

Health Law Outlook

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HEALTH LAW
FORUM



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2L

*Class of
2022*

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Prior to law school, he worked as a purchasing manager in the construction industry, a speech and debate coach, and an ethics and compliance interviewer. As a compliance interviewer, Matthew interviewed employees from a wide spectrum of industries and documented various claims ranging from workplace harassment to discriminatory treatment. This experience sparked Matthew's interest in employment and labor matters and informed his decision to pursue a career in law.

After completing his 1L year, Matthew worked as a judicial intern to the Honorable Judge Thomas Moore, the presiding judge at Essex County Civil Division. Currently, Matthew is a mock trial board member, a leadership fellow, Asian Pacific American Law Student Association (APALSA) e-board member, a 2L Student Bar Association (SBA) Senator, the SBA Governance Committee Chair, and a representative on the SBA Diversity, Equity, and Inclusion Committee.

Matthew's interest in health law is a natural extension of his commitment to becoming a better advocate for employees. He believes safeguarding the mental and physical health of employees is a fundamental pillar of the employer-employee relationship. Matthew is particularly interested in ensuring compliance with workplace safety standards and resolving workers' compensation claims.

Teachers Are Essential: Reducing the Barriers to Workers' Compensation for Public School Teachers Who Contract COVID-19

Matthew Morales

Introduction

While COVID-19 has affected nearly all sectors of society, public school closures have had a particularly high social and economic cost, especially for the most vulnerable and marginalized communities.¹ Research suggests that the sudden switch to online instruction has cost some students a full year of academic progress.² In addition to major disruptions to the learning process for students, lack of in-person classes exposes gaps in childcare on which working parents traditionally rely.³ Given the far-reaching effects of school closures, many states have prioritized reopening schools as a crucial first-step in society's return to normalcy.⁴ However, in being the forerunners, public school employees, particularly teachers, are putting themselves at higher risk of exposure to COVID-19.⁵ Alongside the health concerns that COVID-19 infection poses, teachers are rightfully concerned with the financial costs of missing work due to contracting COVID-19.⁶ This Essay examines the feasibility of a state enacted workers' compensation presumption that contracting the COVID-19 infection arises out of and in the course of a public school faculty's employment.

Part II provides an overview of workers' compensation systems generally and as applied to COVID-19 claims. Part II.A reviews basic concepts in workers' compensation that will be addressed in examining a COVID-19 presumption for school faculty. Part II.B reviews general doctrines related to occupational diseases in workers' compensation systems. This provides an important backdrop for understanding COVID-19 as a claim under occupational disease provisions. Part II.C discusses state accommodations to workers' compensation systems in response to the COVID-19 pandemic. Part II.D examines the status quo regarding the compensability of COVID-19 claims by teachers. This establishes the uphill process teachers face when filing COVID-19 workers' compensation claims.

Part III navigates arguments in favor of state action that would create a presumption of compensability for COVID-19 claims made by teachers. Part III.A discusses the cost concerns of expanding workers' compensation presumptions to include COVID-19 claims by teachers. Part

¹ *Adverse Consequences of School Closures*, United Nations Educational, Scientific and Cultural Organization (UNESCO), <https://en.unesco.org/covid19/educationresponse/consequences>.

² Dana Goldstein, *Research Shows Students Falling Months Behind During Virus Disruptions*, N. Y. TIMES <https://www.nytimes.com/2020/06/05/us/coronavirus-education-lost-learning.html?auth=login-google>.

³ *Adverse Consequences supra* note 1.

⁴ Valerie Strauss, *National Academies: Schools should 'prioritize' reopening but need more funding to do it*, WASHINGTON POST, <https://www.washingtonpost.com/education/2020/07/15/national-academies-schools-should-prioritize-reopening-need-more-funding-do-it-embargoed-until-11-am/>.

⁵ Alexa Lardieri, *Teachers Are Growing More Concerned About COVID-19 Exposure, Poll Finds*, U.S. NEWS, <https://www.usnews.com/news/education-news/articles/2020-07-24/poll-finds-majority-of-teachers-are-very-concerned-about-coronavirus-exposure-at-school>.

⁶ Ryan McKinnon et al., *'Scared for my life' But Needing a Salary: Teachers Weigh Risks of COVID-19*, USA TODAY (Jul. 9, 2020), <https://www.usatoday.com/story/news/education/2020/07/09/covid-school-reopening-teachers-health/5403160002/>.

III.B discusses constitutional concerns of presumptions of compensability. Part III.C discusses the public policy dimensions of an emergency presumption provision for COVID-19. The Essay concludes in support of a COVID-19 presumption of compensability for public school teachers.

II. Defining and Applying Workers' Compensation

A. Workers' Compensation Systems Generally

1. *Purposes and Functions of Workers' Compensation*

In the United States, most states normally require some form of workers' compensation for almost all employers.⁷ The primary objective of workers' compensation systems is founded on the notion that employees should be afforded compensation for injuries arising out of the course of employment.⁸ This is to ensure employees are not reduced to poverty if unable to work due to occupational injury.⁹ The benefits available under workers' compensation include medical expenses and wage-loss payments.¹⁰ Prior to the establishment of workers' compensation systems, an injured employee had to sue their employer to pay for medical expenses, to recover wages, and secure future earnings.¹¹ Suing an employer for workplace injuries is often a challenging endeavor because, under common law, an employer's responsibility to employees is limited to the minimal obligation of exercising reasonable care.¹²

Workers' compensation systems are not meant to be cumulative or supplemental to the tort system, but are, instead, wholly substitutional.¹³ By design, workers' compensation imputes strict liability to employers, meaning benefits would be payable even without a finding of negligence.¹⁴ In exchange, most states have workers' compensation systems that statutorily establish an exclusive remedy provision that bars an injured worker's civil causes of action for negligence against their employer.¹⁵ The advantage of this type of system is that both the employer and employee avoid the burdensome and costly process of litigation.¹⁶

⁷ *Workers' Compensation Laws – State by State Comparison*, National Federation of Independent Business (NFIB) (June 7, 2017), <https://www.nfib.com/content/legal-compliance/legal/workers-compensation-laws-state-by-state-comparison-57181/>.

⁸ *See, e.g., Minish v. Hanuman Fellowship*, 214 Cal. App. 437 (6th Dist. 2013) (The Workers' Compensation Act is designed and intended for the protection of workers who come within its provisions.).

⁹ Thomas M. Domer, *Wisconsin Practice Series TM: Workers' Compensation Law* § 1:1 (March 2020).

¹⁰ *Id.*

¹¹ Ann Clayton, *Workers' Compensation: A Background for Social Security Professionals*, Social Security Administration Office of Policy (May 2005), <https://www.ssa.gov/policy/docs/ssb/v65n4/v65n4p7.html>.

¹² *See Armour v. Hahn*, 111 U.S. 313, 315 (1884) (concluding that, under common law, an employer's responsibility to workers was limited to the minimal obligation of exercising reasonable care).

¹³ *White v. Marriott Management Services*, 724 N.Y.S.2d 771 (App. Div. 2001) (holding that an action brought by a building service housekeeper at a hospital against the hospital's housekeeping department to recover for injuries allegedly sustained while using a "windblower" machine to dry the hospital's floors should have been referred to the Workers' Compensation Board for a determination as to whether the housekeeper had a valid cause of action for damages or whether he is relegated to benefits under the Workers' Compensation Law).

¹⁴ Sandra A. Day, *How Did We Get Here? The Development of Arizona Workers' Compensation Law*, Ari. Att'y, April 2000, at 10, 11.

¹⁵ *See Bell v. Macy's California*, 212 Cal. App. 3d 1442 (1989), review den 1989 Cal LEXIS 4637 (Cal) (declaring that the facts leading to the exclusivity of the workers' compensation laws are to be liberally construed, even where the employee, in an effort to escape the limited but relatively certain compensation remedy in favor of the riskier but more lucrative tort claim, attempts to show that his or her injury is not compensable).

¹⁶ *See id.*

2. *Scope of Employment and the Coming-and-Going Rule*

To recover under workers' compensation systems, the employee's injury must arise out of their employment.¹⁷ An injury "arises out of employment," if the claimant was performing acts the employer instructed the claimant to perform, acts incidental to the claimant's assigned duties, or acts which the claimant had a common law or statutory duty to perform.¹⁸ As a general rule, the injured employee has the initial burden of proof to show that the medical services sought are directly related to a work-related injury.¹⁹

The coming-and-going rule establishes that an employee with a fixed place of employment, who is injured while traveling to or from their place of employment, is not entitled to receive workers' compensation benefits.²⁰ Injuries incurred during the commute to or from work are not normally included as part of the scope of employment for the purposes of workers' compensation because the requisite causal connection between injury and the employment does not exist during the employee's commute where the employer lacks exclusive control of the environment.²¹ However, transportation-related injuries may be included in the scope of employment if the employee's duties involve traveling or transporting goods.²²

B. Occupational Disease Claims in Workers' Compensation Systems

Workers' compensation systems also cover occupational diseases, which are essentially illnesses caused or aggravated, at least in part, by work-related duties.²³ Most states have enacted statutes that address the compensability of occupational diseases either under their standard workers' compensation act or in a separate statutory section, while a minority do not statutorily define occupational diseases at all.²⁴ Occupational disease claims can be more challenging to win because, unlike an acute workplace injury, occupational diseases are not necessarily confined to one specific triggering event, making the date of injury harder to identify and causation more

¹⁷ See *Stone & Webster Constr. v. Lanier*, 914 So. 2d 869, 875 (Ala. App. 2005). The court also noted that "arising out of" is a requirement of a causal relationship between the injury and the nature of the employment. *Id.* See also *Castillo v. Caprock Pipe & Supply*, 285 P.3d 1072, 1077 (N.M. App. 2012).

¹⁸ *Stone*, 914 So. 2d at 875.

¹⁹ See *Smith v. Mr. Sweeper Stores*, 544 S.E.2d 758, 760 (2001).

²⁰ See *Bungard v. Jeffers*, 8 N.E.3d 336, 341 (2014).

²¹ For further discussion, see the New Jersey Supreme Court's analysis in *Hersh v. County of Morris*. The New Jersey Supreme Court concluded that, for purposes of New Jersey's workers' compensation statutes, where an employer did not own or control the garage where the employee parked; did not control the public street on which the employee walked when injured; did not dictate the path the employee took to walk to work; and did not expose the employee to any special or additional hazards—the employee's injuries are not compensable. See *Hersh v. City of Morris*, 86 A.3d 140, 149 (2014).

²² See *Scott v. Foodarama Supermarkets*, 942 A.2d 107, 112 (2008) (reversing the decision of the workers' compensation judge, the Appellate Division held that the "travel-time" exception to the going-and-coming rule does not apply where a salaried employee is reimbursed for gas, tolls, and wear and tear on his vehicle, but is not paid wages for the time of his commute to and from work).

²³ See, e.g., *Currier v. Manpower*, 721 N.Y.S.2d 137, 138 (2001) (holding that an occupational disease is a condition which derives from the very nature of the employment and not from an environmental condition specific to the place of work).

²⁴ *Survey of State Workers Compensation Compensability Statutes*, NATIONAL COUNCIL ON COMPENSATION INSURANCE (2020), <https://www.ncci.com/Articles/Pages/Insights-Compensability-Statutory-Survey-May-2020.pdf>.

difficult to prove.²⁵ While each state law is different, in general, to succeed on an occupational disease claim, a claimant must establish the following elements: (1) the employee contracted a disease “peculiar” to their employment;²⁶ and (2) the risk of contracting the disease was substantially increased by the nature of their employment.²⁷

1. *Peculiar-risk Doctrine*

Establishing that the disease suffered by the claimant is “peculiar” to their employment requires proving that the disease was caused by a hazard characteristic and specific to the claimant’s employment.²⁸ This peculiar-risk standard is met if the claimant presents sufficient evidence that they were exposed to a hazard in a substantially different manner than are persons in employment generally.²⁹ It is not necessary for the claimant to prove that the hazard is exclusive to the claimant’s employment nor is it necessary for the claimant to prove that the disease is a commonly occurring incident of the occupation.³⁰

2. *Increased-risk Doctrine*

In determining whether there has been “an increased risk,” the claimant should make a comparison to a broad cross-section of the public—not to a locality, neighborhood, or area.³¹ By design, increased-risk requirements normally exclude all ordinary diseases of life which the general public is exposed; the rationale being that the employee is at no greater risk of contracting such diseases through work than as a member of the general public.³² In some states, however, an ordinary disease of life may still be compensable if the illness is characteristic of the employment and was caused by hazards peculiar to the employment.³³ For example, the Supreme Court of Connecticut awarded workers’ compensation benefits to a dental hygienist who contracted hepatitis type B, a contagious disease, on the basis that dental hygienists are ordinarily in contact with blood and other secretions that would expose them to hepatitis type B infection more so than the general public.³⁴ In some states, contagious diseases are statutorily included under accidental injury provisions.³⁵

²⁵ See, e.g., *Travelers Ins. Co. v. Helstrom*, 351 S.W.2d, 323–24 (Tex. App. 1961) (finding date of injury to be the date when claimant broke their wrist); *Childs v. Haussecker*, 974 S.W.2d 31, 37–38 (Tex. 1998).

²⁶ *Smith v. Crane Cams*, 418 So. 2d 1266 (Fla. App. 1982).

²⁷ *Id.*

²⁸ See *Risor v. Nebraska Boiler*, 765 N.W.2d 170, 181 (2009).

²⁹ See *Greater Mobile Chrysler-Jeep v. Atterberry*, 11 So. 3d 835, 842 (Ala. App. 2008).

³⁰ Stephen A. Brunette, *Cause of Action to Recover Workers’ Compensation Benefits for Occupational Disease*, 15 COA 61 (Nov. 2020).

³¹ A. Larson, *The Law of Workmen’s Compensation*, § 8.42 (1985).

³² *Chevrolet Muncie Division of General Motors Corp. v. Hirst*, 46 N.E.2d 281, 284 (1943).

³³ See, e.g., *Lanning v. Virginia Dept. of Transp.*, 561 S.E.2d 33 (2002); *Lawhead v. United Air Lines*, 584 P.2d 119 (1978) (establishing compensability where claimant, in the course of her duties as a flight attendant, contracted influenza after having worked in a cold aircraft and was housed by her employer in a hotel with faulty heating).

³⁴ *Hansen v. Gordon*, 602 A.2d 560, 564 (1992) (finding that, although HBV is contagious, and can be transmitted through means outside the workplace, for dental hygienists it is a disease so distinctly associate with their profession that the necessary causal connection was present).

³⁵ *Survey of State Workers Compensation Compensability Statutes*, *supra* note 24 (citing Nevada’s statute establishing that a contagious disease contracted while providing medical services shall be deemed an injury by accident).

3. *Special Statutory Presumptions*

In general, the burden is on the employee to prove proximate causation for occupational disease claims; a number of states, however, have passed legislation that establishes a rebuttable presumption of causation for certain diseases in specific occupations.³⁶ Where a claimant has an occupational disease enumerated in such a presumption law, and the claimant meets certain requirements, the claimant need not prove the occupational disease was caused by workplace exposure.³⁷ Instead, it is the employer's heightened burden to show otherwise.³⁸ The legislative purpose for this kind of statutory presumption is to provide an evidentiary advantage for a claimant who has contracted an occupational disease in an occupation in which such disease is a hazard.³⁹ For example, Pennsylvania enacted a statutory presumption that heart and lung diseases in firefighters are occupational diseases that arise out of and in the course of employment.⁴⁰ This evidentiary advantage is often necessary for enumerated occupational diseases because, absent special provisions, many state workers' compensation acts would disqualify the majority of these claims as ordinary diseases of life to which the general public is exposed.⁴¹

B. Compensability of COVID-19 Claims

1. COVID-19 as an Occupational Disease

The COVID-19 outbreak raises critical questions regarding workers' compensation because many jobs that are not ordinarily considered hazardous have suddenly become very dangerous.⁴² As noted heretofore, while most states' workers' compensation systems provide compensation for occupational diseases, many state statutes exclude common communicable diseases from compensation due to their ubiquitous natures.⁴³ However, as discussed, there have been a number of common and contagious diseases subject to a finding of compensability in cases where the disease is peculiar to the claimant's occupation and the risk is substantially increased by the nature of the claimant's work.⁴⁴ Given these findings, several states, such as Connecticut, initially anticipated that COVID-19 cases could be addressed by their workers' compensation commissions by applying existing case law.⁴⁵ However, the dramatic proliferation of COVID-19

³⁶ 21 Summ. Pa. Jur. 2d Employment & Labor Relations § 16:49 (2d ed.).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Marcks v. Workmen's Com. App. Bd.*, 547 A2d 460, 463 (1988) (reasoning that the legislative intent was to provide an evidentiary advantage to firefighters seeking recovery due to hazards associated with their trade).

⁴¹ *See Larson's Workers' Compensation Law*, §§ 52.01, 52.02 (2020).

⁴² Josh Cunningham, *Covid-19: Workers' Compensation*, National Conference of State Legislatures (NCSL) (Dec. 2020), <https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx#:~:text=States%20are%20taking%20action%20to,workers%20impacted%20by%20COVID%20D19.&text=This%20presumption%20places%20the%20burden,workers%20to%20file%20successful%20claims>.

⁴³ *See Hirst v. Chevrolet Muncie Div. of Gen. Motors Corp.*, 33 N.E.2d 773, 775 (1941) (concluding that the workers' compensation act does not provide for diseases such as influenza).

⁴⁴ *See, e.g., Lanning v. Virginia Dept. of Transp.*, 561 S.E.2d 33 (2002); *Lawhead v. United Air Lines*, 584 P2d 119 (1978); *Hansen v. Gordon*, 602 A.2d 560, 564 (1992).

⁴⁵ COVID-19 cases, 19 Conn. Prac., *Workers' Compensation* § 4:5.50.

cases across the country⁴⁶ made showing a substantial increase of risk of exposure from employment harder to distinguish from the risk of exposure among the general population.⁴⁷

2. *State Responses to COVID-19*

Several states have responded to the COVID-19 pandemic by taking actions to extend workers' compensation coverage.⁴⁸ In 2020, twenty-two states considered legislation relating to COVID-19 presumptions and/or compensability for certain employees.⁴⁹ Nine states enacted COVID-19 presumption legislation: Alaska, California, Illinois, Minnesota, New Jersey, Utah, Vermont, Wisconsin, and Wyoming.⁵⁰ Other states like Connecticut have relied on executive branch authority to enact presumption laws by issuing executive orders, directives, and/or emergency rules regarding COVID-19 compensability.⁵¹

Many of the COVID-19 workers' compensation presumptions are temporary, meaning the presumption is applicable for a certain period of time or expires when the state's state of emergency ends.⁵² In 2021, states may take additional action to extend and/or expand their existing presumptions.⁵³ In addition, new states may consider workers compensation presumptions for COVID-19.⁵⁴

3. *Who Is Covered by COVID-19 Presumption Laws?*

Most COVID-19 presumption laws focus on creating expanded coverage to include essential workers.⁵⁵ However, the definition of what constitutes an essential worker is not consistent across the states.⁵⁶ Early in the pandemic, amidst state mandated business closures, forty-two states issued some sort of guidance on which sectors and industries they consider essential for critical infrastructure operations and services.⁵⁷ Twenty of these states deferred to the federal definitions developed by the U.S. Cybersecurity and Infrastructure Security Agency ("CISA").⁵⁸ The other twenty-two states that issued essential worker orders developed their own lists of occupations considered essential under stay-at-home orders.⁵⁹ In many states, such as Arizona and Delaware, first responders are explicitly mentioned in definitions for essential worker.⁶⁰ Only a handful of states such as California have enacted broadly inclusive expansions to their workers' compensation laws that provide rebuttable presumptions of compensability for

⁴⁶ *CDC COVID Data Tracker*, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (last visited Dec. 2020).

⁴⁷ *Larson's Workers' Compensation Law*, *supra* note 41.

⁴⁸ Laura Kersey, *2020 Legislative Trends Recap: Top Takeaways*, NCCI (Dec. 14, 2020), <https://www.ncci.com/Articles/Pages/Insights-2020-Legislative-Trends-Recap.aspx>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Kersey, *supra* note 48.

⁵⁵ Samantha Bloch, *States Acting Quickly to Support 911 COVID-19 Responders*, NCSL (Apr. 15, 2020), <https://www.ncsl.org/blog/2020/04/15/states-acting-quickly-to-support-911-covid-19-responders.aspx>.

⁵⁶ *Id.*

⁵⁷ *COVID-19: Essential Workers in the States*, NCSL <https://www.ncsl.org/research/labor-and-employment/covid-19-essential-workers-in-the-states.aspx#:~:text=According%20to%20the%20U.,to%20defense%20to%20agriculture> (last updated Dec. 31, 2020) (last visited Jan. 11, 2021).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

all employees who test positive for COVID-19.⁶¹ The expansions on workers' compensation presumption laws regarding COVID-19 can roughly be organized into 4 camps: limited to certain kinds of essential workers, inclusive of all essential workers, coverage for all employees, and no expanded coverage at all.⁶²

D. COVID-19 Compensability for Public School Teachers

1. Essential Worker Status

With most states focusing on expanding workers' compensation for frontline and essential workers, states and their citizens have raised the question if teachers qualify as frontline or essential. In truth, there are only a few states whose emergency workers' compensation expansions include teachers under the category of frontline, let alone essential.⁶³ Adding to the uncertainty of whether teachers count as essential workers is the patchwork of state regulations defining who qualifies as an essential worker. As mentioned earlier, at least twenty-two states have their own definition of essential worker apart from the twenty that operate under the CISA definition.⁶⁴

It might seem to help that in August 2020, the White House formally added teachers as essential workers; however, as later clarified by then Vice President Pence, the official declaration is not a mandate, meaning that states do not have to accommodate their own guidelines on essential workers to comply with the mandate.⁶⁵ Some saw the White House designation of teachers as essential workers as part of the Trump administration's campaign to pressure districts to return to in-person classes.⁶⁶ If anything, the White House's symbolic designation of teachers as essential could exacerbate confusions when teachers try to rely on this declaration when arguing COVID-19 claims.

Absent any special presumption of compensability from the state, the general rule across the United States would be that teachers are not covered by their state's workers' compensation laws for COVID-19 infection claims.⁶⁷ As discussed, most workers' compensation systems inherently exclude widespread, contagious diseases such as COVID-19 because of the difficulty

⁶¹ *2020 State Activity: COVID-19 WC Compensability Presumptions*, NCCI, https://www.ncci.com/Articles/Documents/II_Covid-19-Presumptions.pdf, (last updated Jan. 2021).

⁶² Cunningham, *supra* note 42.

⁶³ Meghan Carino, *Teachers Move Near the Front of the Line for Vaccine*, MARKETPLACE (Dec. 21, 2020), <https://www.marketplace.org/2020/12/21/teachers-move-near-the-front-of-the-line-for-vaccine/>. Francine Blau, labor economist at Cornell University, warned that "teachers may not be considered essential frontline workers under some state guidelines." *Id.*

⁶⁴ *COVID-19: Essential Workers in the States*, *supra* note 57.

⁶⁵ Sarah Westwood, *White House Formally Declaring Teachers Essential Workers*, CNN (Aug. 21, 2020), <https://www.cnn.com/2020/08/20/politics/white-house-teachers-essential-workers/index.html>. CISA essential worker guidelines added teachers and other workers who support the education sector as essential critical infrastructure workers. *The Essential Critical Infrastructure Workers Guidance 4.0*, CISA (Dec. 16, 2020), https://www.cisa.gov/sites/default/files/publications/ECIW_4.0_Guidance_on_Essential_Critical_Infrastructure_Workers_Final3_508_0.pdf.

⁶⁶ *Id.*

⁶⁷ *2020 State Activity: COVID-19 WC Compensability Presumptions*, *supra* note 61.

of proving causation attributable to employment.⁶⁸ This leaves teachers that are required to return to in-person classes with little to no coverage through workers' compensation.⁶⁹

2. K-12 School Reopening Orders Across the US

For the Fall 2020 school year, the vast majority of states had not issued state-wide orders to reopen schools for in-person classes; instead, the decision to reopen was left to school districts.⁷⁰ In these states, each school district had to consider their own capacity to safely facilitate in-person classes.⁷¹ School districts have the responsibility of weighing the benefits of in-person schooling against the risk of spreading COVID-19 in their schools and communities.⁷²

Four states enacted statewide orders to reopen schools for in-person classes: Arkansas, Florida, Iowa, and Texas.⁷³ In early July 2020, Florida Education Commissioner, Richard Corcoran, issued an emergency order mandating all districts open "brick and mortar schools" at least five days a week for families who want to send their students back for in-person instruction.⁷⁴ Not only did Florida lack expanded workers' compensation coverage for teachers, but the state designated teachers as essential workers, so families could choose if their children would attend in-person classes but the teachers effectively had no choice.⁷⁵ The designation as an essential worker requires Florida teachers to work in-person because they are considered critical infrastructure workers despite not receiving any special presumption of compensability for COVID-19 claims.⁷⁶ Making matters worse, Florida saw an accelerated spread of COVID-19 around the same time students were expected to start a new school year in-person.⁷⁷ The Florida state emergency order requiring schools to re-open with in-person instruction has faced constitutional challenges in court. On August 24, 2020, a state court judge issued a temporary injunction blocking the state order; however, on August 28, a Florida appeals court issued a stay of the trial court injunction, putting the state's emergency order back in place.⁷⁸

⁶⁸ Chevrolet Muncie Division of General Motors v. Hirst, 46 N.E.2d 281, 284 (1943).

⁶⁹ Kate Masters, *Virginia's Largest School Insurer Says Worker's Compensation Is Unlikely for Teachers Who Catch COVID-19*, NBC (July 23, 2020), <https://www.nbc12.com/2020/07/23/virginias-largest-school-insurer-says-workers-compensation-is-unlikely-teachers-who-catch-covid-19/>.

⁷⁰ *Where Schools Are Reopening in the US*, CNN (Dec. 15, 2020), <https://www.cnn.com/interactive/2020/health/coronavirus-schools-reopening/>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Rachel Treisman, *Florida Judge Rules State Order Requiring Schools to Reopen 'Unconstitutional'*, NPR (Aug. 24, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/08/24/905627630/florida-judge-rules-state-order-requiring-schools-to-reopen-unconstitutional>.

⁷⁵ *Good Luck Getting Workers' Compensation If You Catch COVID-19 on the Job*, SUN SENTINEL (July 14, 2020), <https://www.sun-sentinel.com/opinion/editorials/os-op-edit-covid-19-workers-compensation-20200714-crxy47ujxjavfcfzyzhwqski4-story.html>.

⁷⁶ Madeline Will, *Deemed 'Essential Workers,' Some Teachers Told to Skip Quarantine After COVID-19 Exposure*, EDUC. WEEK (Aug. 21, 2020), <https://www.edweek.org/leadership/deemed-essential-workers-some-teachers-told-to-skip-quarantine-after-covid-19-exposure/2020/08>.

⁷⁷ *Good Luck Getting Workers' Compensation If You Catch COVID-19 on the Job*, *supra* note 75.

⁷⁸ *Where Schools Are Reopening in the US*, *supra* note 70; Triesman, *supra* note 74. Circuit Judge Charles Dodson concluded the order was "unconstitutional to the extent that it arbitrarily disregards safety, denies local school boards' decision making with respect to reopening brick and mortar schools, and conditions funding on an approved reopening plan with a start date in August." *Id.*

III. The Feasibility of COVID-19 Presumption of Compensability for In-Person Teachers

A. Cost Concerns

Legislators who oppose COVID-19 compensability presumptions for public school teachers often argue that enacting such legislation would be economically infeasible.⁷⁹ One possible rationale is that more coverage means more claims which leads to an increase in premiums for the school districts to pay. Indeed, some observers readily point to California as an example of how expansive coverage for COVID-19 has led to COVID-19 claims becoming a large chunk of a dwindling number of workers' compensation claims.⁸⁰ While the number of COVID-19 claims has nearly quadrupled in California, the total number of claims in the system has plummeted likely due to statewide shelter-in-place and stay-at-home orders.⁸¹

B. Constitutional Concerns

Some opponents of COVID-19 presumptions of compensability for teachers argue that such presumptions are unconstitutional because statistics do not necessarily show that public school employees are at any significantly higher risk to COVID-19 than other occupations.⁸² While it is often cited that 1 in 4 teachers are at risk of serious illness from COVID-19, opponents would gladly point out that that percentage is about the same for workers overall.⁸³ Additionally, these same opponents would likely argue that the ubiquity of COVID-19 among the general populace reduces the difference of risk between teaching and being in public to a negligible amount.⁸⁴ Despite these statistical arguments, presumptions of compensability were never intended to create legal conclusions on statistical risk.⁸⁵ Rather, under the Morgan theory, the persuasive weight of a statutory presumption is grounded in its policy objectives.⁸⁶ In *Spivey v. Bellevue*, where an employer challenged the presumption that heart and lung diseases arise out of a firefighter's work, the court concluded that the purpose of the statutory presumption was to compensate firefighters even in circumstances when there may not be strong medical or scientific evidence establishing a definitive causal relationship.⁸⁷ Essentially, rebuttable presumptions of compensability can act as an exception to a state's workers' compensation act in order to advance social policy objectives that cannot be accommodated within the standard rules.

C. Policy Objectives

⁷⁹ *Id.* The Virginia Senate Finance Committee argued that it would be too expensive to let public sector employees collect workers' compensation if they contract COVID-19 on the job. *Id.*

⁸⁰ Jim Sams, *COVID-19 A Growing Share of Shrinking Work Comp Claims in 2 States*, CLAIMS J. (Aug. 3, 2020), <https://www.claimsjournal.com/news/national/2020/08/03/298529.htm>.

⁸¹ *Id.*

⁸² Elizabeth Cavallaro, *Covid-19 Workers' Compensation Presumptions*, CHARTWELL L. (May 18, 2020), <https://www.jdsupra.com/legalnews/covid-19-workers-compensation-21536/>. The authors of this article emphasize how presumption laws may run counter to epidemiology and commonsense notions of fairness and contemplate that such laws may not withstand constitutional scrutiny. *Id.*

⁸³ Rachel Nania, *1 in 4 U.S. Teachers at Risk of Severe Illness from Coronavirus*, AM. ASS'N OF RETIRED PERSONS (July 23, 2020), <https://www.aarp.org/work/working-at-50-plus/info-2020/teachers-coronavirus-risk/>.

⁸⁴ Cavallaro, *supra* note 82 (arguing that COVID-19 is just as easy to pick up while at home, going on essential errands, or while out exercising).

⁸⁵ See *City of Bellevue v. Raum*, 286 P.3d 695, 710 (2012).

⁸⁶ See *Spivey v. City of Bellevue*, 389 P.3d 504, 512 (2017).

⁸⁷ *Id.*

A statewide law establishing a rebuttable presumption of compensability for in-person teachers helps accomplish several social policy objectives pertaining to pandemic recovery efforts. First, and likely the most overt benefit of a COVID-19 presumption of compensability is that it eases teachers' apprehension with working in-person by increasing access to treatment in the event of contracting COVID-19.⁸⁸ This beneficent outcome is the intended purpose of workers' compensation as part of the compensation bargain between employer and employee.⁸⁹

Aside from satisfying concerns for fundamental fairness,⁹⁰ enacting compensability presumptions is also an important mechanism in limiting the spread of COVID-19.⁹¹ What is not normally contemplated in this compensation bargain dynamic is the risk an infected teacher can pose to others outside the employer-employee relationship. Statutory presumptions allow legislators to graft important social policy objectives such as limiting the spread of COVID-19 onto workers' compensation systems. According to the CDC, a critical component of safely reopening schools is implementing actions that slow the spread of COVID-19.⁹² Ensuring that teachers and other public school employees are provided for financially while recovering from COVID-19 helps this endeavor by deterring teachers from working while infected with COVID-19.⁹³ A teacher going to work while sick with COVID-19 is potentially a higher risk to the community than employees in other occupations given the teacher's interactions with both older non-teacher public school employees and school-aged children who may live with elderly family members. A report released July 16, 2020 from the Kaiser Family Foundation found that 3.3 million adults 65 years or older lived in a household with school-age children.⁹⁴

A COVID-19 compensation presumption for teachers supports another policy objective: preserving the dwindling teacher workforce. In the midst of an economic downturn, the pandemic recession led to nearly 500,000 lost public education jobs by April 2020.⁹⁵ The National Education Association predicted that number could eventually hit close to 2 million.⁹⁶ To exacerbate the situation, due to COVID-19 concerns, teachers across the countries are deciding to

⁸⁸ Alexa Lardieri, *Teachers Are Growing More Concerned About COVID-19 Exposure, Poll Finds*, U.S. NEWS (Jul. 24, 2020), <https://www.usnews.com/news/education-news/articles/2020-07-24/poll-finds-majority-of-teachers-are-very-concerned-about-coronavirus-exposure-at-school>.

⁸⁹ See, e.g., *Minish v. Hanuman Fellowship*, 214 Cal. App. 437 (6th Dist. 2013).

⁹⁰ Michael Pope, *Senate Committee Says No to COVID-19 Workers Comp for Teachers, Firefighters & Police*, WVTF (Sept. 24, 2020), <https://www.wvtf.org/post/senate-committee-says-no-covid-19-workers-comp-teachers-firefighters-police#stream/0> (Senate Finance Committee rejected a bill meant to provide expanded coverage to teachers who have been risking their safety.).

⁹¹ *Operating Schools*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html> (last updated Jan. 8, 2021).

⁹² *Id.*

⁹³ *Guidance for Businesses & Employers – Plan, Prepare and Respond to Coronavirus Disease 2019*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> (last updated Jan. 4, 2021). Employers are encouraged to implement supportive policies and practices as part of a comprehensive approach to prevent and reduce transmission. *Id.*

⁹⁴ Nania, *supra* note 83.

⁹⁵ Elise Gould, *Public Education Job Losses in April Are Already Greater than in All of the Great Recession*, EPI.ORG (June 3, 2020), <https://www.epi.org/blog/public-education-job-losses-in-april-are-already-greater-than-in-all-of-the-great-recession/>.

⁹⁶ Amanda Litvinov, *NEA Analysis: Nearly 2 Million Education Jobs Could be Lost*, NEA NEWS (June 10, 2020), <https://www.nea.org/advocating-for-change/new-from-nea/nea-analysis-nearly-2-million-education-jobs-could-be-lost>.

retire or resign.⁹⁷ Hopefully, enacting statewide COVID-19 presumptions for teachers, in conjunction with other COVID-19 safety legislation and guidance, can stem the loss of teachers.

IV. Conclusion

Without teachers, we will not have schools where students can return. This Essay supports a presumption of compensability for COVID-19 claims from public school teachers. Teachers deserve this token of societal appreciation, and presumption laws facilitate policy objectives that typical workers' compensation systems cannot easily accommodate. This Essay explained inherent designs in workers' compensation systems that teachers must confront when filing COVID-19 claims. By alleviating teachers of some financial concerns attributed to COVID-19, a presumption of compensability can help limit schools from being a major nexus of COVID-19 infections as a result of sick teachers financially compelled to continue working. In the same vein, the improved financial security these presumption laws afford teachers with can help preserve a teacher workforce that has been shrinking during the pandemic. Accordingly, states and school districts across the United States should not hesitate to enact COVID-19 presumption of compensability laws for teachers. Such presumption laws will help heal our weakened education sector and hasten the recovery of our communities.

⁹⁷ Courtney Tanner, *79 Teachers Have Retired or Resigned in Salt Lake County Due to COVID-19 Concerns*, SALT LAKE TRIB. (Aug. 16, 2020), <https://www.sltrib.com/news/education/2020/08/16/teachers-have-retired-or/>.

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