees who must rely on an unaltered occupational disease statute likely face a lower chance at recovery than employees working in states that have adopted specific presumptions of coverage, but some state statutes are broad enough to potentially cover a large number of claims. Massachusetts, for instance, includes contagious diseases in its definition of “personal injury” for the purposes of workers’ compensation.⁴⁰ The state holds that contagious diseases are compensable if the risk of disease is “inherent in the employment.”⁴¹ It seems plausible that employment which puts an employee at a substantially higher risk of contracting COVID-19 than she would face outside work should be considered employment with an inherent risk of falling ill with the virus. Though the success of workers’ compensation claims for COVID-19 will likely revolve around case-specific facts such as whether the employee was following government stay-at-home and social distancing guidelines outside the workplace,⁴² employees in states like Massachusetts enjoy the highest degree of statutory protection.

B. Selective Coverage States

Though not all states have taken such sweeping measures to protect workers as likely coverage states, some have passed emergency measures that protect a select few professions and leave all others with uncertain chances to claim workers’ compensation benefits. A state emblematic of the latter policy is Wisconsin.⁴³ Traditionally, to recover for an occupational disease in Wisconsin, an employee must establish that her employment was, at least, a material contributory factor in the condition’s onset or progression.⁴⁴ Following the COVID-19 outbreak, the state explicitly extended the presumption of workers’ compensation coverage to all first responders.⁴⁵ It is reasonable to assume, however, that some non-first-responder employees will be able to prove that their employment was a material contributory factor in their contraction of COVID-19, though this will likely be highly fact dependent. An individual who works in a large grocery store and faces hundreds of customers each day, for instance, has a materially higher likelihood of contracting

⁴⁰ MASS. ANN. LAWS ch. 152, § 1(7A) (LexisNexis 2020).

⁴¹ *Id.*

⁴² See generally Michael C. Schmidt, *An Interview Breaking Down Covid-19 and Workers Compensation*, EMP. L. NOW (June 17, 2020), <https://www.employmentlawnow.com/2020/06/17/iv-74-an-interview-breaking-down-covid-19-and-workers-compensation/> [https://perma.cc/RUK4-UVXW].

⁴³ WIS. STAT. § 102.03 (2020).

⁴⁴ See *Universal Foundry Co. v. Wis. Dep’t of Indus., Lab. & Hum. Rel.*, 263 N.W.2d 172, 177 (Wis. 1978).

⁴⁵ Assemb. B. 1038, 2019–2020 Leg., Apr. 2020 Sess. (Wis. 2020).

the virus compared to someone who works from home.⁴⁶ Should this worker contract COVID-19 while employed, she has a plausible path to recovery under the text of Wisconsin's statute.⁴⁷

Some states have extended the presumption of coverage to specific professions but leave other employees with a comparatively paltry chance at accessing workers' compensation benefits after falling ill with COVID-19.⁴⁸ Minnesota, for instance, has extended a presumption of coverage to all first responders and health care workers.⁴⁹ Though narrower than the presumptions found in likely coverage states, this explicit presumption of coverage is broader than Wisconsin's first-responders-only presumption. Minnesota's occupational disease statute, however, is more limited than Wisconsin's workers' compensation law.⁵⁰ Under the Minnesota statute, an occupational disease is compensable only if the employee can establish a "direct causal connection" between the disease and the employment.⁵¹ Further, the employee is not eligible for compensation for an illness "to which the worker would have been equally exposed outside of the employment."⁵² Considering the extremely contagious nature of COVID-19 and the difficulty in pinpointing exactly when someone becomes infected,⁵³ it seems unlikely that many workers will succeed in bringing statutory claims under Minnesota law.⁵⁴

⁴⁶ See Marcus Lu, *The Front Line: Visualizing the Occupations With the Highest COVID-19 Risk*, VISUAL CAPITALIST (Apr. 15, 2020), <https://www.visualcapitalist.com/the-front-line-visualizing-the-occupations-with-the-highest-covid-19-risk/> [<https://perma.cc/HXL6-7M45>].

⁴⁷ Similar policy regimes exist in Florida and Kentucky. See FLA. STAT. § 440.151(2) (2021) (defining an occupational disease as a disease peculiar to a particular trade unless the incidence of the disease is substantially higher in that particular trade); Fla. Dep't of Fin. Servs., Chief Fin. Officer Directive 2020-05 (2020), <https://www.myfloridacfo.com/coronavirus/documents/CFO-Directive-20-05.pdf> [<https://perma.cc/3WHM-JB23>] (establishing a presumption of coverage for certain state employees); KY. REV. STAT. ANN. § 342.0011(3) (LexisNexis 2020) (requiring that compensable occupational diseases be fairly traceable to employment as a proximate cause); Ky. Exec. Order No. 2020-277 (Apr. 9, 2020), https://governor.ky.gov/attachments/20200409_Executive-Order_2020-277_Workers-Compensation.pdf [<https://perma.cc/2S6K-X7JC>] (extending a presumption of coverage to a swath of different employees, including grocery store workers).

⁴⁸ See, e.g., MINN. STAT. § 176.011.

⁴⁹ H.F. 4537, 91st Leg., Reg. Sess. (Minn. 2020).

⁵⁰ Compare MINN. STAT. § 176.011 subdiv. 15(a) ("A disease arises out of the employment only if there be a direct causal connection between the conditions under which the work is performed."), with *Universal Foundry Co. v. Wis. Dep't of Indus., Lab. & Hum. Rel.*, 263 N.W.2d 172, 177 n.5 (Wis. 1978) (explaining that a prior workplace injury need only be a "material factor" in causing a subsequent compensable occupational disease, rather than the sole or main factor).

⁵¹ MINN. STAT. § 176.011 subdiv. 15(a).

⁵² *Id.*

⁵³ See, e.g., Adrianna Rodriguez, *Most COVID-19 Patients Don't Know Who Infected Them, CDC Survey Finds*, USA TODAY (July 1, 2020), <https://www.usatoday.com/story/news/health/2020/07/01/most-covid-19-patients-dont-know-who-infected-them-cdc-survey-finds/5354603002/> [<https://perma.cc/24P6-WSH5>].

⁵⁴ Michigan and Washington have similar policies—a handful of professions enjoy the presumption of coverage, but most employees who contract COVID-19 will likely struggle to receive

C. Uncertain Coverage States

In most states and for most workers, COVID-19 workers' compensation coverage is simply uncertain. Essentially, the states in this category mirror those in the preceding category in which workers without a presumption of coverage still have a nonzero—though by no means probable—likelihood of collecting workers' compensation benefits through traditional statutory avenues. Importantly, the states in this category have not extended a presumption of coverage to anyone. In many of these states, the lower-than-expected financial impact of COVID-19 occupational disease claims on insurers⁵⁵ may leave statutory schemes largely untested. Maryland, for instance, vaguely defines occupational disease as a disease “contracted as the result of and in the course of employment”⁵⁶ and allows coverage only when “it reasonably may be concluded that the occupational disease was incurred as a result of the employment.”⁵⁷ The Maryland Court of Appeals shed some light on the contours of this statutory requirement in *Baltimore v. Quinlan*.⁵⁸ In deciding whether an occupational disease is compensable, the court considered: “(a) [whether] the ‘nature’ of the employment includes the hazards of the ailment the employee suffers from to a greater degree than that present in general employment; and (b) whether the employee’s individual job functions expose the employee to those hazards.”⁵⁹

Understandably, individuals in some professions will have an easier path to satisfying the *Quinlan* standard than others. For instance, medical professionals like dental hygienists, registered nurses, and respiratory therapists are engaged in employment with a greater hazard

benefits. See MICH. COMP. LAWS SERV. § 418.401(2) (LexisNexis 2020) (“‘Personal injury’ includes a disease or disability that is due to causes and conditions that are characteristic of and peculiar to the business of the employer.”); Mich. Exec. Order No. 2020-125 (June 17, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-532255--,00.html [<https://perma.cc/CNV8-XLBW>] (extending a presumption of coverage for first-response employees); *Dennis v. Dep’t of Lab. & Indus.*, 745 P.2d 1295, 1303 (Wash. 1987) (“[T]he conditions causing the disease or disease-based disability must be . . . conditions of the worker’s particular occupation as opposed to conditions coincidentally occurring in his or her workplace.”); Press Release, Wash. Dep’t of Lab. & Indus., Insee Announces Workers’ Compensation Coverage to Include Quarantined Health Workers/First Responders (Mar. 5, 2020), <https://www.governor.wa.gov/news-media/insee-announces-workers-compensation-coverage-include-quarantined-health-workersfirst> [<https://perma.cc/6GVX-WMFD>].

⁵⁵ See Andrew G. Simpson, *It Could Have Been Worse. An Update on COVID-19 Impact on Workers’ Compensation*, INS. J. (Feb. 9, 2021), <https://www.insurancejournal.com/news/national/2021/02/09/600507.htm> [<https://perma.cc/52MH-FYNU>].

⁵⁶ MD. CODE ANN., LAB. & EMPL. § 9-101(g) (LexisNexis 2020).

⁵⁷ § 9-502(d)(2).

⁵⁸ 215 A.3d 282 (Md. 2019).

⁵⁹ *Id.* at 293 (citing CLIFFORD B. SOBIN, 1 MARYLAND WORKERS’ COMPENSATION § 7.2, at 196–97 (2018)).

of contracting COVID-19 than the average job.⁶⁰ Whether any individual nurse's claim for workers' compensation succeeds, then, will likely depend on whether her specific duties expose her to the hazards of COVID-19 inherent in nursing.⁶¹ It seems relatively likely that, under the Maryland statute, many frontline and health care workers will have access to coverage. However, it is difficult to gauge how many professions will have a reasonable chance at receiving benefits. Both employees working in industries where the overall hazard of contracting COVID-19 is only slightly higher than average and employees in high-risk industries who cannot prove they came into contact with an infected individual at work could struggle to recover.

Any individual's access to benefits in a state with a similar workers' compensation system will likely amount to a threshold question as to how much more likely her job was to expose her to COVID-19 than the average worker's. It is unclear whether the benchmark in this instance will be the total pool of employees—many of whom are working from home and would therefore be ineligible for workers' compensation upon contracting COVID-19—or the total pool of employees working in person.⁶²

Some uncertain coverage states make this determination even more mercurial. A swath of state workers' compensation statutes bar recovery when a claimant is equally exposed to the disease both on and off the job.⁶³ While doctors and nurses working with COVID-19 patients directly will likely have little trouble proving that their jobs led to increased exposure, it will be much more difficult to quantify whether other laborers—like grocery store clerks, janitors, and retail workers—were exposed to the virus equally during working hours and during their time off. These cases will likely depend on the individual employees' habits outside of work,⁶⁴ but it could be difficult for courts to quantify the risk of workplace exposure relative to the risk now present in everyday life outside of work.⁶⁵ The presence of a robust contact tracing

⁶⁰ See Lu, *supra* note 46.

⁶¹ *Quinlan*, 215 A.3d at 296 (quoting *Black & Decker Corp. v. Humbert*, 984 A.2d 281, 292 (Md. Ct. Spec. App. 2009)) (“We look to the ‘duties of a claimant’s profession’ and determine whether ‘the hazard that led to the disease exists in the nature of that employment.’”).

⁶² Certain databases, such as the US Department of Labor’s O*NET OnLine compilation of likelihood of disease exposure by profession, may guide adjudicators and courts in answering this threshold question. See U.S. DEP’T OF LAB., WORK CONTEXT—EXPOSED TO DISEASE OR INFECTIONS, <https://www.onetonline.org/find/descriptor/result/4.C.2.c.1.b?a=1> [https://perma.cc/Z5GB-CP9U] (last visited Dec. 17, 2020).

⁶³ See, e.g., IND. CODE ANN. § 22-3-7-10(b) (LexisNexis 2020); W. VA. CODE § 23-4-1(f) (2020); COLO. REV. STAT. § 8-40-201(14) (2020).

⁶⁴ See generally Schmidt, *supra* note 42.

⁶⁵ See Ashley Hagen, *COVID-19 Transmission Dynamics*, AM. SOC’Y FOR MICROBIOLOGY (Apr. 20, 2020), <https://asm.org/Articles/2020/April/COVID-19-Transmission-Dynamics>

scheme could help individuals prove that workplace exposure was, in fact, the cause of their illness.⁶⁶ Unfortunately, government efforts at providing contact tracing have been scrutinized for their inadequacy,⁶⁷ likely leaving workers in uncertain coverage states without sufficient data to support their claims.

D. Unlikely Coverage States

The states that fall within this category have workers' compensation statutes that would likely reject compensating someone who has fallen ill with a pandemic virus such as COVID-19, and they have not changed their policies in the wake of the outbreak. Often, these states have adopted specific statutory language that seems to bar recovery for diseases to which the public is substantially exposed.⁶⁸ In Georgia, for instance, diseases to which the employee may have had substantial exposure outside the workplace do not fall within the statutory definition of occupational diseases.⁶⁹ Similarly, in Oregon, compensable diseases do not include those to which an employee is ordinarily exposed outside of work.⁷⁰ This slight difference in language may mean that a worker in Oregon has a better chance at receiving benefits than a similarly situated employee in Georgia,⁷¹ but both state statutes suggest that few—if any—workers will receive benefits.

[<https://perma.cc/9FGE-DRJY>] (“Transmission dynamics of SARS-CoV-2 have generated a significant amount of debate since the emergence of the virus in late 2019. One reason for this is simply a lack of evidence.”).

⁶⁶ See generally Paul Giannetti, *If I Contracted COVID-19 at Work—Can I Get Workers' Compensation?*, PAUL GIANNETTI ATT'Y AT LAW (May 1, 2020), <https://www.comp7777.com/workers-compensation/contracted-covid-19-can-i-get-workers-compensation/> [<https://perma.cc/2QUY-SMMD>] (suggesting that contact tracing may improve an employee's odds of receiving workers' compensation in New York).

⁶⁷ See Selena Simmons-Duffin, *Coronavirus Cases Are Surging. The Contact Tracing Workforce Is Not.*, NPR (Aug. 7, 2020), <https://www.npr.org/sections/health-shots/2020/08/07/899954832/coronavirus-cases-are-surging-the-contact-tracing-workforce-is-not> [<https://perma.cc/V3NX-Y786>]; Jennifer Steinhauer & Abby Goodnough, *Contact Tracing Is Failing in Many States. Here's Why.*, N.Y. TIMES (Aug. 1, 2020), <https://www.nytimes.com/2020/07/31/health/covid-contact-tracing-tests.html> [<https://perma.cc/2FJ3-QB27>].

⁶⁸ See, e.g., GA. CODE ANN. § 34-9-280(2)(C) (2020); OR. REV. STAT. § 656.802(1)(a) (2020).

⁶⁹ GA. CODE ANN. § 34-9-280(2)(C).

⁷⁰ OR. REV. STAT. § 656.802(1)(a).

⁷¹ Compare Bryan Churchill, *State of Oregon Workers' Compensation COVID-19 Quick Guide*, USLAW NETWORK, INC. (2020), https://www.uslaw.org/files/Compendiums2020/COVID19_WorkersCompQuickGuide/Oregon_USLAW_Compodium_COVID19_WorkersCompQuickGuide_2020.pdf [<https://perma.cc/W7UG-XNJG>] (“Under Oregon's statutory criteria, it is possible that COVID-19 would be considered an occupational disease.”), with Benjamin Gerber, *Coronavirus, Infectious Disease and Workers' Compensation in Georgia*, GERBER & HOLDER WORKERS' COMP. ATT'YS BLOG, <https://www.gerberholderlaw.com/blog/georgia-workers-industry-news/coronavirus-workers-compensation/> [<https://perma.cc/7CE8-2LME>] (last visited Oct. 15, 2020) (“[C]ontracting COVID-19 at work would not qualify as an occupational disease and would therefore not be compensable under Georgia law.”).

The bulk of other states within the unlikely coverage category have statutory language requiring that compensable occupational diseases be “peculiar to” the employment, trade, or occupation.⁷² Kansas, for instance, stipulates that “hazards of diseases and conditions attending employment in general” are not compensable.⁷³ Interestingly, the Kansas legislature has unsuccessfully attempted to reform its policies three times following the COVID-19 outbreak.⁷⁴ The state’s failed legislation would have explicitly defined COVID-19 as an occupational disease and extended a presumption of coverage to all employees who work in close proximity with the public or other coworkers.⁷⁵ The fact that Kansas considered and rejected an explicit presumption of coverage for workers indicates that the vast majority of individuals who contract COVID-19 while working will likely receive no workers’ compensation benefits.⁷⁶

E. The Federal Government’s Selective Coverage Response to COVID-19

Like many states, the federal government has changed its workers’ compensation policies in the wake of COVID-19.⁷⁷ The Office of Workers’ Compensation Programs (OWCP) administers the Federal Employees Compensation Act⁷⁸ (FECA) and manages injured employees’ claims.⁷⁹ Like state workers’ compensation laws, FECA is often an employee’s sole remedy following a workplace injury.⁸⁰ Traditionally, a federal employee who wishes to bring a successful occupational disease claim under FECA must prove that the disease occurred while the employee was engaged in the performance of her duty, and the employee must provide evidence that the medical condition is causally related to her work activity.⁸¹

In cases where federal employees have contracted COVID-19, the OWCP distinguishes between high-risk employment—which carries

⁷² See, e.g., LA. STAT. ANN. § 23:1031.1.B (2020); KAN. STAT. ANN. § 44-5a01(b) (2020).

⁷³ KAN. STAT. ANN. § 44-5a01(b).

⁷⁴ See H.B. 2018, 2020 Leg., Spec. Sess. (2020) (failed in committee); H.B. 2007, 2020 Leg., Spec. Sess. (2020) (failed in committee); S.B. 1, 2020 Leg., Spec. Sess. (2020) (failed in committee).

⁷⁵ See, e.g., S.B. 1, 2020 Leg., Spec. Sess. (2020) (failed in committee).

⁷⁶ See generally *Covid-19 Update*, MVP LAW (Aug. 11, 2020), <https://mvplaw.com/covid-19-update/> [<https://perma.cc/8UQQ-P9AN>] (“As for the general office employee or warehouse worker, it will be much more difficult to successfully bring a workers’ compensation claim for exposure to the coronavirus [when compared to health care workers] since most of these occupations do not include a particular hazard of the coronavirus.”).

⁷⁷ DOL, *Claims Under the FECA*, *supra* note 13.

⁷⁸ See 5 U.S.C. §§ 8101–8193.

⁷⁹ See 20 C.F.R. § 10.1 (2020).

⁸⁰ See, e.g., *Schmid v. United States*, 645 F. Supp. 480, 482 (E.D. Pa. 1986).

⁸¹ 20 C.F.R. § 10.115.

with it the presumption of workers' compensation coverage—and employment which is not high-risk.⁸² The federal government describes high-risk employees as “federal workers who are required to have in-person and close proximity interactions with the public on a frequent basis—such as members of law enforcement, first responders, and front-line medical and public health personnel.”⁸³ If an employee is not considered high-risk, she will have to provide evidence suggesting that she was exposed to COVID-19 through her employment, and her employer may support or oppose the claim.⁸⁴ Because the federal government's system has extended a presumption of coverage to practitioners within a discrete list of professions, it is categorized alongside the selective coverage states discussed above.

III. FULFILLING THE HISTORICAL PROMISE OF THE GRAND BARGAIN

Many essential workers who contract COVID-19 through the course of their employment will not receive workers' compensation. To remedy this problem, states should adopt a selective coverage policy in preparation for the next pandemic, extending a presumption of coverage to public-facing essential workers in enumerated professions. A selective coverage approach is well-grounded in the history undergirding workers' compensation. Further, this approach would bring occupational disease doctrine—which has seen underwhelming development since the Grand Bargain was struck—in line with traditional workers' compensation law. To better explain why current occupational disease law fails to live up to the promises of the Grand Bargain, this Part begins with a brief history of workers' compensation law. It then calls for states to honor the history and intent of the Grand Bargain by adopting a selective coverage approach for future pandemics. Though this Comment does not attempt to prescribe a list of covered professions to states, it urges them to create policy regimes that are both well-reasoned (by offering the presumption to the most deserving employees) and clear (by specifically enumerating the professions that receive the presumption).

A. The Grand Bargain's Proud History and Disappointing Execution

Prior to the widespread adoption of workers' compensation laws in the early 1900s, American employers were technically liable through tort litigation for negligence resulting in injuries to employees, but

⁸² DOL, *Claims Under the FECA*, *supra* note 13.

⁸³ *Id.*

⁸⁴ 20 C.F.R. § 10.115.

workers rarely succeeded in these lawsuits.⁸⁵ During this era, an employee's sole remedy when injured on the job was to sue her employer.⁸⁶ Although employers did have the duty to provide workers with a reasonably safe place to work, workplace negligence lawsuits often failed because employers had access to three powerful legal defenses which would absolve them of liability, even if they had breached this duty.⁸⁷ Employers would not be liable if (1) a worker's injury resulted from the negligence of a fellow worker; (2) the injury was due to an inherent danger of the job which the worker knew or should have known about; or (3) the worker was also negligent in any way.⁸⁸ These three defenses were known as the "fellow servant rule," the "assumption of risk," and "contributory negligence," respectively, and scholars often refer to them collectively as the "unholy trinity."⁸⁹ Together, the unholy trinity made it exceedingly unlikely that an injured employee could bring a successful negligence suit against her employer.⁹⁰

As the United States industrialized near the turn of the century, workers found themselves involved in more accidents that were essentially attributable to chance rather than the fault of the worker or employer.⁹¹ The population boomed, the country urbanized, and a greater proportion of individuals found themselves working in intolerable factory conditions, which led to a struggling middle class and widespread calls for reform.⁹² Workers' compensation laws, which arose as a response to the increased workplace injuries concomitant with repetitive industrial work, came to be known colloquially as the "Grand Bargain."⁹³

The Grand Bargain provided advantages over the previous system of liability for both laborers and employers. While workers gave up their right to bring negligence suits in exchange for surefire (though less substantial) compensation for workplace injuries, employers and insurers mollified an increasingly dissatisfied middle-class workforce.⁹⁴ The Grand Bargain also allowed employers to meaningfully lower nonunion

⁸⁵ P. Blake Keating, *Historical Origins of Workmen's Compensation Laws in the United States: Implementing the European Social Insurance Idea*, 11 KAN. J.L. & PUB. POL'Y 279, 280 (2002).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 280–281.

⁸⁹ *Id.*

⁹⁰ See Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017*, 69 RUTGERS L. REV. 891, 901 n.35 (2017).

⁹¹ Keating, *supra* note 85, at 279.

⁹² *Id.* at 291–292.

⁹³ See Spieler, *supra* note 90, at 893 n.4, for an interesting look into the history of the term itself.

⁹⁴ See Fishback & Kantor, *supra* note 2, at 307–10.

wages in exchange for providing workers' compensation coverage.⁹⁵ In addition, the Grand Bargain decreased employers' uncertainty associated with negligence lawsuits—by 1913, twenty-five states had chipped away at the power of the unholy trinity to shield employers from liability by enacting laws which lessened the strength of employers' negligence defenses.⁹⁶ This marked more than a threefold increase in such legislation since the beginning of the century.⁹⁷ The coincidence of increased media attention to dangerous working conditions and increasingly labor-friendly employer negligence standards convinced employers that predictable workers' compensation payouts would be a better alternative to the roulette wheel of tort lawsuits.⁹⁸ Consequently, the Grand Bargain marked an important historical moment in the evolution of the United States—it was one of the country's first widespread programs of social insurance.⁹⁹ “By 1920, all but eight states had adopted workers' compensation statutes.”¹⁰⁰

Though the institution of workers' compensation laws was a hard-fought victory for laborers, adequate coverage of occupational diseases has proven much more difficult to achieve.¹⁰¹ The majority of early workers' compensation laws simply did not contemplate occupational diseases.¹⁰² Because these early statutes were largely a reaction to increasingly common industrial accidents, they were not well-suited to handle the often slower and less detectable onset of occupational diseases.¹⁰³ Over time, even as all states eventually adopted coverage for occupational diseases, a two-tiered system of workers' compensation developed: workplace accidents leading to obvious bodily injury are often compensated adequately, but workers' compensation payouts for occupational diseases have been paltry and infrequent in comparison.¹⁰⁴

Even now, employees who have fallen ill with clearly compensable occupational diseases face substantial barriers to financial recovery.¹⁰⁵

⁹⁵ *Id.*

⁹⁶ *Id.* at 316.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 306.

¹⁰⁰ Keating, *supra* note 85, at 301. Mississippi was the last state to adopt a workers' compensation law—it did so in 1949. *Id.* at 301.

¹⁰¹ See Albert Kutchins, *The Most Exclusive Remedy Is No Remedy at All: Workers' Compensation Coverage for Occupational Diseases*, 32 LAB. L.J. 212, 213 (1981).

¹⁰² See Spieler, *supra* note 90, at 910.

¹⁰³ Kutchins, *supra* note 101, at 213.

¹⁰⁴ *Id.* at 221; see also Jeff Biddle et al., *What Percentage of Workers with Work-Related Illnesses Receive Workers' Compensation Benefits?*, 40 J. OCCUPATIONAL & ENV'T. MED. 325, 325–31 (1998).

¹⁰⁵ See, e.g., Jamie Smith Hopkins, *Disease Victims Often Shut Out of Workers' Comp System*, CTR. FOR PUB. INTEGRITY (Nov. 4, 2015), <https://publicintegrity.org/inequality-poverty-opportunity/workers-rights/disease-victims-often-shut-out-of-workers-comp-system> [https://perma.cc/46Z2-

In some states, the denial rate for occupational disease claims can be up to three times higher than the rate for injury claims.¹⁰⁶ This asymmetric treatment between diseases and injuries leads to an increased burden on Medicare and the diseased workers' families and a decreased burden on employers.¹⁰⁷

B. Modernizing Occupational Disease Law As a Pandemic Social Safety Net

Although the Grand Bargain was struck to give workers reliable access to adequate funds when they have been harmed through their employment,¹⁰⁸ occupational disease laws have largely failed to live up to this promise.¹⁰⁹ Claims for occupational disease take longer, are less frequently successful, and generally pay less handsomely compared to claims for injury.¹¹⁰ Because workers' compensation largely arose out of a response to industrialization's dangerous working conditions, the relevant state statutes generally contain stringent causation requirements that are much harder for a worker to satisfy when she falls ill as opposed to when she is maimed on the job.¹¹¹

Setting aside the difficulties associated with occupational disease recovery generally, many state workers' compensation schemes are even less equipped to provide benefits to workers who contracted a global pandemic virus due to their employment. Unlikely coverage states in particular neglect even the most important workers—health care professionals and first responders—who have the highest likelihood of contracting COVID-19 at work.¹¹² Even the relatively labor-friendly statutes found in selective and likely coverage states require some sort of causal proof that the employee's work materially contributed to the onset of the disease.¹¹³ Considering the insufficient state of national contact tracing, it seems extremely difficult for an individual

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¹⁰⁶ *Id.*

¹⁰⁷ See J. Paul Leigh & James P. Marcin, *Workers' Compensation Benefits & Shifting Costs for Occupational Injury & Illness*, 54 J. OCCUPATIONAL & ENV'T MED. 445, 447 (2012).

¹⁰⁸ See Fishback & Kantor, *supra* note 2, at 307–10.

¹⁰⁹ See Spieler, *supra* note 90, at 996.

¹¹⁰ Biddle et al., *supra* note 104, at 325–31.

¹¹¹ Kutchins, *supra* note 101, at 213. It is not wholly unreasonable that many states make the hurdle for recovering on occupational disease claims higher than those for physical injuries incurred at work, since it is often more difficult to pinpoint where an employee contracted a disease than it is to prove where an injury occurred. In the context of the COVID-19 pandemic, though, this distinction puts public-facing workers at risk and leaves them without adequate protection.

¹¹² See, e.g., GA. CODE ANN. § 34-9-280(2)(C).

¹¹³ See *Universal Foundry Co. v. Wis. Dep't of Indus., Lab. & Hum. Rel.*, 263 N.W.2d 172, 177 (Wis. 1978).

to pinpoint exactly when and where she contracted COVID-19.¹¹⁴ Despite this, workers who have actually contracted COVID-19 through their employment but enjoy no presumption of coverage are more often than not expected to provide causal evidence that they contracted the disease through their workplace rather than on a trip to the grocery store or at a socially distanced gathering—a burden which proves almost completely unworkable in the context of a pandemic.

This inability to pinpoint the moment of exposure may explain why workers' compensation claims are less frequent than analysts and insurers anticipated in the early aftermath of the outbreak.¹¹⁵ While this may be good news for actuaries, it leaves a substantial number of employees who likely contracted COVID-19 at work without any adequate remedy or access to compensation. Uncertain and unlikely coverage states often lack a straightforward process for workers—even health care workers—to satisfy the statutory requirements to receive compensation. In Georgia, for instance, front-line doctors and nurses seemingly have no chance at recovery.¹¹⁶ Although it is technically possible for workers in unlikely coverage states to bring tort claims against their employers alleging negligence, wrongful death, or unsafe working conditions, few lawsuits have been filed.¹¹⁷ This system tarnishes the legacy of the Grand Bargain and reduces one of America's oldest social safety nets to mere lip service in the context of such a serious disruption to the workforce.

In response to COVID-19, however, certain states have shown that adequate workers' compensation coverage is possible and politically feasible. Likely coverage states, selective coverage states, and the federal government have extended explicit presumptions of workers' compensation coverage to at least some workers. These governments are working to peel off the layer of uncertainty that shrouds typical occupational disease claims¹¹⁸ and that will only be exacerbated by the COVID-19 outbreak.¹¹⁹

¹¹⁴ See Simmons-Duffin, *supra* note 67; Steinhauer & Goodnough, *supra* note 67; see also Hagen, *supra* note 65.

¹¹⁵ See Joseph Paduda, *The Impact of COVID-19 and Employment Changes on Workers' Compensation*, HEALTH STRATEGY ASSOC. (Jun. 24, 2020), <https://www.healthstrategyassoc.com/wp-content/uploads/2020/06/HSA-COVID-Survey-Abridged-FINAL.pdf> [https://perma.cc/E6GF-92Z5].

¹¹⁶ GA. CODE ANN. § 34-9-280(2)(C).

¹¹⁷ As of February 5, 2021, only three COVID-19 employment lawsuits alleging negligence, wrongful death, or an unsafe workplace have been filed in Georgia, Kansas, and Oregon (three unlikely coverage states) combined. See *COVID-19 Employment Litigation Tracker and Alerts*, FISHER PHILLIPS LLP, <https://www.fisherphillips.com/covid-19-litigation> [https://perma.cc/2L4L-RM35] (last visited Feb. 14, 2021).

¹¹⁸ See, e.g., Hopkins, *supra* note 105.

¹¹⁹ See, e.g., Butland, *supra* note 1.

Critics may contend that widespread adoption of presumptions of coverage will clog the system, drain insurers, and incentivize false claims. Emerging analyses of claims in the aftermath of the COVID-19 pandemic, however, suggest that this fear is widely overblown.¹²⁰ A study published in October 2020 found that the impact of COVID-19 on the workers' compensation system has not been nearly as costly for insurers and employers as many early projections forecasted.¹²¹ While COVID-19-related claims have placed some financial strain on the system, their impact has largely been outpaced by the decline in other workers' compensation claims due to increased remote work.¹²² In addition, most COVID-19 claims are relatively inexpensive—one insurer responding to a survey reported that over ninety-five percent of its COVID-19 claims cost under \$3,500 to cover.¹²³ Although the full cost of COVID-19 claims to the workers' compensation system remains unclear, these early estimates suggest that future comprehensive pandemic coverage can be achieved without placing undue strain on the system.

In future pandemics, workers ought not be left uncertain as to whether they will have access to adequate compensation when risking their health to keep essential corporations running. At the very least, states should be more explicit about the outer bounds of their occupational disease coverage in the context of pandemics so that workers can adequately forecast whether they will have access to coverage should they fall ill on the job.¹²⁴ More desirable, however, would be a state-level shift from mercurial and toothless occupational disease coverage toward a more robust system of worker protection.

C. Crafting an Appropriate Selective Coverage Policy Regime

To preserve the historical promise of the Grand Bargain and protect the employees who risk their own health to keep society running during a pandemic, states should adopt a selective coverage approach, extending a presumption of coverage to an enumerated list of essential employees in public-facing positions. This Comment does not take a definitive stance on which professions any state should include in its list of presumptions at the margins. Instead, it offers suggestions on how states can create policy regimes that are both well-reasoned (by extending a presumption to employees who arguably deserve it most) and clear

¹²⁰ See MARSH, *supra* note 18; Simpson, *supra* note 55.

¹²¹ MARSH, *supra* note 18, at 1–2.

¹²² *Id.* at 3.

¹²³ *Id.* at 4.

¹²⁴ This is discussed in greater depth in Part III.D, *infra*.

(by listing professions explicitly so there is little confusion about the boundaries of coverage). States could explore several avenues for crafting a list of professions that should receive the presumption.

First, they could analyze a sample of other states' essential worker lists and establish presumptions of coverage for professions that states seem to agree are essential. Alternatively, states could look to the Centers for Disease Control and Prevention (CDC) Advisory Committee on Immunization Practices' categorization of essential workers.¹²⁵ It would be reasonable for states to extend the presumption of coverage to all those employed in industries the CDC has placed early in its recommended vaccination schedule. This would presume coverage for employees such as health care workers, elementary educators, and grocery store clerks who put themselves in harm's way after a pandemic outbreak. A nurse should not have to face financial uncertainty when she falls ill with the very disease that the entire world is mobilized to combat.

Additionally, if employees and the public at large perceive that businesses are unjustly enriched by laborers who put their lives on the line to keep society running amid a global pandemic, businesses may see a large-scale push for more employee-friendly court doctrines and state laws similar to the original workers' compensation movement of the early 1900s. Businesses may be able to mitigate the severity of these laws if they support the widespread adoption of a selective coverage workers' compensation approach in future pandemics, just as they were able to come to an agreement with laborers concerning the original adoption of workers' compensation laws.¹²⁶ By accepting a selective coverage future, businesses will be better positioned to calculate risk when the next pandemic hits.

More widespread explicit protections¹²⁷ would be preferable for laborers, but this level of coverage would likely be a harder sell for corporations and insurers, especially considering the wide swath of businesses dubiously deemed essential in some states.¹²⁸ Some states have

¹²⁵ *Interim List of Categories of Essential Workers Mapped to Standardized Industry Codes and Titles*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccines/covid-19/categories-essential-workers.html> [<https://perma.cc/T8G4-NW4T>] (last visited Feb. 13, 2021).

¹²⁶ See Fishback & Kantor, *supra* note 2, at 307–10.

¹²⁷ See, e.g., COVID-19 820 ILL. COMP. STAT. ANN. 310/1(g) (offering a presumption of coverage to every essential worker that contracts COVID-19).

¹²⁸ In Arizona, for instance, golf courses were deemed essential. See Nick Hedges, *Over Par: Arizona's Golf Scene Thrives During COVID-19 Pandemic*, CRONKITE NEWS (Dec. 15, 2020), <https://cronkitenews.azpbs.org/2020/12/15/over-par-arizonas-golf-scene-thrives-during-covid-19-pandemic/> [<https://perma.cc/5MCX-7QWD>]. In addition, states were sharply divided as to whether firearms dealers were essential businesses. See Lisa Dunn, *Are Gun Shops an Essential Business? Depends Where You Live*, IDEASTREAM PUB. MEDIA (Mar. 25, 2020), <https://www.ideastream.org/news/are-gun-shops-an-essential-business-depends-where-you-live> [<https://perma.cc/X43J-9826>].

clearly shown interest group preferences when determining which industries are essential,¹²⁹ and not all these professions are equally deserving of a presumption of coverage. However, extending a presumption to the most public-facing essential workers—like grocery store clerks and health care professionals—is likely an uncontroversial policy change in line with the sentiment undergirding the Grand Bargain. These employees put themselves in harm’s way to ensure the smooth functioning of society during a time of great workplace tumult. In this way, they are similar to the employees who first assumed positions working with heavy machinery at the cusp of the Industrial Revolution. States would be normatively remiss to leave such critical workers without financial security following a pandemic.

Some businesses may shortsightedly wish to see a pandemic workers’ compensation landscape that mirrors the pre-Grand Bargain era of workplace liability, laden with uncertainty. An employer who knows that her employee may have contracted a pandemic virus during the course of the workday could nonetheless want the case to go to court, knowing that it will be difficult for the employee to prove that her work environment caused her to contract the virus. This mindset would be a mistake.

While a return to a tort liability system would likely lead to fewer payouts from the employer’s and insurer’s perspectives, the employer would lose massive social credibility and could leave itself open to large, infrequent judgments against it. Many employers supported the original Grand Bargain because it quelled an unhappy labor force and general public, both angry that workers were not adequately compensated for putting themselves in harm’s way.¹³⁰ Similarly, today’s image-conscious firms should welcome the opportunity to strike a new Grand Bargain and avoid uncertainty in future pandemics. This would allow them to have a hand in shaping workers’ compensation policy moving forward and avoid negative press¹³¹ that may ultimately tarnish their image.

IV. ECONOMIC CONSIDERATIONS JUSTIFYING A NEW GRAND BARGAIN

Aside from honoring the Grand Bargain’s legacy and modernizing occupational disease doctrine, a selective coverage approach to workers’ compensation policy is economically desirable. This Part advances two economic arguments suggesting that states adopt a selective coverage

¹²⁹ See, e.g., Hedges, *supra* note 128.

¹³⁰ See Fishback & Kantor, *supra* note 2, at 316.

¹³¹ See, e.g., Shannon Bond, ‘We’re Out There’ So Protect Us, *Protesting Workers Tell Amazon, Target, Instacart*, NPR (May 1, 2020), <https://www.npr.org/2020/05/01/849218750/workers-walk-off-jobs-demand-safer-working-conditions> [<https://perma.cc/ZTY3-RUQH>].

workers' compensation policy: efficient burden allocation and the elimination of market uncertainty. In the absence of meaningful government intervention to provide for workers who fall ill with a pandemic virus, workers' compensation can serve as a workable means to ensure that employees critical to the continuation of society do not bear the economic burden of their illness. Notwithstanding the coverage schemes that states ultimately adopt, they should be more explicit in explaining how their workers' compensation statutes will handle future pandemics.

A. Burden Allocation and Cost Balancing

Employees who put their health on the line to keep critical businesses open during the pandemic ought not bear the costs should they fall ill due to their work. Though the COVID-19 pandemic has been hard on certain sectors of the United States economy, many essential businesses have benefitted greatly from a dogged workforce.¹³² Here, too, states would do well to adopt a selective coverage policy, extending a presumption of coverage to public-facing essential workers. From an efficiency standpoint, states should lay the cost of diseased essential workers upon the corporation, which has a higher ability to pay and is more likely to have insurance, rather than the infected workers themselves. States that thoughtfully weigh employees' interests and ability to pay against those of their employers will find that the employers are better situated to bear the costs of pandemic coverage. Large businesses that have been able to turn a profit during the pandemic through the use of an in-person workforce are simply in a better position to pay insurance deductibles than the employees who must put themselves at risk for their once-safe livelihood.

It seems normatively perverse for employers to profit from their employees' work during a pandemic while shouldering none of the cost when those employees become sick. A hospital that employs a nurse who falls ill through treating emergency COVID-19 patients, for instance, reaps the benefits of the nurse's labor. Further, the hospital almost certainly enjoys a higher ability to pay for the nurse's insurance deductibles than the nurse herself. This rings especially true in light of the fact that most individuals have received only \$3,200 in stimulus money following the COVID-19 pandemic while large businesses have

¹³² See generally Kim Hjelmgaard, *As Coronavirus Ruined the US Economy, These Companies Reaped 'Dramatic Profits,' Study Says*, USA TODAY (July 22, 2020), <https://www.usatoday.com/story/news/2020/07/22/coronavirus-handful-american-companies-strike-gold-amid-pandemic/5477904002/> [<https://perma.cc/X9GZ-DARY>].

access to much larger stimulus packages.¹³³ Although much of the federal money that businesses received to mitigate COVID-19-related losses was intended to cover payroll, businesses have no obligation to use the money for that purpose.¹³⁴

Scholars have long pointed out that taxpayers end up shouldering much of the costs left over after inadequate workers' compensation payouts.¹³⁵ In 2007, for instance, total workers' compensation payouts for medical care hovered just under \$30 billion.¹³⁶ This may seem substantial, but workers' compensation actually grossly underfunded its claimants' medical costs, leaving other insurers, Medicare, and Medicaid to foot the bill.¹³⁷ Together, these three other insurance systems paid just under \$27 billion to cover the medical costs that workers' compensation failed to address.¹³⁸ Although workers' compensation also paid out roughly \$22 billion in indemnity benefits,¹³⁹ taxpayers and other members of injured employees' private insurance risk pools paid for the insufficiencies present in workers' compensation medical payouts.

If workers' compensation fails to adequately cover the medical costs associated with employees contracting a pandemic virus while on the job, taxpayers and the privately insured will likely bear these costs through increased taxes and premiums, respectively. While essential workers no doubt contribute to society as a whole by working in person during a pandemic, they also generate increased revenue for their employers. The increased risk they incur should not be internalized by taxpayers, many of whom are likely struggling financially themselves due to the economic effects of the pandemic. Instead, the burden should fall to the corporations that are able to continue operation in the midst of government-mandated lockdowns. Although a workers' compensation solution would likely not fully reimburse workers who contract a pandemic virus, it would at least provide them with some surefire financial security during a turbulent time. Further, a selective coverage workers'

¹³³ See Peter Whoriskey et al., *Doomed to Fail: Why a \$4 Trillion Bailout Couldn't Revive the American Economy*, WASH. POST (last updated Oct. 5, 2020), <https://www.washingtonpost.com/graphics/2020/business/coronavirus-bailout-spending/> [<https://perma.cc/NA5F-3K9M>] (noting that businesses received more than half of the \$4 trillion in federal aid without being required to show they were impacted by COVID-19).

¹³⁴ See *id.* (“[W]hile a complete accounting of the \$670 billion Paycheck Protection Program isn't likely to be available for months or years, companies that received the money were not compelled to use it to protect paychecks—and many didn't.”).

¹³⁵ Alison Morantz et al., *Economic Incentives in Workers' Compensation: A Holistic, International Perspective*, 69 RUTGERS L. REV. 1015, 1065–66 (2016).

¹³⁶ Leigh & Marcin, *supra* note 107, at 447–48.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

compensation scheme would allocate the bulk of the burden to the entity most likely to realize a direct pecuniary gain stemming from the employee's continued in-person labor.

Critics may argue that many employers—specifically, smaller employers—will not have the resources to pay workers' compensation deductibles when they themselves are struggling during the next pandemic. This is a valid concern, as many small businesses such as restaurants have been forced to close their doors permanently due to poor market conditions following the COVID-19 pandemic.¹⁴⁰ However, this concern will be less pressing should states adopt a competent selective coverage approach and extend the presumption of coverage to only public-facing essential employees working in specific, state-enumerated industries.

Although some states have made questionable choices¹⁴¹ in defining which businesses should be considered essential, the overlap in essential business classifications between states suggests that workers in a few key industries should receive the presumption of coverage.¹⁴² Unsurprisingly, states agree that health care providers, grocery stores, and their concomitant supply chains, for instance, must remain open for society to function in the middle of a pandemic.¹⁴³ Though the exact contours of any list of essential workers will be difficult to determine at the margins, it seems uncontroversial to list these industries as essential and protect the workers involved in their continued operation. Many employers within these industries are large corporations that are likely in a better position to internalize the costs of workers' compensation than smaller employers, giving the selective coverage approach the added benefit of extending a presumption of coverage to only those employees whose employers can most readily afford to pay workers' compensation to begin with. This would decrease the risk that workers' compensation becomes yet another unmanageable cost for smaller employers during the next global pandemic.

¹⁴⁰ See Noam Scheiber, *Pandemic Closures Devastate Restaurant Industry's Middle Class*, N.Y. TIMES (Dec. 9, 2020), <https://www.nytimes.com/2020/12/09/business/pandemic-restaurant-middle-class.html> [<https://perma.cc/M7Q5-Q27J>]; Press Release, Nat'l Rest. Ass'n, 100,000 Restaurants Closed Six Months into Pandemic (Sept. 14, 2020), <https://restaurant.org/news/pressroom/press-releases/100000-restaurants-closed-six-months-into-pandemic> [<https://perma.cc/5TTK-RSHN>].

¹⁴¹ See, e.g., Hedges, *supra* note 128.

¹⁴² See Scottie Andrew, *What Constitutes 'Essential Businesses'? States Seem to Have Varying Standards*, CNN (Mar. 26, 2020), <https://www.cnn.com/2020/03/25/business/essential-businesses-states-coronavirus-trnd/index.html> [<https://perma.cc/E9XM-R746>].

¹⁴³ *Id.*

B. Remediating Market Uncertainty

It is often stated that markets hate uncertainty.¹⁴⁴ Although much of this Comment's purpose is to conduct a textual analysis of state law as it might be applied to a pandemic virus such as COVID-19 to place state policy along a spectrum of coverage, it remains to be seen how legal challenges to workers' compensation decisions will play out in practice.¹⁴⁵ Clearly this is not desirable for laborers, but it is also potentially costly for businesses—some of which are currently facing tort lawsuits from employees associated with the pandemic.¹⁴⁶ Just as the ability to predictably forecast losses rather than face unpredictable tort lawsuits was a main motivation for businesses to support the workers' compensation laws of the 1900s, businesses now should support pandemic workers' compensation laws that will not leave them open to massive tort liability.

Whether states ultimately adopt the presumptions of coverage suggested in this Comment or not, they should better articulate how their workers' compensation systems interact with pandemic diseases *ex ante* to avoid uncertainty. Many of the problems associated with current workers' compensation law in the context of the COVID-19 pandemic arise not from widespread denials of coverage but from widespread uncertainty as to whether any individual employee is covered.¹⁴⁷ In a future pandemic, employees would be better off knowing whether they are covered before the pandemic begins so that they may plan accordingly rather than face the looming uncertainty currently associated with the workers' compensation system in most states. Even knowing they will not be covered would be preferable to the current black box policy found in most states—this would give employees more time to plan their actions in the event of illness or allow them to self-select into employment that will be more likely to cover them should they be exposed to a pandemic while on the job.

¹⁴⁴ See, e.g., Craig Erlam, *Week Ahead—Markets Hate Uncertainty*, SEEKING ALPHA (Oct. 3, 2020), <https://seekingalpha.com/article/4377447-week-ahead-markets-hate-uncertainty> [<https://perma.cc/B9K2-MYKS>].

¹⁴⁵ See, e.g., Butland, *supra* note 1.

¹⁴⁶ See generally Advisory Board, *The First Wave of Covid-19 Workplace Lawsuits Is Here* (Aug. 3, 2020), <https://www.advisory.com/daily-briefing/2020/08/03/covid-lawsuits> [<https://perma.cc/9Z5P-CG3J>] (listing some early lawsuits associated with unsafe working conditions after the COVID-19 outbreak).

¹⁴⁷ See, e.g., Butland, *supra* note 1.

V. CONCLUSION

This Comment makes two contributions to the field of workers' compensation law: First, it creates four novel categories of state workers' compensation policy in the wake of the COVID-19 pandemic and places these policies along a spectrum, from most likely to cover a meaningful number of workers to least likely. Second, this Comment argues that, in light of the historical background of workers' compensation law and principles of economically efficient burden allocation, states should adopt a selective coverage approach in preparing for the next pandemic. This approach would protect the workers who are most at-risk by extending a presumption of coverage to those employed in enumerated essential positions while minimizing the financial impact of workers' compensation for many smaller businesses with a lower ability to pay. Further, it would provide clarity for all employees during a future pandemic as to whether they are likely to receive coverage.

Many workers who put themselves in harm's way following the COVID-19 outbreak have been given a raw deal: they depend on work for their livelihood, but they are insufficiently protected from the risks associated with going to work in person. The origin of workers' compensation law—the Grand Bargain—largely came about under similar conditions. As the country urbanized and industrialized, workers increasingly put themselves at risk during the everyday completion of their professional duties.¹⁴⁸ Though their work benefitted both their employers and society at large, the employees were unjustly left with the burden of medical bills should an accident occur. As society realized that this model of risk allocation was unsustainable, states adopted workers' compensation laws to insulate employees from risk. Though these laws are not perfectly effective at covering the costs of an injured or diseased employee's medical bills, they do shift the majority of the pecuniary burden associated with routine workplace injuries from the taxpayer and the workforce to the employer and insurer.

Public-facing essential employees should not worry that they will be abandoned by the society they go to work to protect. To fulfill the historical promise that the Grand Bargain represents—the promise that employers will provide surefire financial support to employees who are injured through the everyday execution of their dangerous jobs—businesses, states, and laborers should advocate for a selective coverage approach to pandemic diseases. To do otherwise would be to disregard the social agreement that gave rise to workers' compensation laws in the first place.

¹⁴⁸ See Keating, *supra* note 85, at 291–292.