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WORKERS' COMPENSATION AND COVID 19

THE CASE FOR A FEDERAL COVID-19 FUND

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INTRODUCTION

The current Covid-19 pandemic poses a serious challenge to workers' compensation systems around the Country.

Public health officials and labor advocates say that Covid-19 will take the lives of thousands of workers and that many thousands more will lose time from work and need medical attention for work related Coivd-19. As of June 1, 2020 there were a reported 104,000 deaths in the United States; however, there is no definitive data how many of the deaths involved workers who had contracted the Covid-19 virus at work.

The National Council on Compensation Insurance (NCCI) had predicted that in the 38 States covered by NCCI the monetary costs associated for such claims will range from 50 billion to 100 billion dollars. In New York State, the Rating Board has predicted that a recent legislative proposal to expand coverage via a Covid-19 presumption may exceed 30 billion dollars.

In this presentation we will discuss how the workers' compensation system in New York State may respond to the Covid-19 claims, and the reasons for creating a Federal Covid-19 Fund.

It should be emphasized that such Federal Fund will not divest any eligible worker for their rights to seek and and receive benefits under their respective State workers' compensation system. Likewise, such Federal Fund will not eliminate the obligation of an employer and their carrier of paying any statutory awards under the respective State workers' compensation system.

NEW YORK STATE WORKERS' COMPENSATION BOARD

The NYSWCB has already taken a number of steps to meet the challenges associated with Covid-19 as seen by the notices posted on the NYSWCB webpage.

In a March 2020 letter to the carriers, Chair Rodriquez urged the carriers to consider paying the claims. Moreover, the Chair has warned the carriers that if a claim is contested the matter will be placed on an expedited calendar.

As posted on their site, the NYSWCB has issued guidance to stakeholders as follows:

1. All hearings will be by remote attendance until further notice (see page 3 for more information on virtual hearings). 2. The 90-day requirement for medical evidence of ongoing disability has been relaxed. 3. Claimants should notify their

attorney, the doctor and the Board if they can't attend Independent Medical Examinations (IMEs). 4. A conflicting opinion may be based on a record review, instead of an in-person exam, when an Attending Doctor's Request for Authorization and Carrier's Response (Form C-4 AUTH) is filed and an IME is not able to be scheduled in time to meet the 30-day requirement. 5. Extensions may be possible for other IMEs. 6. Extensions may be possible for depositions (cross-examination of medical witnesses). 7. The Board may consider excusing untimely filings of applications involving appeals and rebuttals. 8. The Bureau of Compliance will consider applications to excuse delays and defaults in redetermination requests. NOTE: These changes do not remove the requirement of an employer to obtain and maintain the required coverage. 9. The Payor Compliance Unit will consider applications to excuse delays and defaults in complying with filings.

More recently, on June 1, 2020 the NYSWCB posted notice advising the workers' compensation community of the steps to be taken and the proof to be secured when pursuing a Covid-19 claim.

In short, the NYSWCB has take a number of major administrative steps to address the challenges of Covid-19 claims.

PART ONE
THE NEW YORK STATE WORKERS' COMPENSATION LAW WILL COVER MANY WORKERS WITH COVID-19 BUT NOT COVER EVERY WORKER WHO GETS COVID-19.

Origins of the Law: The Grand Bargain and Covid-19 Claims

In 1910 New York first enacted New York State Workmen's Compensation Law.

On March 24, 1911 the Court of Appeals found that the New York State Workers's Compensation Act was unconstitutional as it violated the rights of an injured person to a jury trial afforded under the NYS Constitution.

The next day, on March 25, 1911 the Triangle Shirtwaist Factory fire caused the deaths of 146 garment workers - 123 women and 23 men with most of the victims being recent immigrant workers. The workers were not able to escape the building because the employer had locked the exits. Hence, while many of the workers died from the fire, or smoke inhalation, others died when falling or jumping from the higher floors of the building to escape the fire.

Thereafter, in 1914 the voters of New York State approved an amendment of the Constitution of the State of New York. Specifically, **Article I, Section 18** now reads as follows:

Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or herself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his or her employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer. (Formerly §19. Renumbered by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; amended by vote of the people November 6, 2001.)

Following the voter approval of the Constitutional measure, the State Legislature again adopted the New York State Workmen's Compensation Law. (Chapter 41, Laws of 1914)

In 1915, the Court of Appeals held that this new version of the law was constitutional. (*Jensen v. Southern Pacific Company* 215 N.Y. 514) Thereafter, the United States Supreme Court found that the NYSWCL did not violate an employer's rights under the United States Constitution. (*Matter of New York Central Railroad C. v White*, 243 U.S. 188 [1917]; *Matter of Southern Pacific Co. v Jensen,* 244 U.S. 205 [1917])

Notably, over the years, the Court of Appeals has held that the statute is to be construed broadly and liberally to achieve its humanitarian and socioeconomic goals of protecting workers and their dependents in case of injury on the job. (Holcomb v. The Daily News, 45 N.Y.2d 602; Smith v. Tompkins County Courthouse, 60 N.Y.2d 939; Johannesen v. New York City Department of Housing Preservation and Development, 84 N.Y.2d 129)

Under the "Grand Bargain" the employee was promised prompt recovery of a dollar amount for wage replacement and medical coverage for the workplace injury without the need for resorting to tort litigation. In return, the employee forfeited the right to a jury trial.

At the same time, the employer was promised protection from the uncertainty and costs of lawsuits.

Hence, when approaching this issue of whether a claim for Covid-19 should be held compensable under a workers' compensation law, there are two controlling principles:

First, the law should be construed broadly and liberally to achieve a humanitarian goal to protect workers with workplace Covid-19 disabilities and deaths.

Second, the law should be construed to protect employers from certain tort litigation associated with workplace Covid-19 disabilities and deaths.

Arguably, the Covid-19 pandemic will test these basic principles.

SOME WORKERS ARE EXPRESSLY EXCLUDED FROM WORKERS' COMPENSATION COVERAGE

Around the Country, each State has enacted workers' compensation laws and created workers' compensation systems. A review of all the various provisions, however, will show that not all workers are covered by the workers' compensation laws of their respective jurisdictions.

For example, in New York State, the NYSWCL provides benefits to many workers but not all workers.

Some of the 'unprotected' workers include volunteers; ministers, priests, rabbis, and sextons; certain non-manual workers of nonprofit charitable and educational institutions; certain teachers; certain real estate salespersons; certain insurance agents; sole proprietors, partners and certain corporate officers; and, certain independent contractors.

At the time of September 11, many individuals from within New York State as well as from other States volunteered and traveled to Ground Zero assisting with the rescue, recovery and cleanup at Ground Zero. To provide some coverage for such individuals, New York State amended the NYSWCL and enacted Article 8-A was to extend the benefits of coverage to 'participants' in the event.

To date, no similar statutory provision exists for Covid-19.

According to news reports including an April 8, 2020 report of the New York Times, over 90,000 individuals (including 25,000 from outside of New York) volunteered to assist hospitals with the outbreak. These 'unprotected' workers (and their families) will not be afforded benefits under the NYSWCL for their Covid-19 injuries, treatments and deaths. Rather, these individuals will be relegated to the traditional tort system with the associated litigation delays and costs.

Moreover, in all likelihood, many thousands more volunteered to assist at homeless shelters, food banks, and other nonprofit hospitals and institutions around the Country. Absent statutory reforms in every jurisdiction, such individuals and many other workers will not be afforded wage protection and medical coverage under a workers' compensation statutory system.

A flood of Covid-19 lawsuits will likely result from this group of workers.

COVID 19 RECOVERY THEORIES

Please note that as of this week several States have considered or approved 'presumption' legislation and other States have used Executive Orders to address Covid-19 claims. To date, no similar presumption has been enacted in New York State. Nonetheless, even absent a newly enacted presumption there are separate theories under which a Covid-19 claim can be pursued as a workers' compensation claim

COVID 19 AS AN OCCUPATIONAL DISEASE CLAIM

One of the theories for securing workers' compensation coverage for Covid-19 is to assert it as an Occupational Disease claim with the precedent based upon workers' compensation claims for tuberculosis. Please note, however, that not every tuberculosis claim has been established as a compensable occupational disease.

The initial 1914 enactment of the NYSWCL did not contain any reference to occupational disease. In 1920 and in 1922 sections on occupational disease were added to the NYSWCL.

Interestingly, the 1920 and 1922 amendments adding these clauses were enacted in the shadow of the 1918-1919 Spanish Flu which took the lives of over 500,000

out of the 100,000,000 Americans. Yet, the legislation did not include pandemic as an occupational disease.

NYSWCL Section 2(15) provides that an occupational disease is a condition which a worker contracts in the employment and results from the nature of employment.

Specifically, NYSWCL Section 2(15) provides:

"Occupational disease" means a disease resulting from the nature of employment and contracted therein.

NYSWCL Section 3 subdivision 2 paragraph 30 provides as follows:

30. Any and all occupational diseases.	*30. Any and all employments enumerated in subdivision one of section three of this chapter.*

This broad language would seemingly authorize the NYSWCB to find an occupational disease in a vast array of situations. For example, under this broad statutory provision the NYSWCB has found a number of conditions to be occupational diseases including: arthritis, bronchial asthma, bronchitis, pulmonary fibrosis, cardiac pathology, dupuytrens contracture, encephalitis, hernia, neuritis, rhinitis, conjunctivitis, and varicose veins.

Over the years, however, the Court of Appeals has repeatedly stated that the language in Section 2(15) sets the basic standard for determining whether a particular condition is compensable as an occupational disease.

In Matter of Harman v. Republic Aviation Corp., 298 N.Y. 285 [1948], the Court dismissed a claim by a **foreman's assistant** for occupational tuberculosis saying

The hazard that rendered claimant subject to the disease was Humphrey and not any condition that inhered in the nature of the employment itself. Any one, whether supervisor, laborer, factory hand or clerical worker, in any field of work, in any occupation or employment, whether factory, store or office, may contract tuberculosis, given a fellow worker already ill with that disease. ***No peculiarity of claimant's job induced the disease or heightened the chance of infection****; workers in other occupations, carried on under similar conditions, would have been just as likely as claimant to fall victim to the ailment if a Humphrey were about. As thus becomes evident, claimant's disease resulted not from the ordinary and generally recognized hazards incident to a particular employment, but rather from the general risks common to every individual regardless of the employment in which he is engaged.*

In the case of *Matter of Paider v. Park East Movers* 19 N.Y.2d 373 [1967] the Court of Appeals denied occupational disease award to a **truck driver** who had contracted **tuberculosis** from a fellow driver. In denying benefits the Court relied upon *Goldberg* and *Harman* stating:

*we view an occupational disease as an **ailment which is the result of a distinctive feature of the kind of work performed by claimant and others similarly employed,** not an ailment caused by the peculiar place in which particular claimant happens to work,*

Hence, the *Harman* and *Paider* decisions would seemingly require the Covid-19 claimant to demonstrate that the Covid 19 was a specific increased risk associated with a particular occupation and that there was special link with a distinctive feature of the job.

Notably, in the *Harman* and *Paider* cases, the claimant's were not health care workers.

Other Court decisions affirming compensable occupational disease tuberculosis claims, however, provide guidance on whether the contagious disease will be covered as an occupational disease.

In the health care area, there are a number of cases where nurses, laboratory workers, or other hospital workers are granted benefits where it can be shown that there is contact with an active tubercular patient or the tubercule bacilli.

In *Matter of Lyden v. United Hospital,* 275 A.D. 877 [1949] the Court affirmed an occupational disease award to a claimant who worked as a **laboratory technician.** The evidence demonstrated that (a) upon entering work the claimant was free from disease; (b) there was no family history of the disease; (c) there was no history of outside contact with others who had the disease; and, (d) there was exposure to cultures of live tubercle bacilli and sputum specimens. Hence, the Court concluded that the evidence and the reasonable inferences it permits, coupled with the applicable presumptions, supported the decision and award.

In *Matter of Holmes v. Beth El Hospital,* 286 A.D. 1055 [1955], the Court affirmed an occupational disease award to the claimant who worked as a **laboratory porter** where there was evidence (a) of at least three known and two suspected tubercular patients in the hospital during the time of claimant's employment; (b) sputum specimens were tested in the laboratory where claimant worked; and, (c) claimant was required to handle and clean unsterilized tubes and to wash the floors when an occasional recepticle was broken.

In *Matter of Cook v. Buffalo General Hospital*, 283 A.D. 899 [1954] the Court upheld an occupational disease award to a **student nurse** who had contracted pulmonary tuberculosis where there was exposure to a known tubercular patient.

In *Matter of Nathan v. Presbyterian Hospital,* 66 A. D. 2d 933 [1978] the Third Department, upheld an occupational disease award to a **nurse** for tuberculosis saying that "...there is sufficient evidence in the record to establish that, despite whatever precautions may be taken to prevent exposure, the danger of exposure is ever present to all nurses. The work exposure to which all nurses are subjected is sufficient to meet the essential tests of occupational disease".

In a case where the record does not contain evidence of exposure, however, the occupational award will be reversed even where the claimant is a health care worker.

In *Matter of Mahar v. St. Mary's Hospital,* 3 A.D. 2d 875 [1957], the Court reversed an award as there was no competent evidence that there were tubercular patients in the hospital wing where the claimant had worked as a **nurse**.

Moreover, other non-healthcare occupations might also show a respiratory condition, such as Covid-19, as an occupational disease provided some 'special' exposure can be shown.

In *Matter of Mason v. YMCA of the City of New York,* 271 A.D. 1042; 297 N.Y. 1037, the Court upheld an award as an occupational disease where a **telephone operator** contracted tuberculosis from using a telephone mouthpiece which had been used by another tubercular operator. The Court reasoned that the use of the mouthpiece was a hazard of the employment.

In *Matter of Hovancik v. General Aniline & Film Corp*. 8 A D 2d 1i71 [1959], the Court upheld an occupational disease award where a **factory laboratory technician** contracted tuberculosis at work with the Court saying:

Although the chance or haphazard contact with a fellow employee having tuberculosis would not ordinarily result in an occupational disease within the definitions of the statute, here the use of an instrument in the work itself would expose all employees alike who might use such an instrument as a pipette to a special hazard of spread of certain infections, such as tuberculosis.This seems to us to meet the essential tests of the statute and of the cases, such as Matter of Harman v. Republic Aviation Corp. (298 N.Y. 285) and Matter of Goldberg v. 954 Marcy Corp.(276 N.Y. 313), which have construed the statute.

In other words, the documented use of a contaminated specialized piece of equipment particular to the occupation might support a claim for Covid-19.

Hence, in the Covid-19 world, the question then becomes whether the workers at the "essential businesses" will be afforded any benefit of the doubt in their claim absent any newly enacted presumption.

COVID -19 AS AN ACCIDENTAL INJURY CLAIM

A second theory for securing workers' compensation coverage for Covid-19 is to assert the claim as an accidental injury.

Again, please note that although current case law has affirmed awards for certain contagious diseases, such is not a guarantee that every Covid-19 claim will be covered as an accidental injury as it will be necessary to show a work related exposure and causation.

In New York State, a claimant may opt to pursue a disease claim as an accidental injury.

Specifically, NYSWCL Section 48 expressly provides

Diseases which are accidents. Nothing in this article shall affect the rights of an employee to recover compensation in respect to a disease to which this article does not apply if the disease is an accidental personal injury within the meaning of subdivision seven of section two of this chapter.

In a number of decisions, the Court of Appeals has held that the NYSWCB is authorized to find a disease condition to be compensable as an accidental injury.

In *Matter of Goldberg v. 954 Marcy Corp.,* 276 N.Y. 313 [1938] the Court of Appeals upheld the award as an accidental injury but dismissed the claim as an occupational disease by establishing the definition of "occupational disease" as follows:

one which results from the nature of the employment, and by nature is meant, not those conditions brought about by the failure of the employer to furnish a safe place to work, but conditions to which all employees of a class are subject, and which produce the disease as a natural incident of a particular occupation, and attach to that occupation a hazard which distinguishes it from the usual run of occupations and is in excess of the hazard attending employment in general. Thus compensation is restricted to disease resulting from the ordinary and generally recognized risks incident to a particular employment, and usually from working therein over a somewhat extended period. Such disease is not the equivalent of a

disease resulting from the general risks and hazards common to every individual regardless of the employment in which he is engaged.

In *Middleton v. Coxsackie Correctional Facility*, 38 N.Y.2d 130 (1975), the Court upheld a NYSWCB decision awarding benefits to a correction officer who had contracted tuberculosis from an inmate. Reversing the Appellate Division and reinstating the NYSWCB decision the Court stated:

Nothing in article 3 of the Workmen's Compensation Law, dealing with occupational diseases, affects the rights of an employee to recover compensation in respect to a disease to which said article does not apply if the disease is an accidental personal injury within the meaning of subdivision 7 of section 2 of said law (Workmen's Compensation Law, § 48).

Moreover, the Court noted a long line of cases which had found disease conditions to be compensable as accidents as follows:

Numerous awards based on diseases found to be the result of industrial accidents, including those caused by germs, have been sustained (e.g., Matter of Lepow v Lepow Knitting Mills, 288 N.Y. 377 [malignant tertian **malaria** caused by sting of certain specie of mosquito]; Matter of Drew v Beyer, 33 A.D.2d 24 [cranio-orbital **mucormycosis** after inhalation of dust with musty odor]; Matter of McDonough v Whitney Point Cent. School, 15 A.D.2d 191 [38 N.Y.2d 136] [**mumps** by teacher after exposure to pupils during epidemic]; Matter of Gardner v New York Med. Coll., 280 App Div 844, affd 305 N.Y. 583 [**poliomyletis** after sneeze in face by fellow nurse suffering from said disease]; Matter of Gaites v Society for Prevention of Cruelty to Children, 251 App Div 761, affd 277 N.Y. 534 **[scarlet fever** by matron in direct contact with children suffering therefrom]

Hence, in the Covid-19 world there is ample precedent for an employee to file a Covid-19 claim as an accidental injury. In such a case, the claimant must still produce some evidence, including medical evidence, of the manner in which the condition is related to work.

COVID-19 AS A MENTAL STRESS CLAIM

A third theory for asserting a Covid-19 workers' compensation claim would involve a claim for mental stress associated with possible exposure to the Covid-19 virus.

It is to be expected that a number of Covid-19 related mental stress claims will be filed with the NYSWCB. Some claims may allege mental stress due to actions of other workers or lack of safety actions by the employer.

Again, depending upon the facts of those cases, some mental stress claims will be accepted and some will be denied.

It has become quite commonplace for workers' compensation claims to include an allegation of mental injury a/k/a stress due to work. Such may arise from a variety of experiences such as long hours, special projects, disagreements with supervisors, or conflicts with other employees.

As a matter of background, in 1975, the Court of Appeals recognized for the first time that a mental injury due to mental stress is a compensable claim under the NYSWCL. *Matter of Wolfe v. Sibley, Lindsay & Curr Company,* 36 N.Y.2d 505 [1975].

In *Matter of Wood v. Laidlaw Transit, Inc.*, 77 N.Y.2d 79 [1990] the Court of Appeals reinstated a mental stress award of the NYSWCB where the claimant school bus driver had come upon the scene of a motor vehicle accident.

Over the next 15 years, the Appellate Division has affirmed mental stress claims for **harassment by supervisors** *(Haydel v. Sears Roebuck & Company,* 106 A.D.2d 759 [1984]; *Levine v. United Parcel Service*, 124 A.D.2d 381 [1986]); **remarks by fellow employees** *(Bown v. Alos Micrographics Corporation,* 150 A.D.2d 888 [1988]; *Kaliski v. Fairchild Republic Company,* 151 A.D. 867 [1989]); **work load or special assignment** (*Kolvig v. Oakwood School,* 78 A.D.2d 759 [1980]; *Ottomanelli v. Ottomanelli Brothers* 80 A.D.2d 688 [1981]); and, **threat of physical injury** (*Peters v. New York State Agricultural and Industrial School*, 64 A.D.2d 749 [1978].

In 1990, the Legislature responded to the requests of the business community and amended NYSWCL Section 2(7) to read as follows:

"Injury" and "personal injury" mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom. ***The terms "injury" and "personal injury" shall not include an injury which is solely mental and is based on workrelated stress if such mental injury is a direct consequence of a lawful personnel decision involving a disciplinary action, work evaluation, job transfer, demotion, or termination taken in good faith by the employer.***

Following the "lawful personnel decision" amendment the NYSWCB was required to focus on whether (1) the mental injury is "solely" mental; (2) the mental injury was the "direct" consequence of a personnel decision; (3) the personnel decision was "lawful"; and, (4) the personnel decision was undertaken in "good faith" by the employer.

A recent Court decision shows that the 1990 amendment is not a compete safe harbor for all personnel decisions.

In *Matter of Kraus v. Wegmans Food Markets* 156 A.D.3d 1132 [2017] the Court affirmed the NYSWCB allowance of a mental stress claim by a no fault claims adjuster. In such case, the self insured employer had adopted a "questionable" practice of investigating and handling no fault benefits. Such new practice prompted numerous complaints from the various parties who were seeking such benefits with such complaints confirmed by the claimant's supervisor and fellow employees. The NYSWCB found the stress to be more than the usual stress experienced by others. The Court affirmed.

EMPLOYER EXCLUSIVITY

It is to be expected that a number of workers will commence lawsuits against employers asserting that the gross negligence of the employer caused the worker to contract Covid-19.

As part of the "Grand Bargain" creating workers' compensation systems, the employer was given a statutory defense against a direct tort lawsuit by the employee or the family of the deceased employee.

For example, in New York State, NYSWCL Section 11 provides that the liability of the employer to provide compensation to the employee is the exclusive liability of the employer unless the employer fails to secure the payment of compensation.

Specifically, **NYSWCL Section 11** provides:

Alternative remedy. The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his or her personal representatives, spouse, parents, dependents, distributees, or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom, except that if an employer fails to secure the payment of compensation for his or her injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his or her legal representative in case of death results from the injury, may, at his or her option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his or her employment, nor that the

injury was due to the contributory negligence of the employee. The liability under this chapter of The New York Jockey Injury Compensation Fund, Inc. created under section two hundred twenty-one of the racing, pari-mutuel wagering and breeding law shall be limited to the provision of workers' compensation coverage to jockeys, apprentice jockeys, exercise persons, and at the election of the New York Jockey Injury Compensation Fund, Inc., with the approval of the New York state gaming commission, employees of licensed trainers or owners licensed under article two or four of the racing, pari-mutuel wagering and breeding law and any statutory penalties resulting from the failure to provide such coverage.

Notably, in his Practice Commentaries, Martin Minkowitz states:

Section 11 was written with the obvious, deliberate intention of ensuring preservation of the concept of the employer's exclusive liability. The language redundantly provides that the employer's liability not only "shall be exclusive" but also "in place of any other liability", then adds the word "whatsoever'.

Where the payment of compensation is not secured by the employer, the employee, or in the case of death his representatives, may nevertheless elect to claim compensation or, at their option, maintain a plenary action in the courts for damages. (NYSWCL Section 11)

The Court of Appeals has repeatedly held that the NYSWCL expressly provides that absent an exception, workers' compensation benefits is the employee's exclusive remedy against an employer for on the job injuries *Isabella v Hallock,* 22 NY3d 788, 792-793; *Reich v Manhattan Boiler & Equip. Corp.,* 91 NY2d 772, 779; *Billy v Consolidated Mach. Tool Corp.,* 51 NY2d 152, 159-160; *Weiner v City of NewYork*, 19 NY3d at 854).

A question arises whether the NYS Courts, which historically have upheld the employer exclusivity defense, will find an exception in the Covid-19 world.

Already there are reports of direct legal actions against employers brought by families of deceased workers who died from Covid-19. One case involves an action in Illinois and another one involves an action in Pennsylvania. Both actions allege that the employer had not taken the necessary steps to provide personal protective equipment to the now deceased worker had contracted Covid-19.

In New York State, an intentional injury by the employer or fellow employee is an exception to the NYSWCL Section 11 bar. In other words, where an injury is sustained to an employee due to an intentional tort perpetrated by the employer or at the employer's direction, the Workmen's Compensation Law is not a bar to a common-law action for damages (*Lavin v. Goldberg Bldg. Material Corp*., 274 App.

Div. 690 [1949] (worker died from assault by fellow worker); *De Coigne v. Ludlum Steel Co.,* 251 App. Div. 662 [1937] (worker given intentionally tainted food by employer).

A valid complaint under this theory of recovery must allege an intentional or deliberate act by the employer causing harm to the employee and absent such proof the lawsuit will fail. (*Ross v. State of New York*, 8 A.D.2d 902 [1959] (failure to provide employee with protection from dangerous patient in mental institution) ; *Artonio v. Hirsch,* 3 A.D.2d 939 [1957] (employer tampered with safety devices on machine). To constitute an intentional tort, the conduct must be engaged in with the desire to bring about the consequences of the act or a specific intent to bring about a specific injury. (*Acevedo v. Con Ed of New York* 189 A.D.2d 497 [1993] (failure to warn or provide equipment to protect from asbestos exposure was gross negligence and not intentional tort)

A mere knowledge and appreciation of a risk is not the same as the intent to cause injury (see Prosser, Torts [3d ed.], pp. 31-32, § 8).A result is intended if the act is done with the purpose of accomplishing such a result or with knowledge that to a substantial certainty such a result will ensue (1 Harper and James, Torts, p. 216, § 3.3).

In New York State, it is a difficult burden in any case (including a Covid-19 case) to prove the employers' actions were sufficient to avoid the exclusivity defense.

POINT TWO
THE NEED FOR A FEDERAL FUND

There are a number of reasons which support the creation of a Federal Covid-19 Fund.

First, the NYS workers' compensation systems does not include explicit protection for workers with pandemic related claims for injuries and deaths.

Second, in the NYS workers' compensation system there are coverage gaps in the traditional workers' compensation system which can be addressed with the creation of a Federal Covid-19 Fund.

Third, there are other examples of Federal Funds so a Federal Covid-19 Fund is not a unique or unprecedented step by the Federal Government.

WORKERS COMPENSATION DOES NOT EXPRESSLY COVER COVID-19

As discussed above, within a couple of years after the 1918-19 Spanish Flu pandemic, the NYSWCL was amended in 1920 and again in 1922 to add provisions allowing coverage for occupational diseases. These included conditions such as anthrax, lead poisoning, mercury poisoning, radium poisoning, bursitis, synovitis, dermatitis, epitheliomatous cancer, and silicosis or other dust diseases.

At the time of such amendments, however, flu and virus was not enumerated as one of the occupational diseases covered even though about 30,000,000 Americans contracted the flu and 500,000 Americans died as a result of it.

Moreover, during the last 100 years, the NYSWCL was not amended to expressly include various other epidemics such as tuberculosis or polio. Likewise, no legislative action was taken after the 2009 H1N1 pandemic during which the CDC illness and death estimates from April 2009 to April 2010, in the US were as follows: (a) between 43 million and 89 million cases of 2009 H1N1 occurred between April 2009 and 10 April 2010. The midpoint in this range is about 61 million people infected with 2009 H1N1; (b) between about 195,000 and 403,000 H1N1-related hospitalizations occurred between April 2009 and 10 April 2010. The midpoint in this range is about 274,000 2009 H1N1-related hospitalizations; and, (c) between about 8,870 and 18,300 2009 H1N1-related deaths occurred between April 2009 and 10 April 2010. The midpoint in this range is about 12,470 2009 H1N1-related deaths.

The absence of any special statutory language for any pandemic must be contrasted with the actions of New York State following September 11 when the NYSWCL was amended and Article 8A was enacted to cover certain ailments surrounding the September 11 collapse of the Twin Towers. Such enactment extended workers' compensation coverage to 'participants' for certain 'qualifying conditions' and required registration and notice requirements.

Notably, for volunteers the Uninsured Employers Fund was deemed to be the employer of the volunteer.

Again, even though the NYSWCL does not expressly cover Covid-19 injuries and deaths like an Article 8-A, the NYSWCB and the Courts in New York State have established some precedent to support establishing a Covid-19 claim as an occupational disease or an accidental injury provided a work related exposure can be proven. Hence, it is to be expected that under such precedent some Covid-19 cases will be accepted and other cases denied.

WORKERS' COMPENSATION WILL NOT COVER ALL WORKERS WITH COVID-19

As discussed above, not every worker are 'covered' under the workers' compensation laws of their State. The types of 'uncovered' workers will vary from State to State, but even without a State by State analysis, it is nonetheless to be expected that around the Country there will be thousands of 'uncovered' workers who are expressly not covered under the workers compensation laws and will not be afforded any workers' compensation coverage for Covid-19 related medical treatments, injuries and deaths.

Hence, it is conceivable that thousands of volunteers...at food banks, homeless shelters, and hospitals....around the Country will be without access to the workers compensation benefits which other essential workers may receive.

Moreover, even if the worker is a 'covered' employee under a workers' compensation law, the history of tuberculosis claims reveal some clear truths. First, many of the cases are litigated on the question of whether there was an exposure at work. Second, some tuberculosis claims were established and others were denied.

Accordingly, it is to be expected that the Covid-19 cases will experience the same course just as tuberculosis and other virus cases have been handled under the current laws.

EXAMPLES OF EXISTING FEDERAL FUNDS

There are examples of Federal Funds which have been enacted to meet certain national needs during crisis. These Federal Funds contain elements which a Covid-19 Fund may adopt.

Crime Victims Fund

The 1984 Victim of Crime Act authorized the creation of the Crime Victims Fund to be financed by fines and penalties paid by convicted federal offenders. As of 2018, the Fund balance exceeded $12 billion and includes deposits from federal criminal fines, forfeited bail bonds, penalties, and special assessments collected by U.S. Attorneys' Offices, federal courts, and the Federal Bureau of Prisons. Federal revenues deposited into the Fund also come from gifts, donations, and bequests by private parties, as provided by an amendment to VOCA through the USA PATRIOT Act in 2001 that went into effect in 2002. Since 2002, hundreds of thousands of dollars have been deposited into the Fund through this provisions

For the first 15 years of the Fund's existence, the total deposits for each fiscal year were distributed the following year to support services to crime victims.

Starting in Fiscal Year (FY) 2000, Congress placed a cap on funds available for distribution with the intent to maintain the Fund as a stable source of support for future victim services. From FY 2000 to 2018, the amount of the annual cap varied from $500 million to more than $4 billion. In FY 2018, the cap was set at $4.436 billion.

In FY 2018, more than $3.4 billion from the Fund was awarded to thousands of local victim assistance programs across the country and to help compensate victims in every state for crime-related losses.

September 11 Victim Compensation Fund

The September 11th Victim Compensation Fund (VCF) provides compensation to individuals (or a personal representative of a deceased individual) who were present at the World Trade Center or the surrounding exposure zone; the Pentagon crash site; and the Shanksville, Pennsylvania crash site, at some point between September 11, 2001, and May 30, 2002, and who have since been diagnosed with a 9/11-related illness. The VCF is not limited to first responders. Compensation is also available to those who worked or volunteered in construction, clean-up, and debris removal; as well as people who lived, worked, or went to school in the exposure zone.

The September 11th Victim Compensation Fund ("VCF") was created to provide compensation for any individual (or a personal representative of a deceased individual) who suffered physical harm or was killed as a result of the terrorist-related aircraft crashes of September 11, 2001 or the debris removal efforts that took place in the immediate aftermath of those crashes. The original VCF operated from 2001-2004.

On January 2, 2011, President Obama signed into law the James Zadroga 9/11 Health and Compensation Act of 2010 (Zadroga Act). Title II of the Zadroga Act reactivated the September 11th Victim Compensation Fund. The reactivated VCF opened in October 2011 and was authorized to operate for five years, ending in October 2016.

On December 18, 2015, President Obama signed into law a bill reauthorizing the James Zadroga 9/11 Health and Compensation Act of 2010. This included the reauthorization of the VCF. The new law extends the VCF for five years, allowing individuals to submit their claims until December 18, 2020.

On February 15, 2019, the Special Master determined that the funding remaining in the VCF would be insufficient to pay all pending and projected claims under current VCF policies and procedures and, consequently, announced modifications to VCF policies consistent with her statutory obligations.

On July 29, 2019, President Trump signed into law H.R. 1327, The Never Forget the Heroes: James Zadroga, Ray Pfeifer, and Luis Alvarez Permanent Authorization of the September 11th Victim Compensation Fund. The VCF Permanent Authorization Act extends the VCF's claim filing deadline from December 18, 2020, to October 1, 2090, and appropriates such funds as may be necessary to pay all approved claims.

Under the VCF, the non-economic loss from cancer is capped at $250,000.00 and the non-economic loss that does not result from a cancer at a $90,000.00 amount.

CONCLUSION
A COVID-19 FUND IS NECESSARY AND APPROPRIATE MECHANISM FOR RELIEF TO WORKERS AND EMPLOYERS

The Covid-19 pandemic has caused thousands of deaths in the State of New York and placed a number of covered and uncovered workers in an environment of heightened risk to their health.

For the 'covered' workers, there is existing legal precedent for some, but not all Covid-19 claims to be established as compensable.

For the 'uncovered' workers, there will be no coverage under the workers' compensation systems absent legislative enactments in such systems

General Provisions - Worker Benefits

As discussed above, not all workers will be covered by the provisions of a workers' compensation system, and not all Covid-19 claims will be established as compensable under the workers' compensation laws.

Hence, any Federal Covid-19 Fund should have the following elements:

1. A definition of the parties to be covered by the Federal Fund;
2. A rebuttable presumption that Covid-19 was contracted during work activities;

3. A procedure which sets forth a clear and transparent 'formula' or 'schedule' of the nature of the benefits with caps; and,
4. A protection against 'double recovery; and,
5. A mechanism for funding for the Fund.

Participation in the program should be voluntary, but there must be rules and regulations regarding an election of remedies.

Who individuals should be covered?

The Fund should be designed to cover only those Covid-19 cases involving **workers**...essential as well as non-essential....paid as well as unpaid....who are not otherwise covered under their respective workers' compensation systems.

Recently, Senators Kamala Harris, Kirsten Gillibrand, Bernie Sanders, and others have proposed a national "Essential Frontline Worker Compensation Fund" to provide reimbursements to certain essential workers for expenses incurred as a result of the Covid-19 pandemic.

The essential workers would include Health Care Workers (including janitors, cleaning staff and food service workers in health care); First Responders; Sanitation workers; Transportation workers; Grocery store and pharmacy employees; Domestic workers; Farm workers; and other workers "whose work or workplaces are deemed essential by federal, state and local governments."

The Federal September 11 Fund as well as the NYSWCL Article 8A might serve as other models for the Covid-19 Fund. Such an approach would cover certain workers as well as volunteers based upon other factors such as where and when their respective participations took place.

Notably, such model legislation would require some type of registration and some level of certification of status.

What presumption should be used?

As noted earlier, a number of States have already enacted various presumptions to extend coverage for Covid-19 claims.

The Federal Covid-19 Fund should consider two different presumptions depending upon the classification of the worker.

For certain workers in certain locations, the Fund should use a conclusive presumption. Such would provide an automatic coverage for such worker.

An example of such automatic coverage is the recent NYS law in which the families of certain public front line workers will receive a line of duty death benefit where the worker dies from Covid-19 during a specified period from March 1, 2020 to December 31, 2020 and there is medical evidence showing Covid-19 as

For other workers, the Fund should use a rebuttable presumption. Such an approach would allow evidence to be presented to show that the claim is not a Covid-19 claim.

An example of such rebuttable presumption is the one in Illinois which allows for evidence to be introduced showing the Covid-19 was not contracted at work.

What benefits should be provided?

Clearly, one of the challenges involves the level of the benefits to be provided by the Federal Covid-19 Fund.

Using the traditional workers' compensation, benefits would include medical benefits, wage loss benefits, permanent disability benefits, and death benefits. Such benefits would be subject to certain legislative caps and regulatory schedules.

Other non-traditional benefits, including spousal benefits, might be considered.

For example, the above referenced US Senate proposal specifically provides the following

"The reimbursements should cover costs incurred while being treated for COVID-19, as well as any future costs incurred, including, but not limited to, medical costs, mental health care costs, alternative housing costs, childcare costs, and lost wages," the senators' letter reads. "Finally, in certain instances, funding should be made available for essential frontline workers for the pain and suffering incurred as a result of the COVID-19 pandemic, and should supplement, not supplant, funds distributed through a Heroes Fund."

This language awarding 'non-traditional' benefits then raises more questions as follows: Should a worker covered under a State system be allowed to collect additional benefits...such as child care...beyond the benefits awarded under the State system? Or, if the State system provides a lower benefit than the Federal Covid-19 Fund should the worker be able to collect the difference?

Clearly, the primary purpose of the Federal Covid-19 Fund is to ensure the a basic level of benefits to meet the uninsured needs of the designated workers and their families, but these other questions would likewise need to be addressed.

What safeguards need to be enacted?

The Federal Covid-19 Fund should be protected from duplicative claims to avoid 'double recoveries' by the same person for the same conditions.

First, the Federal Covid-19 Fund should not be considered an 'insurance policy' for employers or a relief valve for insurance companies.

A number of employers will be adversely impacted by Covid-19, and some have already taken steps to compensate their workers above and beyond the standard workers' compensation coverage.

For example, the New York City Metropolitan Transit Authority [which is self insured] has experienced a huge tsunami of claims due to the Covid-19 pandemic.

Upon information and belief, in an average year the MTA will experience less than 5 work related death claims. Over the last 4 months the MTA has lost about 125 workers due to the Covid-19 pandemic. According to the NYCIRB Covid-19 legislative analysis, $575,000.00 is the 'average' cost of a death claim under the NYSWCL. Hence, as a result of Covid-19 the self insured MTA will now experience an additional $70,000,000.00 in costs for the Covid-19 death cases over the average number of claims.

At a recent MTA Board Meeting, the MTA approved a $500,000.00 family benefit to any family where the MTA employee had died from Covid-19.

Clearly, the MTA and other similarly situated employers are free to solicit separate aid packages from the Federal Government, but the Federal Covid-19 Fund should not cover such reimbursement.

Likewise, the insurance industry will be impacted by the number and costs of Covid-19, but their recourse should be some Fund other than the Federal Covid-19 Fund.

Second, the Covid-19 Fund should have a procedure which is easy to navigate for applicants, yet the procedure should still permit attorney representation of applicants and payment of attorneys fees for such procedures.

Obviously, the Fund should maintain a website which sets forth the requirements of the program and the rights of the applicants. A web based application process should be easy to navigate so that an applicant may file from home.

If the applicant should secure an attorney, the rules and regulations of the Fund should set forth a schedule for the award of attorney fees from any ultimate award.

Where there is no award, however, the applicant shall not be liable for the payment of an attorney fee. Such is consistent with the NYSWCL provisions for attorney fees as well as the rules and regulations for attorney fees from the SSA.

Third, as a requirement for the Covid-19 Fund any applicant must certify under penalties of perjury that the applicant meets the requirements for the program.

In general, the workers' compensation laws require an applicant to file a written claim under penalties of perjury. In New York State, the C3 form contains a fraud warning and each check issued to the injured worker contains a fraud warning.

Specifically, the C3 form provides:

Any person who knowingly and with INTENT TO DEFRAUD presents, causes to be presented, or prepares with knowledge or belief that it will be presented to, or by an insurer, or self-insurer, any information containing any FALSE MATERIAL STATEMENT or conceals any material fact, SHALL BE GUILTY OF A CRIME and subject to substantial FINES AND IMPRISONMENT

Likewise, the VCF claim form provides as follows:

I Certify that the information provided in this application and any documents provided in support of this claim are true and accurate to the best of my knowledge, and I declare under penalty of perjury that the foregoing is true and correct. I Understand that false statements or claims made in connection with the application may result in fines, imprisonment and/or any other remedy available by law to the Federal Government, including as provided in 18 U.S.C. § 1001, and that claims that appear to be potentially fraudulent or to contain false information will be forwarded to federal, state, and local law enforcement authorities for possible investigation and prosecution.

Fourth, the Covid-19 Fund should have sufficient resources and safeguards to review and process the applications. Absent well designed claims processes and experienced personnel, delays will encountered and erroneous payments will be made.

For example, a 2017 OIG audit of the VCF found that

the VCF did not consistently maintain in its Claims Management System (CMS) support of certain eligibility and compensation decisions. Some claim files lacked proof establishing presence at a September 11th attack site or of a September 11th-related physical condition, while other claim files included the status of ongoing claimant litigation, which the Zadroga Act required to be resolved before a claimant could receive an award. Some claim files also lacked proof of Special Master or designee approval of eligibility or compensation amounts. We believe that inconsistent documentation placed the VCF at an increased risk of i making erroneous award decisions or of being unable to substantiate such decisions in later appeals or reviews.

Moreover, as part of the safeguards the Covid-19 Fund should have the ability to contract with outside vendors to protect the operation of the Fund.

Fifth, as part of the Covid-19 application, the applicant shall be required to waive any right to sue their 'employer' for tort except in certain circumstances.

As discussed above, part of the Grand Bargain of workers' compensation, the worker forfeited the right to bring a direct lawsuit against the employer except in certain situations.

Likewise, under the September 11 VCF the applicant is required to execute a release or waiver.

Absent a release or waiver the applicant might commence a tort action and seek Fund recovery and thus receive a double recovery.

Sixth, in certain cases, the Covid-19 Fund should be able to assert a lien against any legal action which the applicant might commence against a private party.

Many States provide that an employer has a lien against any third party recovery. For example, in New York State under the NYSWCL Section 29, an employer and the carrier are afforded a lien against any third party recovery by the injured worker.

Since it is conceivable that many Covid-19 victims will be filing tort actions, the Covid-19 Fund should be allowed to file a lien and secure recovery for the payments by the Covid-19 Fund to the applicant.

Again, absent such lien, the worker would receive a double recovery.

How should the Fund be supported?

The cost numbers from the NCCI and the NYCIRB are frighteningly high.

As the Congress reviews the current US Senate proposal, there will likely be a vigorous debate over the manner of funding any Federal Covid -19 Fund.

Unfortunately, these days are contentious ones in this Country, and the discourse can be really nasty and divisive even those which involve existing compensation programs. As you may recall from 2019, it took appearances by public celebrities such as John Stewart to secure another funding authorization in Congress.

In summary, there are many unknowns which must be addressed in creating a Federal Covid-19 Fund.

NOTES