Belmont Health Law Journal

Volume 6 *Symposium 2022: The Legal Role in Building Sustainable Public Health Systems* Article 9

2-18-2022

Accidental Injury or Occupational Disease? Where American Workers' Compensation Law Currently Stands and Where It Should Go in Preparing for Pandemics

Delaney Williams J.D. Candidate
Belmont University College of Law

ACCIDENTAL INJURY OR OCCUPATIONAL DISEASE? WHERE AMERICAN WORKERS' COMPENSATION LAW CURRENTLY STANDS AND WHERE IT SHOULD GO IN PREPARING FOR PANDEMICS

DELANEY WILLIAMS*

* Delaney Williams is 3L at Belmont University College of Law at the time of publishing with the intention to graduate in May of 2023. She submitted this Note as a 2L prior to being elected as the Editor-in-Chief of the Health Law Journal. Delaney would first like to thank Judge Brian Addington for igniting her interest in Workers' Compensation law and for his valuable insight on this novel issue in the field. She would also like to thank her advisor, Professor Lynn Zehrt, for her guidance and encouragement throughout the note writing process. Finally, Delaney would like to thank her parents and grandparents for their unwavering support through all of her academic endeavors - she could not have done it without you.

I. INTRODUCTION

It is May 2020, and Sara arrives at the hospital to begin her night shift as a respiratory therapist in a newly created unit. This unit is dedicated to treating patients with a highly contagious, but not yet well understood, virus that is wreaking havoc on the world. She suits up in the available personal protective equipment (PPE), including the same N-95 mask that she has been wearing all week. During her shift, many of the patients she intubates are coughing aggressively, and Sara can see the droplets accumulate on her face shield. She does not think much about this because the same thing has been happening for weeks, and it is her job to care for these patients. A few days later, Sara wakes up feeling miserable. Her chest hurts, her head hurts, and she can barely catch her breath between coughing fits. She immediately calls her supervisor and informs her that she suspects she has been infected with the disease they have now named COVID-19. Her supervisor encourages her to get tested.

Sara's test comes back positive for COVID-19, and her condition deteriorates rapidly. Soon, she requires the care she provided to others. She misses weeks of work, and ultimately, the physical and mental toll the virus took leaves her unable to return to her job as a respiratory therapist. Additionally, she has amassed significant medical debt. She knows she contracted COVID-19 at work because it was the only place that she was exposed to the virus. She did not go out to eat or to the grocery store during the time she was working on the COVID-19 unit, and there was no community transmission in her town during this time. Sara wonders if she can receive workers' compensation to help with her medical bills. Had she contracted a disease like Hepatitis B or HIV, her chances of receiving worker's compensation benefits for these medical conditions would be high. Similarly, had she aggravated her degenerative disk disease or required rotator cuff repair or knee arthroscopy after lifting a patient, her injuries would likely be covered by the worker's compensation statute. However, contracting COVID-19 in the workplace is uncharted territory for workers' compensation laws.

The threat of unknown infectious diseases causing pandemics is a threat well anticipated by microbiologists and epidemiologists globally.[1] For decades, governmental agencies like

[1] Tom Frieden, *Dr. Tom Frieden: Protecting the World from the Next Pandemic*, GE REPORTS: BREAKTHROUGH (Oct. 29, 2015), https://www.ge.com/news/reports/dr-tom-frieden-protecting-the-world-from-the-next-pandemic.

the World Health Organization[2] and the Centers for Disease Control and Prevention[3] have worked to prepare the healthcare field for outbreaks with unknown origins, with a primary focus on influenza spillover events. In 2020, while scientists and physicians worked to rein in the COVID-19 pandemic, it became clear that the law was not prepared for the drastic effects a pandemic would have on well-established legal concepts ranging from federalism to workers' compensation. This Note, using the COVID-19 pandemic as a guiding example, explains why proactively adopting workers' compensation statutes that provide for compensation caused by infectious diseases in any pandemic emergency is vital to a functioning workers' compensation statutory scheme.

Section I of this Note will introduce the basics of workers' compensation law, including the history of infectious diseases as compensable workplace injuries in the field of American workers' compensation law. Section II explains the fundamentals of both the occupational disease theory and accidental injury theory as a means for recovery when an infectious disease is contracted in the workplace. This section further explores how both theories, in their current state, fail to adequately protect employees in a pandemic emergency. Finally, Section III of this Note provides guidance on how state legislatures may proactively amend their workers' compensation schemes to better protect employees and why these proactive measures are vital to furthering the purpose of workers' compensation laws.

II. BACKGROUND OF WORKERS' COMPENSATION AND INFECTIOUS DISEASES

Originating out of the industrial revolution, workers' compensation has a long and complicated history in the United States.[4] States began enacting forms of workers' compensation statutes in the early twentieth century. From their inception, workers' compensation laws have varied from state to state.[5] At the heart of workers' compensation law is the idea that some injury or disease must "arise out of and in the course of employment."[6] This idea is broken down into two parts: the "arising out of" component and the "in the course of" component. The "arising out of" component generally relates to the causal connection between employment and injury; some aspect of the employee's job must

---

[2] TRAINING FOR EMERGENCIES, https://www.who.int/emergencies/training (Last visited Nov. 2, 2021).

[3] NATIONAL PANDEMIC STRATEGY, https://www.cdc.gov/flu/pandemic-resources/national-strategy/index.html (Last visited Nov. 2, 2021).

[4] 1 LARSON'S WORKERS' COMP. LAW § 2.07 (2021).

[5] *Id.*

[6] 1 LARSON'S WORKERS' COMP. LAW § 1.01 (2021).

have been the cause or exacerbation of the injury.[7] The "in the course of" component generally relates to the time and place of the injury; the injury must occur during the hours in which the employee usually works and in the location in which the employee usually works.[8] An employee must fulfill both requirements in order to receive compensation for their injuries.[9]

Early workers' compensation laws excluded occupational diseases from coverage, focusing instead on compensation for accidental injuries. Over time, compensation laws evolved and coverage for workplace diseases became more common.[10] States vary tremendously, however, in how they classify workplace diseases and compensate them. Some states view infectious disease as accidental in nature and, therefore, treat such diseases as compensable accidental injuries.[11] Other states include infectious diseases in occupational disease statutes that apply only in circumstances where a specific accident or exposure cannot be identified.[12]

In states that compensate employees for infectious diseases under an accidental injury theory, the infection must have been caused by some unexpected event or unusual exposure.[13] Accidental injuries in workers' compensation are generally characterized by their unexpected nature and the ability to trace the injury to a reasonably specific time, place, or cause.[14] Infections caused by microorganisms entering the skin through a scratch or by handling colonized materials can constitute unexpected events for which compensation is granted.[15] Unexpected and unforeseen exposures to known allergens may also be considered accidental.[16] Unusual exposures include contracting an infectious disease while caring for patients in a hospital ward dedicated specifically to that disease.[17] In these cases, the accidental nature of the injury stems from the

---

[7] Harold J. Fisher, *Injuries Arising Out of and in the Course of Employment*, 26 MO. L. REV. 278, 282 (1961).
[8] *Id*. at 283.
[9] *Id*. at 280.
[10] 1 LARSON'S WORKERS' COMP. LAW § 2.08 (2021).
[11] 4 LARSON'S WORKERS' COMP. LAW § 51.01 (2021).
[12] 4 LARSON'S WORKERS' COMP. LAW § 52.03[1] (2021).
[13] 4 LARSON'S WORKERS' COMP. LAW Chap. 51.syn (2021).
[14] 3 LARSON'S WORKERS' COMP. LAW § 42.02 (2021).
[15] 4 LARSON'S WORKERS' COMP. LAW § 51.02-03 (2021).
[16] Lorentzen v. Industrial Comm'n, 790 P.2d 765, 767-68 (Ariz. Ct. App. 1990) (a teacher's allergic reaction to a pesticide exposure was deemed to be accidental because, while the teacher knew of her allergy, she did not expect to be exposed to the substance in the course of her employment).
[17] 4 LARSON'S WORKERS' COMP. LAW § 51.05; *see* Gaites v. Soc'y for Prevention of Cruelty to Children, 251 A.D. 761, 762 (N.Y. App. Div. 1937); Industrial Com. v. Corwin Hospital, 250 P.2d 135, 136-7 (Colo. 1952).

unusualness of the exposure.[18] In some states, an injured worker can only be compensated for an infectious disease if that infection resulted from some traumatic injury.[19]

A majority of states have enacted occupational disease statutes within their workers' compensation schemes. These statutes provide compensation for diseases that cannot be traced to a specific exposure or traumatic accident.[20] Additionally, these statutes allow compensation for infectious diseases when the infection does not fulfill the statutory requirements of an accidental injury.[21] In contrast with the more concrete and definite elements of accidental injuries, occupational disease statutes generally require the disease to be "peculiar to the calling" and one in which the employee is exposed to "hazards greater than those involved in ordinary living."[22] Occupational disease statutes, by their nature, allow for a broader range of compensable injuries. For example, these statutes may reach musculoskeletal issues like herniated discs and carpal tunnel syndrome, as well as diseases that are infectious in nature like tuberculosis and hepatitis.[23] Because occupational diseases necessarily lack a specific exposure, proof of causation rests on circumstantial evidence.[24] This evidence includes both the extent of exposure, during employment and outside employment, and absence of the disease in the individual prior to the work-related exposure.[25]

During the first two years of the COVID-19 pandemic, states across the country implemented measures to account for the unique nature of COVID-19 in workers' compensation law.[26] Governors used executive orders to create a presumption of compensability for certain employees, namely healthcare workers and first responders in some states.[27] In other states, the legislatures amended workers' compensation laws in order to provide a presumption of

---

[18] *Id*.
[19] 4 LARSON'S WORKERS' COMP. LAW § 51.04; *see* Hoffman v. Consumers Water Co., 99 P.2d 919, 920-21 (Idaho 1940); Mills v. Columbia Gas Const. Co., 55 S.W.2d 394, 396 (Ky. Ct. App. 1932).
[20] 4 LARSON'S WORKERS' COMP. LAW § 52.03[1] (2021).
[21] *Id*.
[22] Grain Handling Co. v. Sweeney, 102 F.2d 464, 465 (2d Cir. 1939).
[23] 4 LARSON'S WORKERS' COMP. LAW § 52.04 (2021); *see* Ross v. Kollsman Instrument Corp., 24 A.D.2d 670, 671 (N.Y. App. Div. 1965); Kinney v. Tupperware Co., 792 P.2d 330, 333 (Idaho 1990); Quallenberg v. Union Health Center, 280 A.D. 1029 (N.Y. App. Div. 1952); Jeannette Dist. Mem'l Hosp. v. Workmen's Comp. Appeal Bd. (Mesich), 668 A.2d 249, 251 (Pa. Commw. Ct.1995).
[24] Booker v. Duke Med. Ctr., 256 S.E.2d 189, 200 (N.C. 1979).
[25] *Id*.
[26] 4 LARSON'S WORKERS' COMP. LAW § 51.06[2] (2021).
[27] *Id.*; California, Connecticut, Kentucky, Michigan, Missouri, New Hampshire, New Mexico and North Dakota created a presumption of compensability through executive order.

compensability.[28] In some other states, governors signed executive orders that indicated support for first responders but did not create a form of rebuttable presumption for them.[29] A majority of these executive orders and amendments contain sunset provisions establishing set dates of expiration.[30] These piecemeal amendments and executive orders indicate that most state governments want employees to recover for COVID-19 infections contracted in the workplace; however, as explained below, more detailed and permanent codification is required to fully provide for injured employees.

III. CURRENT STATUTORY SCHEMES ARE INSUFFICIENT TO CLASSIFY PANDEMIC DISEASES AS COMPENSABLE INJURIES.

There are two major categories of compensable injuries in American workers' compensation law: occupational diseases and accidental injuries. Currently, both categories are flawed in relation to pandemic diseases, leaving many employees without redress should they contract such a disease in the workplace.

A. Occupational disease statutes preclude pandemic diseases.

Multiple issues arise when attempting to classify an infectious disease as an occupational disease under the majority of states' occupational disease statutes. The disease must be both peculiar to the calling and it must not be an ordinary disease of life.[31] These causation requirements may fit an infectious disease like COVID-19 in certain contexts, but in most employment contexts these diseases would be excluded.

What constitutes a disease "peculiar to the calling" is not well defined statutorily and derives its meaning mostly from common law decisions. A disease may be peculiar to the calling when the risk of contracting or developing the disease is present to a greater degree than is found in employment and living conditions

---

[28] *Id*.; Alaska, Illinois, Minnesota, New Jersey, Utah, Vermont, Virginia, Wyoming, and the District of Columbia amended their workers' compensation schemes to include a presumption of compensability.

[29] *Id*.; Arkansas and Washington did not create a presumption of compensability.

[30] A.C.A § 11-9-601 extends coverage until May 1, 2023; Cal Lab Code § 3212.86 extended coverage until January 1, 2023; 820 ILCS 310/1 extended coverage to cases of COVID-19 contracted prior to June 30, 2021; Utah Code Ann. § 34A-3-203 extended coverage to cases of COVID-19 contracted prior to June 1, 2021; Va. Code Ann. § 65.2-402.1 extended coverage to cases of COVID-19 contracted prior to Dec. 31, 2021; Wyo. Stat. § 27-14-102 extended coverage until March 31, 2022.

[31] 4 LARSON'S WORKERS' COMP. LAW § 51.01 (2021).

in general.[32] This increased risk is not meant to be interpreted as the risk associated with all employees in a particular field, but rather for the specific individual seeking compensation.[33] This individual evaluation should primarily focus on the risk associated with the nature of the individual's employment and not some singular condition present at the individual's workplace.[34] Further, a disease that arises from an unavoidable risk of the employment itself or is inherent to the nature of the employment may be peculiar to the calling.[35] Interpreting the peculiar to the calling requirement too narrowly, however, may lead to the exclusion of diseases that, while present in the general population, are more commonly found in specific industries and workplaces.[36] For example, consider an employee who contracts a disease like Serum Hepatitis in the course of their employment via some action unique to their job, such as handling infected materials as a lab technician; an employer cannot exclude this employee from receiving compensation simply because the general population could also contract the disease.[37]

Diseases that are ordinary to everyday life are also defined by common law rather than by statute. The distinction between what is and is not an ordinary disease of life relies on the likelihood of contracting or developing the disease at work versus the likelihood of contracting or developing the disease anywhere outside of work.[38] It is important to note that under this framework, diseases that exist in the general population are not diseases of ordinary life when the manner in which the general public is exposed is less likely to cause disease than the manner in which an employee in a specific profession is exposed.[39] For example, even where Tuberculosis may be present in the general population, an employee working in close proximity to Tuberculosis patients for an extended period of time is more likely to contract Tuberculosis than a person who does not work in the same role and who is only incidentally exposed to Tuberculosis.[40] Because it is difficult to find specific factors that cause disease, whether it be repetitive motion or bacteria, that are not present in everyday life, employers cannot limit compensation to only those diseases that arise from the specific type of

---

[32] Aleutian Homes v. Fischer, 418 P.2d 769, 777 (Alaska 1966).
[33] Patterson v. Connor, 484 N.E.2d 240, 242 (Ohio Ct. App. 1984).
[34] In re Claim of Leventer, 257 A.D.2d 903, 904 (N.Y. App. Div. 1999).
[35] McCreary v. Industrial Comm'n, 835 P.2d 469, 475 (Ariz. Ct. App. 1992); *see also* Perron's Case, 88 N.E.2d 637, 639 (Mass. 1949) (inherent danger exists when the likelihood of contracting a disease is "so essentially characteristic of the employment.").
[36] Bowman v. Twin Falls Const. Co., Inc., 581 P.2d 770, 781 (Idaho 1978).
[37] *Booker*, 256 S.E.2d at 200.
[38] 4 LARSON'S WORKERS' COMP. LAW § 52.03[1] (2021).
[39] Mills v. Detroit Tuberculosis Sanitarium, 35 N.W.2d 239, 241 (Mich. 1948).
[40] *Id*.

employment.[41] Ultimately, where an employee is exposed to the disease causing factors in a greater degree and in a different manner than the general public, employees can receive compensation for otherwise ordinary diseases of life.[42]

This begs the question of whether infectious diseases qualify as occupational diseases. There are no simple answers to this question even for existing diseases such as Hepatitis and Tuberculosis. Specifically, courts in states with occupational disease statutes have taken many different positions relating to three common infectious diseases: Hepatitis B, Hepatitis C, and Tuberculosis. For instance, Pennsylvania's workers' compensation scheme creates a rebuttable presumption that a disease arose out of and in the course of employment if the disease is a hazard in certain occupations, including infectious Hepatitis for healthcare workers.[43] By comparison, the Georgia Court of Appeals has held that Hepatitis B is an ordinary disease of life that an employee, even in the healthcare setting, has the same chance of contracting outside of work.[44] In Virginia, for Tuberculosis to be considered an occupational disease, it must be contracted while working in a specialized Tuberculosis unit. Otherwise, Tuberculosis is considered an ordinary disease of life even where an employee can show a potential increased risk for contracting the disease in their employment.[45] Tuberculosis is an ordinary disease of life in Florida; for an employee to be compensated for contracting Tuberculosis, there must be concrete evidence that there is some increased risk or opportunity for infection in the employee's occupational setting.[46] While this is not an exhaustive list of state views on infectious diseases as occupational diseases, these examples demonstrate that COVID-19, or any other airborne disease that has pandemic-level spread, does not fit squarely within the existing occupational disease statutes.

While scientists have not yet labeled COVID-19 as endemic, it is hard to see COVID-19 as anything other than an ordinary disease of life. Indeed, many leading scientists do believe that the disease will become endemic across the globe, similar to the

---

[41] 4 LARSON'S WORKERS' COMP. LAW § 52.03[3][b] (2021); *see* Louisville v. Laun, 580 S.W.2d 232, 234 (Ky. Ct. App. 1979); Roettinger v. Great Atl. & Pac. Tea Co., 17 A.d.2d 76, 80-1 (N.Y. App. Div. 1962).

[42] Adams v. Hygrade Food Prods. Corp., 82 N.W.2d 871, 872 (Mich. 1957).

[43] *Jeannette Dist. Mem'l Hosp.*, 668 A.2d at 251 (Pennsylvania workers' compensation law lists enumerated occupational diseases for which a rebuttable presumption exists that the injury arose out of and in the course of employment); *see also* 77 P.S. § 27.1.

[44] Fulton-Dekalb Hosp. Auth. v. Bishop, 365 S.E.2d 549, 550 (Ga. Ct. App. 1988).

[45] Van Geuder v. Commonwealth, 65 S.E.2d 565 (Va. 1951); Lindenfeld v. City of Richmond Sheriff's Off., 492 S.E.2d 506, 510 (Va. Ct. App. 1997).

[46] Fla. State Hosp. v. Potter, 391 So. 2d 322, 323 (Fla. Dist. Ct. App. 1980).

common cold and flu.[47] In the United States, community spread of the disease is high.[48] Community spread usually relates to the amount of infected persons in the community who cannot identify the source of their infection.[49] It is highly likely that, in most occupations, the chance of contracting COVID-19 at work is the same or less than in the community at large, especially when factoring in social distancing, mask wearing, and remote work opportunities. It is also hard to see how COVID-19 would be considered "peculiar to the calling" in most occupations. For employees outside the healthcare sector, COVID-19 is likely neither an unavoidable risk of employment nor a risk inherent to employment. This precludes teachers, factory workers, and "essential" employees like grocery store clerks and restaurant waiters and waitresses from recovering for COVID-19 infections contracted at work. While state governments have implemented changes to their workers' compensation schemes that may allow for compensation in these occupations, these amendments relate solely to COVID-19, and most amendments expired during 2021.

B. Accidental injury statutes currently preclude pandemic diseases.

Pandemic-causing infectious diseases are not well encompassed by accidental injury statutes. Most accidental injury statutes require an infectious disease to arise out of an unexpected event or unusual exposure.[50] In order to qualify as an accident, the disease must have some factor of unexpectedness and must be traceable to some definite time, place, and cause within reasonable limits.[51] Like occupational disease statutes, pandemic diseases like COVID-19 may fall under these statutes in specific contexts.

Unexpected events were the starting point for infectious diseases as accidental injuries, and unexpected events can include

---

[47] Kelly Servick, *Is it Time to Live With COVID-19? Some Scientists Warn of Endemic Delusion*, SCIENCE (Feb 15, 2022); Nicky Phillips, *The Coronavirus is Here to Stay – Here's What That Means*, NATURE (Feb. 16, 2021) https://www.nature.com/articles/d41586-021-00396-2; Ingrid Torjesen, *Covid-19 Will Become Endemic but With Decreased Potency Over Time, Scientists Believe*, BMJ (Feb. 18, 2021), https://www.bmj.com/content/372/bmj.n494; Jesse T. Jacob et al., *Risk Factors Associated with SARS-CoV-2 Seropositivity Among U.S. Healthcare Personnel*, 4 JAMA NETW. OPEN, 7 (March 10, 2021).

[48] COVID DATA TRACKER, https://covid.cdc.gov/covid-data-tracker/#datatracker-home (Last visited Nov. 2, 2021).

[49] COVID-19 FREQUENTLY ASKED QUESTIONS, https://www.cdc.gov/coronavirus/2019-ncov/faq.html#:~:text=Community%20spread%20means%20people%20have,health%20department's%20website.%E2%80%8B (Last visited Nov. 2, 2021).

[50] 4 LARSON'S WORKERS' COMP. LAW Chap. 51.syn (2021).

[51] 4 LARSON'S WORKERS' COMP. LAW § 51.01 (2021).

entry of pathogens into the body by either abnormal or normal methods.[52] Infectious diseases that are caused by abnormal entry of pathogens tend to arise when pathogens or poisons enter the body due to some accident that occurred during employment.[53] Allowing compensation for infectious diseases caused by an unexpected event seems to stem from the idea that the unexpected event is the accident, not the contraction of a disease. More clearly stated, a scrape,[54] an insect bite,[55] or an exposure to bodily fluids[56] qualifies as the accident, and the disabling infection contracted from it is the injury.

Infectious diseases caused by the normal entry of pathogens are diseases that arise out contaminated food or water or otherwise inadequately kept employment conditions.[57] Here, unlike abnormal entry of pathogens, the infection itself is the accident.[58] Contracting a disease after consuming contaminated food and beverages is considered an accident in these cases because of the truly unexpected nature of the infection, and no specific instance of violence or trauma to the body is required.[59] A fundamental difference in cases related to normal entry of pathogens is the added element of the employer's failure to use due care in maintaining a clean and safe working environment.[60] Finally, in cases of normal entry of pathogens causing infectious diseases, an important consideration is state statutes that limit compensation to infections

---

[52] 4 LARSON'S WORKERS' COMP. LAW § 51.02-03 (2021).

[53] Connelly v. Hunt Furniture Co., 147 N.E. 366, 367 (N.Y. 1925).

[54] In re Worker's Comp. Claim of Vinson, 473 P.3d 299, 311 (Wyo. 2020) (noting a situation in which an employee scraped his hand on a work locker and later developed a Streptococcus A infection, the scrape was the accident, and the infection was a compensable subsequent condition).

[55] Oalmann v. Brock & Blevins Co., 428 So. 2d 892, 896 (La. Ct. App. 1983) (noting a situation in which an employee was bitten by fleas and later developed Typhoid Fever, the flea bites were considered the accident and the infection was considered to be causally related to those bites).

[56] Ky. Emplrs. Safety Ass'n v. Lexington Diagnostic Ctr., 291 S.W.3d 683, 685 (Ky. 2009) (noting a situation in which an employee was splashed by another's bodily fluids, the splash was considered an accident and any subsequent preventative measures and treatment were considered causally related to the splash).

[57] 4 LARSON'S WORKERS' COMP. LAW § 51.03 (2021); *see* Vennen v. New Dells Lumber Co., 154 N.W. 640, 642 (Wis. 1915).

[58] Victory Sparkler & Specialty Co. v. Francks, 128 A. 635, 639 (Md. Ct. App. 1925) (while this case is not an infectious disease related ruling, the general rule that some unexpected foreign substance entered the body through normal employment activities applies in the same manner to infectious disease cases); *see* Union Mining Co. v. Blank, 28 A.2d 568, 576 (Md. Ct. App. 1942).

[59] *Union Mining Co.*, 28 A.2d at 576.

[60] 4 LARSON'S WORKERS' COMP. LAW § 51.03 (2021); *see also Victory Sparkler & Specialty Co.*, 128 A. at 640.

and other injuries that result directly from violence or trauma to the body.[61]

Unusual exposures to pathogens differ from unexpected events in that the exposure to the pathogen is the accident.[62] These exposures are unusual precisely because they arise from circumstances that are outside of the general expectation of the public. Thus, these exposures are unexpected. These cases encapsulate the field of infectious diseases caused by working directly with sick patients in specific units in the hospital,[63] but also reach classrooms[64] and daycare facilities.[65] It is more difficult to identify the time, place, and cause of an unexpected exposure in cases of unexpected events. Unusual exposure cases usually stem from a collection of exposures over a short period of time, and the traceability element requires only that the time, place, and cause be determined within reasonable limits.[66] As such, if a disease can be reasonably traced to a time and place where the cause existed, an employee is likely to recover as long as there is no evidence that the employee was exposed to the same disease outside of work.

The issue is whether infectious diseases qualify as accidental injuries. The answer, while not certain, is that infectious diseases are more likely to qualify as accidental injuries than they are as occupational diseases. There are a wider variety of cases where employees have received compensation for injuries and disabilities caused by infectious diseases when classified as accidental injuries as opposed to occupational diseases. For instance, employees have been compensated for diseases caused by infectious agents such as *Neisseria meningitides*,[67] Poliovirus,[68] *Histoplasma capsualatum*,[69] *Salmonella typhi*,[70] and *Bacillus anthracis*.[71] Some of these cases were traced to a specific exposure, while others simply required

---

[61] Buchanan v. Maryland Casualty Co., 288 S.W. 116, 118 (Tex. 1926); *Hoffman*, 99 P.2d at 920-21; Loudon v. H. W. Shaull & Sons, 13 A.2d 129, 131 (Pa. Super. Ct. 1940); *Mills*, 55 S.W.2d at 396.

[62] 4 LARSON'S WORKERS' COMP. LAW § 51.05

[63] *Industrial Com.*, 250 P.2d at 136-7 (noting a nurse's polio infection after working in a polio specific ward at the hospital was found to be accidental).

[64] McDonough v. Whitney Point Cent. Sch., 222 N.Y.S.2d 678, 679-80 (N.Y. App. Div. 1961) (noting that a teacher's mumps infection during an outbreak at her school found to be accidental); *see also Lorentzen*, 790 P.2d at 767-68.

[65] Portman v. Camelot Care Ctrs., 2000 Tenn. LEXIS 96 at *4 (Tenn. Special Workers' Comp. App. Panel Mar. 2, 2000) (noting that a daycare worker's herpes infection after being spit at was found to be accidental).

[66] 3 LARSON'S WORKERS' COMP. LAW § 42.02 (2021).

[67] Omron Elecs v. Ill. Workers' Comp. Comm'n, 21 N.E.3d 1245, 1255 (Ill. App. Ct. 2014); New Castle v. Workmen's Comp. Appeal Bd. (Sallie), 546 A.2d 132, 137 (Pa. Commw. Ct. 1988).

[68] *Industrial Com.*, 250 P.2d at 138.

[69] City of Nichols Hills v. Hill, 534 P.2d 931, 955 (Okla. 1975).

[70] Scott & Howe Lumber Co. v. Indus. Com., 199 N.W. 159 (Wis. 1924).

[71] McCauley v. Imperial Woolen Co., 104 A. 617, 622-23 (Pa. 1918).

testimony that the disease was contracted through employment. Additionally, some courts have found that an infectious disease that does not satisfy the occupational disease elements may be considered an accidental injury for which the employee could recover.[72] Again, while every state does not view infectious diseases as accidental injuries, it is much easier to see how COVID-19 or other emerging infectious diseases would fit under these requirements.

Not every person who contracted COVID-19 knew with certainty where they were exposed.[73] However, accidental injury statutes do not require complete certainty so long as an exposure can be connected with employment within reasonable limits.[74] For most employees that worked full time in person during the COVID-19 pandemic, their place of employment was most likely the place of exposure.[75] This includes healthcare workers[76] and first responders,[77] but may also include grocery store workers,[78]

---

[72] Baldwin v. Jensen-Salsbery Laboratories, 708 P.2d 556, 558 (Kan. Ct. App. 1985) (noting that an employee filed workers' compensation occupational disease claim for injuries caused by brucellosis infection, court found the infection to be accidental injury); Mid-South Packers, Inc. v. Hanson, 178 So. 2d 689, 691 (Miss. 1965) (employee's brucellosis infection held to be accidental injury as opposed to occupational disease); Wheaton v. City of Tulsa Fire Dep't, 970 P.2d 194, 196 (Okla. Civ. App. 1998) (employee's Hepatitis C was not an occupational disease as defined by state statute, case was remanded for determination of whether the infection could be considered an accidental injury).

[73] *Supra* note 49.

[74] 4 LARSON'S WORKERS' COMP. LAW § 51.01 (2021).

[75] Jay Barmann, *How Many Essential Workers Died in California During the Pandemic?* SFIST, August 6, 2021, https://sfist.com/2021/08/06/how-many-essential-workers-died-in-california-during-the-pandemic/.

[76] Soumya Karlamangla, *A Nurse Without N95 Mask Raced in to Treat a Code Blue Patient. She Died 14 Days Later*, LOS ANGELES TIMES, May 10, 2020, https://www.latimes.com/california/story/2020-05-10/nurse-death-n95-covid-19-patients-coronavirus-hollywood-presbyterian.

[77] Jace Harper and Dane Kelly, *DeWitt Township First Responder Dies of COVID Caught on the Job*, NEWS 10 WILX, Dec. 28, 2021, https://www.wilx.com/2021/12/29/dewitt-township-first-responder-dies-covid-caught-job/.

[78] Leticia Miranda, *Grocery Workers Died Feeding the Nation. Now, Their Families are Left to Pick Up the Pieces*, NBC NEWS, April 12, 2021, https://www.nbcnews.com/business/business-news/grocery-workers-died-feeding-nation-now-their-families-are-left-n1263693.

restaurant workers,[79] factory workers,[80] and teachers.[81] As stated earlier in this note, employees are likely unable to recover compensation under occupational disease statutory schemes. Employees working in spaces where there is limited social distancing, poor ventilation, minimal personal protective equipment, and high levels of exposure to the public are subject to exposures of the disease in an unexpected or unusual manner. An unmasked infected customer having a coughing fit or screaming at an employee may be considered an accident which caused the disease.[82] In the same way, a nurse or respiratory therapist being splattered with saliva while caring for an infected patient could be said to have experienced an accidental injury should the nurse or respiratory therapist become infected with COVID-19. However, these specific instances of causation are not explicitly required so long as there is a "causal connection between the conditions under which the work is required to be performed and the resulting injury" and that the connection is "apparent to the rational mind."[83]

C. Ultimately, accidental injury statutes are the best way to classify pandemic diseases.

Accidental disease statutes provide employees with a broader range of protections for infectious diseases like COVID-19. Employees need only show that contracting the disease was unexpected and that there is a reasonable traceability between employment and contracting the disease. Employees should, however, be cautious of statutes that require infectious diseases to be directly caused by a traumatic or violent injury.

On the other hand, occupational disease statutes make recovering for workplace infections with COVID-19 difficult for employees that work in occupations that are not directly associated with an increased risk of contracting COVID-19. Additionally, in

---

[79] Naomi Knowles, *A Beloit Restaurant Worker Died in a Covid-19 Outbreak. Throughout the Pandemic, Worker Protections Often Left Behind*, NEWS 3 WISC-TV, Feb. 8, 2021, https://www.channel3000.com/unprotected-a-news-3-investigation-sunday-at-10/.

[80] Josh Funk, *Report: At Least 59,000 Meat Workers Caught COVID, 269 Died*, ASSOCIATED PRESS, Oct. 27, 2021, https://apnews.com/article/coronavirus-pandemic-business-health-pandemics-congress-72e766be17083ad819ea3ac26cb7fb76.

[81] Mye Owens, *More Than 20 Tennessee School Staff Members Have Died From COVID-19*, WKRN NEWS 2, Oct. 13, 2021, https://www.wkrn.com/news/more-than-20-tennessee-school-staff-members-have-died-from-covid-19/.

[82] MacRae v. Unemployment Comp. Com., 9 S.E.2d 595, 600(N.C. 1940) (an employee's award for compensation for Tuberculosis was affirmed on the grounds that being exposed to Tuberculosis by a coughing coworker constitutes an accidental injury).

[83] *Industrial Com.*, 250 P.2d at 137.

some states, it may be difficult to recover unless the employee works in a unit dedicated solely to caring for COVID-19 patients.

In sum, emerging pandemic diseases do not clearly fall under occupational disease statutes and may be covered by accidental injury statutes. With this in mind, state lawmakers should better prepare for future pandemics by explicitly providing compensation for employees that contract these diseases under the accidental injury theory.

IV. PREPARING FOR FUTURE PANDEMICS REQUIRES CODIFYING COMPENSATION UNDER ACCIDENTAL INJURY STATUTES AND CONSIDERING OTHER FACTORS THAT MAY MAKE COMPENSATION FOR THESE DISEASES DIFFICULT.

The lack of consistent nationwide guidance on how to classify and compensate workers injured by COVID-19 indicates that drafters of workers' compensation statutes did not anticipate the effect a pandemic would have on the workforce. While there is no fault to be associated with this unforeseen unpreparedness, now is the time to prepare for a future where both employees and employers know their rights. As they stand today, neither traditional occupational disease statutes nor traditional accidental injury statutes completely encompass a disease like COVID-19 for all employees.

A. Emerging infectious diseases and pandemic-causing diseases should be classified as accidental injuries for workers' compensation purposes.

When viewing infectious diseases from an epidemiological standpoint, the connection between infectious diseases and accidental injuries is clear. Boiled down to the simplest terms, infectious disease epidemiology is identifying a specific source (a time, place, and cause, *per se*) of an exposure to an infectious disease (usually, an exposure that is unexpected or unusual to the sick individual).[84] Just as employees may not be able to identify the specific date and method of their exposure, epidemiologists cannot always identify exactly how every infected individual contracted their disease. That fact does not prevent epidemiologists from identifying potential sources of disease when the source can be found within reasonable limits. Thus, it should not preclude employees from recovering when they are exposed to a disease that can reasonably be traced to their employment.

[84] U.S. DEP'T OF HEALTH AND HUM. SRVS., PRINCIPLES OF EPIDEMIOLOGY IN PUBLIC HEALTH PRACTICE (3d ed. 2012).

Bloodborne infectious diseases like Hepatitis and HIV, while sometimes compensable as accidental injuries, are more often considered occupational diseases.[85] The common cold and the flu, which are caused by airborne pathogens similar to the one that causes COVID-19, have traditionally been viewed as non-compensable injuries,[86] whereas Tuberculosis, which is caused by a different airborne pathogen, is often considered compensable either as an accidental injury or occupational disease.[87] While there is limited scholarship specifically related to classifying COVID-19, most articles take the view that these infections should be classified as occupational diseases and investigate how that classification applies in a single state.[88] These discussions point out that classifying COVID-19 as an occupational disease is not without its issues and spend little to no time reviewing accidental injury coverage in depth.[89] Classifying these infections as accidental injuries provides an opportunity for more types of employees to recover for the severe injuries that COVID-19, or other diseases like it, may cause.

For example, if Sara, the respiratory therapist from the introductory story, lived in a state that compensated infectious diseases under a theory of occupational disease, she would likely receive compensation. In any pandemic emergency, it is likely that her role as a respiratory therapist in a specific ward of the hospital dedicated to treating patients suffering from the disease in an early phase of the pandemic would qualify her illness as a disease that was

---

[85] Nikita Williams, *HIV as an Occupational Disease: Expanding Traditional Workers' Compensation Coverage*, 59 VAND. L. REV. 937, 943-948 (2006).

[86] Dealers Transport Co. v. Thompson, 593 S.W.2d 84, 91 (Ky. Ct. App. 1979) (noting here that a common cold alone would not be compensable, but the employee may have a better chance at recovering workers' compensation were the cold exacerbated by employment to the point of severe injury or death).

[87] *MacRae*, 9 S.E.2d at 600 (treating exposure to tuberculosis as an accident); *Lindenfeld*, 492 S.E.2d at 510 (treating Tuberculosis as an occupational disease).

[88] Kate E. Britt, *Libraries and Legal Research: Workers' Comp and Contagious Disease: History and Future*, 100 MI BAR JNL. 42, 43-44 (2021), investigates COVID-19 as a compensable disease in Michigan and focuses solely on occupational diseases; Stephen D. Palmer, *The Compensability of COVID-19 in Workers' Compensation Cases – A General Analytical Roadmap*, 44 AM. J. TRIAL ADVOC. 367, 371-379 (2021), investigates COVID-19 as a compensable disease in Alabama and points out that COVID-19 may not be an accidental injury under Alabama law; Glenn W. Garcia, *A Novel Virus Brings Novel Issue in the Area of Workers' Compensation: Addressing COVID-19 Injury Claims Faced by Workers on the Frontlines*, 7 ST. THOMAS J. COMPLEX LITIG. 46, 50-58 (2021), focuses on Florida's presumption of compensability and how it affects COVID-19 as an occupational disease; Creola Johnson, *Crushed by COVID-19 Medical Bills, Coronavirus Victims Need Debt Relief Under the Bankruptcy Code and Workers' Compensation Laws*, 125 PENN. ST. L. REV. 453, 490-493 (2021), promotes changes to workers' compensation laws to include COVID-19 as an occupational disease to help mitigate costs incurred while hospitalized with the disease.

[89] *Id.*

peculiar to the calling. Sara's job put her at an inherent risk of contracting the disease. Further, in early stages of a pandemic before community transmission became widespread, the disease would likely not be considered a disease of ordinary life. Sara's risk of contracting the disease at work is higher than it would be in the general public. If Sara contracted the disease later in the pandemic when community transmission peaked, Sara's risk is likely still greater in her role working directly with patients infected with disease than outside of work.

In contrast, compare Sara's story to that of an employee in a meat packing factory, a grocery store, or even a school. These employees work in roles where contracting an airborne infectious disease is not inherent to their employment. They do not work in roles where they are directly and purposefully exposed to infected individuals, and it cannot be said that their jobs specifically create a risk of disease that is more than the risk of living in general. Further, even in the early days of the pandemic, their roles did not expose them to the disease in a manner different than the general public, which would make proving that the disease was not a disease of ordinary life difficult.

In a post-COVID-19 pandemic world, proving that COVID-19 is not a disease of ordinary life for these employees is almost impossible; the chances of contracting COVID-19 at work is likely the same as it would be outside of work. [90] As such, occupational disease statutes do not help those employees who work in roles that are not associated with the direct care of COVID-19 patients.

Industrial Commission v. Corwin Hospital is a useful parallel in evaluating pandemic diseases as accidental injuries. In this case, a nurse working in a polio ward during an outbreak contracted polio and the court concluded that the nurse's disease was an accident. In coming to the conclusion that the nurse's disease was an accident, the court considered factors including the nurse's role working exclusively in a polio ward, extreme working conditions that included fatigue and overworking, and that the personal protective equipment may not be satisfactory to protect from the disease.[91] The court in this case emphasized that these factors increase the likelihood of contracting polio. Further, the court determined that contracting polio in these conditions, specifically the fatigue felt by the nurse and the inadequacy of available PPE, led to the type of unexpected result that indicates an accidental injury. Those factors, utilized by the Supreme Court of Colorado in 1952, are relevant nationwide, now and in the future, for courts reviewing cases of employees contracting emerging infectious diseases at work.

---

[90] Jacob et al., *supra* note 47, at 11.
[91] *Industrial Com.*, 250 P.2d at 138.

When applying accidental disease statutes to Sara's story and those of the factory and grocery store workers and teachers, they all are likely to receive compensation. The only required elements are for the exposure to have some level of unexpectedness and that the exposure be reasonably traceable to some time, place, and cause. For Sara, her exposure is clearly unusual as most people do not regularly experience such close contact with individuals infected with deadly diseases. Additionally, her exposure can be reasonably traced to her employment because she is working in a role that exclusively deals with infected patients.

When evaluating the claims for workers' compensation made by essential workers using the factors from *Corwin*, it becomes clear that contracting a pandemic-causing emerging infectious disease at work is an accidental injury. Contracting these types of diseases at their place of employment is unexpected; there is no expectation that they will contract the disease as part of their job. However, the traceability of the exposure is a trickier element to meet. But again, as the court in *Corwin* provided, there need only be a causal connection between the work environment and the resulting injury.[92] In a factory, where employees are working in close contact with coworkers for long hours and where PPE may not be sufficient, the causal connection is apparent to the rational mind. Additionally, for the grocery store worker who is working in a space where he or she is not adequately protected against the general public and are subject to outbursts by customers who may or may not be wearing PPE, the causal connection is apparent to the rational mind. Finally, for the teacher who is working with children who struggle with personal space and mask-wearing in a small classroom with little ventilation, the causal connection is apparent to the rational mind. Additionally, fatigue is likely high in all of these occupations, as more employees are required to work longer hours to meet the demand caused by a lack of adequate labor. It is important to emphasize that all of the different factors applied to the different employees may be present or not present for each or all of those employees, and each case must be evaluated on the merits.

After reviewing a variety of hypothetical situations involving pandemic diseases under both disease theories of workers' compensation law, it is clear that utilizing an accidental injury theory of disease during pandemics is vital to furthering the purpose of workers' compensation laws: to provide for employees when they are injured while working.[93] Requiring most employees to meet an almost impossible standard during a time of uncertainty regarding the disease and its spread goes directly against this purpose. States that have already amended their workers' compensation legislation

---

[92] *Id.*

[93] 1 LARSON'S WORKERS' COMP. LAW § 1.03[2] (2021).

to include cases of COVID-19 should be commended. However, these amendments do not go far enough to protect workers.

The amendments to workers' compensation schemes vary widely from state to state. Some create a rebuttable presumption of compensability for all or most employees.[94] Others create a rebuttable presumption for healthcare workers and first responders.[95] There are amendments that only create a presumption for first responders.[96] There are amendments that create a presumption for healthcare workers, first responders, and essential workers.[97] There are some amendments that create no presumption of compensability.[98] Additionally, all of the amendments provide specific dates at which the coverage ends. Although Florida has not made any amendments, there is some indication that teachers may be able to recover after contracting COVID-19 in the workplace.[99] The variety in these amendments indicate that building piecemeal legislation to address specific needs in workers' compensation schemes is not the best way to address emerging infectious diseases because the laws will not provide for employees in accordance with the purpose of workers' compensation law. As the amendments reach their expiration dates, lawmakers must meet and decide to extend the coverage of the laws both in scope and in time. When state governments disagree on the cause and severity of a pandemic-causing disease, coming to agreement on terms for the scope and length of compensation may be difficult. Ultimately, lawmakers should make specific provisions for infectious diseases in their accidental injury statutes that will apply prospectively in times of pandemic.

These laws should apply to all workers, regardless of "essential" status. This will prevent lawmakers from showing favor to certain occupations, such as: allowing a grocery store clerk and a teacher, who contract the disease in a similar manner to recover despite only one being considered an essential worker under most current amendments. These laws should also not provide for any specific method of transmission. Where pandemics of unknown origin are likely, there is no guarantee that the method of

---

[94] 4 LARSON'S WORKERS' COMP. LAW § 51.06[2] (2021); California and Wyoming created rebuttable presumptions for nearly all employees.

[95] *Id*.; Alaska and Virginia created rebuttable presumptions for health care workers and first responders.

[96] *Id*.; Missouri, New Hampshire and Wisconsin protect only public facing first responders.

[97] *Id*.; Kentucky protects grocery clerks but not pharmacy clerks; Illinois; New Jersey.

[98] *Id*.; Arkansas and Washington have no presumption of compensability for COVID-19 related claims.

[99] Fla. Educ. Ass'n v. Desantis, 2020 Fla. Cir. LEXIS 2693 at *20 (2d. Cir. Fl. 2020).

transmission can be predicted. Restricting these laws to a specific method, whether it be airborne, fecal-oral, vector borne, etc., prevents these provisions from being applicable to a range of potential emerging infectious diseases. Finally, these laws should not require that the disease arise from some violence or trauma to the body. While the states that have this requirement are in the minority,[100] this requirement in relation to pandemic preparedness precludes the ability to recover from contracting a disease that was unquestionably related to employment.

The most pressing concern relating to enacting these types of provisions is the most fundamental judicial concern: will the floodgates open to unending legislation relating to everyday infections like the common cold or seasonal flu? This concern is understandable, but misplaced, and does not stand under either the occupational disease or accidental injury theory.

This concern has been addressed in multiple cases across the country.[101] First, common infectious diseases like the common cold or flu are undoubtedly diseases of ordinary life and are peculiar to no calling. These diseases are so prevalent in society that the risk of contracting them at work are equal to the risk of contracting them outside of work. Next, and most pertinent for the purposes of this Note, diseases like the common cold and flu are not likely to meet the requirements of accidental injury. The prevalence of these diseases, coupled with the understanding that they are a part of life, takes away the unexpectedness of their development. Further, the inability to accurately test for the common cold specifically makes it difficult to trace to employment because it cannot be diagnosed with certainty. Regardless of their classification, these diseases, while severe in a small number of cases, are not likely to cause significant time off from work or costly medical bills and life changing disability.

B. Classifying pandemic diseases as accidental injuries provides a solution to additional issues in preparing workers' compensation schemes for pandemics.

There are two significant areas of concern when considering coverage for pandemic diseases: the unforeseen and unknown long-term impacts these diseases may have on employees and the exclusivity associated with workers' compensation claims.

---

[100] 4 LARSON'S WORKERS' COMP. LAW § 51.04.

[101] *Loudon*, 13 A.2d at 114–15; In *New Castle*, 546 A.2d at 137, the court refused to consider under circumstances that the disease at issue was rare; View taken by the Dissent in *MacRae*, 9 S.E.2d at 605.

i. Post-COVID Conditions

The injuries caused by pandemic diseases like COVID-19 vary from individual to individual, and for some employees, the only impact on work would be the days taken off to quarantine from a known exposure or to recover from a mild case at home. For other employees, an infection may result in long stints in the hospital, periods of time on a ventilator, and even death. It is highly likely that where these diseases would be considered a compensable injury, there would be no issue with granting lost wages, medical costs, or death benefits for the immediate aftermath of an infection. Where the diseases cause long-term effects; however, is where the issue arises.

In the United States, there are generally two types of benefits covered by workers' compensation laws: wage loss and medical expenses.[102] These benefits are paid to disabled employees as defined by state workers' compensation statutes, but those disability definitions often vary from state to state and usually require some disruption in the ability to work. For example, in states like Idaho[103] and New Mexico,[104] for an injury or disease to be a disability, the employee must be totally incapacitated and thus no longer able to perform the job at which they were injured. In Oregon, an infectious disease simply must interfere with the employee's ability to work to be considered a disability.[105] These disability requirements imply that someone suffering from long-term effects of a pandemic disease must prove that the symptoms they experience have a significant effect on their work, and not just in their everyday life. The Department of Health and Human Services (HHS) recently classified long-term effects of COVID-19 as a disability under certain provisions of the Americans with Disabilities Act (ADA),[106] and this provides important context for the severity and nature of these long-term effects.[107] This decision provides that where long-term symptoms impose limitations on major life activities, including work, an individual can be considered disabled.[108] While the ADA is not the reference for which injuries or diseases constitute

---

[102] 6 LARSON'S WORKERS' COMP. LAW § 80.02 (2021).
[103] Jones v. Morrison-Knudsen Co., 567 P.2d 3, 7 (Idaho 1977).
[104] Herrera v. Fluor Utah, 550 P.2d 144, 146-47 (N.M. Ct. App. 1976).
[105] Beaudry v. Winchester Plywood Co., 469 P.2d 25, 29 (Or. 1970).
[106] 42 U.S.C. § 12102.
[107] *Guidance of "Long COVID" as a Disability Under the ADA, Section 504, and Section 1557*, DEP'T OF HEALTH AND HUM. SRVS., https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/guidance-long-covid-disability/index.html#footnote10_0ac8mdc (last visited Nov. 2, 2021).
[108] *Id*.

compensable workplace injuries, the importance of long-term effects of a disease like COVID-19 being categorized as a legal disability cannot be overstated.

Additionally, the long-term effects of a pandemic disease may not be clearly diagnosable for workers' compensation purposes. For example, some individuals who have contracted COVID-19 experience symptoms related to the disease for weeks or months following infection.[109] These impacts are generally referred to as "post-COVID conditions" or more colloquially as "long-COVID." These symptoms vary in each patient and can range in severity from things like a cough or headache to heart palpitations and organ system inflammation.[110] Post-COVID conditions further muddy the waters because not all individuals that contract COVID-19 experience these long-term effects, and these long term effects may or may not have significant impacts on an individual's ability to work.[111] Drafters of workers' compensation laws must consider whether long-COVID is compensable as a separate disease from COVID-19 or compensable due to its connection with the initial infection.

Should post-COVID conditions be categorized as a separate compensable injury, employees may have difficulty recovering in states that would classify COVID-19 as an occupational disease. Employees in these states may be able to recover for costs associated with their initial infection if that infection is found to satisfy the occupational disease elements, but where the long-term effects are considered a separate disease, the evaluation may not even reach the elements. In some states, if an employee cannot be diagnosed with a specific disease, they are unlikely to recover. [112] Some states take an alternative approach, however, and allow recovery even where there is no identifiable disease.[113] Thus, the issue arises of whether post-COVID conditions are a diagnosable disease. Employees suffering from post-COVID conditions may fare better in states that view COVID-19 as an accidental injury. Even if post-COVID conditions were viewed as a separate injury, employees would likely still be able to satisfy the unexpectedness and traceability requirements.

Where post-COVID conditions are considered part of the initial COVID-19 infection, employees have a better chance of

---

[109] *Post-COVID Conditions*, CTRS. FOR DISEASE CONTROL, https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects/index.html (last visited Nov. 2, 2021).

[110] *Id*.

[111] *Id*.

[112] Peer v. MFA Milling Co., 578 S.W.2d 291, 296 (Mo. Ct. App. 1979) (noting that where a disease is not identified, there can be no recovery).

[113] Armstrong v. City of Wichita, 907 P.2d 923; 927 (Kan. Ct. App. 1995) (noting that a disease does not have to be identified to be compensable).

recovering in states that apply either theory of recovery. Occupational disease states would likely view long-term effects as part of the disease itself. Similarly, accidental injury states would likely view the effects as symptoms arising out of the accidental injury itself.

Codifying pandemic diseases under accidental injury statutes would prevent these diagnosability issues. Accidental injury statutes would make associating long-COVID with the initial infection easier under the theory that all injuries arising out of an accident are compensable. Additionally, these statutes do not require a specific diagnosis for compensability like many occupational disease statutes require, therefore making the difficulty in properly diagnosing long-COVID irrelevant.

ii. Workers' Compensation Exclusivity

Workers' compensation statutes nationwide generally restrict employees from recovering under both a workers' compensation theory and under a tort theory like negligence.[114] This exclusivity rests on the idea that where employers may be held liable for injuries due to no fault of their own, there must be some limit on how much injured employees can recover.[115] Applying the exclusivity doctrine to cases of pandemic disease like COVID-19 can be tricky and ultimately may preclude recovery altogether.

The idea that exclusivity provisions may prevent employees from recovering for injuries associated with contracting COVID-19 in the workplace has been explored previously through a lens viewing COVID-19 as an occupational disease.[116] Essentially, employees may not recover for a disease that does not fit the statutory definition of an occupational disease, but employees cannot use traditional tort theories to sue their employers for injuries sustained at work in place of a workers' compensation claim.[117] These provisions effectively leave employees suffering from the medical effects and faced with exorbitant medical bills with no means of redress.

Exclusivity provisions have already influenced COVID-19 tort lawsuits against employers. In New York, for example, an employee's public nuisance claim for failure to maintain a safe work environment was denied for a variety of reasons, one being the exclusivity provision in New York's workers' compensation law.[118]

---

[114] 9 LARSON'S WORKERS' COMP. LAW § 100.01 (2021).
[115] *Id*.
[116] Michael C. Duff, *Pandemic Mini-Symposium: Can Workers' Compensation "Work" In A Mega-Risk World? The Covid-19 Experiment*, 35 ABA JOURNAL LAB. & EMP. LAW 17, 20 (2020).
[117] *Id*.
[118] Palmer v. Amazon.com, Inc., 498 F. Supp. 3d 359, 374-75 (E.D.N.Y. 2020).

The court indicated that allowing the employee to recover under the tort claim violated the premise that employees should not be allowed to recover for workplace injuries twice.[119] Additionally, in California, an employee sued her employer for the wrongful death of her husband after he contracted COVID-19 from his wife who contracted COVID-19 at work.[120] The employer moved to have the case dismissed on the grounds that the husband's death was derivative of the wife's workplace injury and, therefore, the wrongful death action was excluded under California workers' compensation law; the court denied the motion.[121]

While exclusivity provisions are a cornerstone of American workers' compensation law and generally provide adequate relief to employees without unduly burdening employers, it is clear that in times of pandemics, these provisions may provide a workaround for employers. In occupational disease jurisdictions, employers could defend against tort actions using workers' compensation exclusivity and employees would be left to the mercy of the court to find that the disease was not ordinary to everyday life and peculiar to the calling. Additionally, employers may create their own policies for emerging infectious diseases that exclude employees from receiving workers' compensation benefits regardless of what the law requires.[122]

Codifying pandemic diseases under accidental injury statutes would prevent these exclusivity issues. Accidental injury statutes would provide clear guidance to employees that pandemic-related claims are compensable rather than leaving employees to guess as to whether they could file a claim. Additionally, the statutes would provide a greater chance of recovery so that employees would not have to rely on tort claims by requiring the employee to prove that the disease was unexpected and traceable, as opposed to proving the disease was peculiar to the calling and not ordinary to everyday life.

---

[119] *Id*.

[120] See's Candies v. Superior Court of Cal. for L.A., 2021 Cal. App. LEXIS 1076 at *14–16 (Cal. Ct. App. 2021).

[121] *Id*.

[122] Barnes v. Vanderbilt Univ. Med. Ctr., 2021 TN Wrk. Comp. LEXIS 92 at *3, 9 2021 TN WRK. COMP. LEXIS 92 (Tenn. Ct. of Workers' Comp. Cl. September 21, 2021) (noting a worker who was denied workers' compensation benefits at a preliminary hearing after his employer treated his COVID-19 symptoms through its occupational health clinic rather than through a workers' compensation claim, and once the workers' compensation claim was brought, the employee was no longer considered disabled, and causation could not be proven at the hearing).

V. CONCLUSION

Considering the nationwide impact of COVID-19, the optimal time to prepare for pandemics is before they happen. Although the distinction between accidental injuries and occupational diseases may be blurred in many areas of infectious diseases, lawmakers should provide clear rules for emerging pandemic diseases. Both employers and employees suffer when there is no guidance on how best to handle workers' compensation claims. In order to better serve both employers and employees and promote the goal of workers' compensation laws, state lawmakers should enact proactive legislation that would become effective in times of pandemics and provide compensation for pandemic diseases as accidental injuries.