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Glenn W. Garcia*

The spread of COVID-19 throughout America has resulted in numerous impacts, many of which have yet to be realized.[1] While the novel virus has demanded immediate change in daily life, the virus' long-term health implications have yet to be fully comprehended.[2] During this unprecedented time, governments have needed to act in unique and innovative ways to combat this novel threat, what has become the "new normal" is clear for all to see. States and localities swiftly moved to mandate closures and/or modifications to the operation of numerous "non-essential" businesses in attempts to "slow the spread."[3] The characterization of "non-essential" has varied depending on the specific locality and instruction, remaining subject to constant change.[4] The virus coupled with the plethora of directives implemented by government agencies attempting to slow the spread has left devastating effects on industries.[5] Within the first few weeks of the pandemic shaking the United States, roughly three million individuals were left unemployed, a number that would continue to climb over the coming months.[6] However, individuals who retained their employment and were unable to work from home, as well as employees whose jobs were regarded as "essential services," were quickly confronted by new and unforeseen risks associated with their jobs in the midst of this pandemic.

Nearly every state government has addressed the issue of what is considered an essential business.[7] Although the definitions of what constitutes an essential business differs between states, the Economic Policy Institute estimates there is roughly over 55 million individuals classified as essential workers.[8] The healthcare industry has the highest concentration of these essential

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[1] Grant Suneson, *Industries hit hardest by coronavirus in the US include retail, transportation, and travel*, USA TODAY (Mar. 20, 2020, 7:00 AM), https://www.usatoday.com/story/money/2020/03/20/us-industries-being-devastated-by-the-coronavirus-travel-hotels-food/111431804/.

[2] George Citroner, *What We Know About the Long-Term Effects of COVID-19*, HEALTHLINE (Apr. 21, 2020), https://www.healthline.com/health-news/what-we-know-about-the-long-term-effects-of-covid-19.

[3] Erin Schumaker, *Here are the states that have shut down nonessential business*, ABC NEWS (Apr. 3, 2020, 7:58 PM), https://abcnews.go.com/Health/states-shut-essential-businesses-map/story?id=69770806.

[4] Irene Jiang, *Here's the difference between an 'essential' business and a 'nonessential' business as more than 30 states have imposed restrictions*, BUSINESS INSIDER (Mar. 31, 2020, 5:11 PM), https://www.businessinsider.com/what-is-a-nonessential-business-essential-business-coronavirus-2020-3.

[5] Suneson, *supra* note 1.

[6] Jim Zarroli, *Deluge Continues: 26 Million Jobs Lost In Just 5 Weeks*, NATIONAL PUBLIC RADIO (Apr. 23, 2020, 8:33 AM), https://www.npr.org/sections/coronavirus-live-updates/2020/04/23/841876464/26-million-jobs-lost-in-just-5-weeks.

[7] *See generally* Holland & Knight COVID-19 Response Team, *State and Local Orders and Regulations*, HOLLAND & KNIGHT (June 30, 2020), https://www.hklaw.com/en/case-studies/covid19-response-team; *see also* The Council of State Governments, *COVID-19 Resources for State Leaders*, THE COUNCIL OF STATE GOVERNMENTS, https://web.csg.org/covid19/executive-orders/.

[8] Celine McNicholas & Margaret Poydock, *Who are essential workers? A comprehensive look at their wages, demographics, and unionization rates*, THE ECONOMIC POLICY INSTITUTE (May 19, 2020, 11:25 AM),

workers, and though that may seem obvious, these healthcare workers encompass only roughly 30% of "essential" workers; the other 70% of essential workers are spread throughout industries ranging from food services to emergency personnel and everywhere in between.[9] Essential workers, such as healthcare workers, first responders, grocery store clerks, restaurant workers, as well as numerous others in a myriad of different industries, are oftentimes at an increased risk of contracting COVID-19 due to their exposure while at work. These risks are further exacerbated, oftentimes turning into a validated fear, when considered against the backdrop of a shortage of personal protective equipment.[10] The fact of the matter is that thousands of these truly essential workers have been diagnosed with the virus, including and most definitely not limited to, healthcare workers,[11] supermarket workers,[12] police officers,[13] and firefighters,[14] many of whom have died as a result. It is without question that those described as "essential workers" often face a true threat and a heightened possibility that they may contract the virus while at work. This issue raises the critical question: What happens when an employee is diagnosed with COVID-19 and believes that they contracted it within the course and scope of their employment?

Companies are now facing an inevitable possibility that employees who contract the virus may pursue remedy by way of benefits and medical treatment provided through workers' compensation claim insurance systems or otherwise attempt to hold their employer(s) liable.[15] However, according to Ms. Daiquiri Steele, a Forrester Fellow at Tulane University Law School, workers' compensation claims related to the novel coronavirus will be "difficult for employees [to establish] because the employees bringing the claims would have to prove they contracted the virus on the job," considering that "because of [the] pandemic, it would be difficult to ascertain where the virus was contracted."[16] Though this would often be the case, current actions by state executives and legislatures throughout the nation are directly negating the notions expressed by Ms. Steele by establishing rebuttable presumptions for certain claims involving the novel virus.[17]

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https://www.epi.org/blog/who-are-essential-workers-a-comprehensive-look-at-their-wages-demographics-and-unionization-rates/.

[9] *Id.*

[10] German Lopez, *Why America ran out of protective masks – and what can be done about it*, VOX (Mar. 27, 2020), https://www.vox.com/policy-and-politics/2020/3/27/21194402/coronavirus-masks-n95-respirators-personal-protective-equipment-ppe.

[11] Adrianna Rodriguez & Ken Alltucker, *Thousands of health care workers sickened by COVID-19 and 27 dead, CDC report says*, USA TODAY (Apr. 14, 2020), https://www.usatoday.com/story/news/health/2020/04/14/cdc-report-thousands-health-care-workers-infected-coronavirus/2988120001/.

[12] Dalvin Brown, *COVID-19 claims lives of 30 grocery store workers, thousands more may have it, union says*, USA TODAY (Apr. 14, 2020, 9:56 AM), https://www.usatoday.com/story/money/2020/04/14/coronavirus-claims-lives-30-grocery-store-workers-union-says/2987754001/.

[13] Ty Russell, *Coronavirus Impact: 11 City Of Miami Police Officers Diagnosed With COVID-19*, CBS MIAMI (Apr. 10, 2020), https://miami.cbslocal.com/2020/04/10/coronavirus-impact-11-city-of-miami-police-officers-diagnosed-with-covid-19/.

[14] Eileen Kelly, *Seminole tribe's fire chief dies from coronavirus*, SOUTH FLORIDA SUN SENTINEL (May 1, 2020), https://www.sun-sentinel.com/coronavirus/fl-ne-seminole-tribe-fire-chief-killed-by-covid-19-20200501-mcp43qc6pfc2ldv66fl3t2ecve-story.html.

[15] Amanda Robert, *Can companies be held liable when their employees fall ill with the coronavirus?*, ABA JOURNAL (Mar. 19, 2020), https://www.abajournal.com/web/article/attorneys-advise-companies-on-potential-coronavirus-related-liability.

[16] *Id*.

[17] Josh Cunningham, *COVID-19: Workers' Compensation*, NATIONAL CONFERENCE OF STATE LEGISLATURES (June 10, 2020), https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx.

Florida has currently directed such presumption applicable to "front line state employees."[18] In fact, many are anticipating a "tidal wave" of workers' compensation claims because of the pandemic.[19] This has already been the case in Florida where roughly 4,000 workers' compensation insurance claims implicating the virus have already been filed and over 1,700 of them denied, not accounting for claims filed after May 2020.[20] Many of these denied claims will inevitably find their way to court in hopes of securing benefits, which may result in costly legal fees, as well as an increase in judicial resources and an overcrowding of the docket. Not to mention that a rise in compensable claims will surely mean an increase in insurance premiums which already burden small businesses.[21]

This article will discuss the challenges posed by COVID-19 in the field of workers' compensation, with special attention paid to cases involving "essential workers." Florida Statutes currently afford a presumption of an injury/illness to be work-related in first responders and other state employees when suffering from certain diseases.[22] These statutes provide that the employees' injury and/or illness will be presumed to be work-related and compensable absent competent substantial evidence to indicate otherwise.[23] The establishment of a similar statutory presumption for COVID-19 would likewise shift the burden onto the employer allowing for eligible employees who contract the virus to receive benefits and absolve them of the burden to establish occupational causation and work-relatedness, such as establishing they got the virus at work, the primary hurdle in such claims.[24]

In seeking to provide a thorough understanding and overview of the issues discussed herein, Part I will provide an overview of workers' compensation claim compensability. Part II will discuss current presumption statutes at play within Florida. Part III will analyze Florida's "new" COVID-19 presumption established by way of the Chief Financial Officer's ("CFO") directive. Part IV will address the issues posed by the novel coronavirus in the field of workers' compensation with special attention being paid to the issues surrounding the establishment of a viable workers' compensation claim in connection with the novel virus. Finally, Part V will look at the option of establishment of a presumption of compensability in all COVID-19 claims, discuss actions being taken by other states, and address what Florida can do in response.

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[18] Jimmy T. Patronis, *Chief Financial Officer Directive 2020-05*, FLORIDA DEPARTMENT OF FINANCIAL SERVICES OFFICE OF THE CHIEF FINANCIAL OFFICER (Mar. 30, 2020), https://www.myfloridacfo.com/sitePages/newsroom/pressRelease.aspx?id=5515.

[19] Baker Donelson et al., *COVID-19 Expected to Create a Tidal Wave of Workers' Compensation Claims: Is Your Business Ready for the Tsunami?*, JD SUPRA (June 5, 2020), https://www.jdsupra.com/legalnews/covid-19-expected-to-create-a-tidal-67039.

[20] Jimmy T. Patronis, *Florida Division of Workers' Compensation 2020 COVID-19 Report*, FLORIDA DEPARTMENT OF FINANCIAL SERVICES DIVISION OF WORKERS' COMPENSATION (June 1, 2020), https://www.myfloridacfo.com/Division/WC/PublicationsFormsManualsReports/Reports/COVID-19-Dashboard-June-1-2020.pdf.

[21] *See* Donelson, *supra* note 19.

[22] Fla. Stat. § 112.18 (2011); Fla. Stat. § 112.181 (2020).

[23] *Id*.

[24] Robert, *supra* note 15 (comments of Ms. Steele).

I. Compensability of Workers' Compensation Claims

This non-exhaustive overview of workers' compensation claim compensability will provide a means of orientation on the issues involved herein. What does it take to have a viable workers' compensation claim? Florida Workers' Compensation Law, § 440.09, provides that an employer may be held liable for an employee's injury "arising out of work performed in the course and scope of employment."[25] The Florida Supreme Court clarified that language in *Strother v. Morrison Cafeteria*:[26]

> To be compensable, an injury must arise out of employment in the sense of causation and be in the course of employment in the sense of continuity of time, space, and circumstances. This latter factor may be proved by showing that the causative factors occurred during the time and space limits of employment.[27]

Simply put, in most cases, for an employee to have a compensable claim the employee must be working (i.e. doing what the employee is employed to do) and such work must cause and/or contribute to the injury suffered and claimed.

Further, employees have a duty to notify their employer, "within 30 days after the date of initial manifestation of the injury," failure to do so may bar an otherwise compensable claim.[28] Generally, the burden to establish the injuries causation and work-relatedness rests with the employee, an injured employee must support their claim through competent, substantial evidence.[29] As stated in Fla. Stat. § 440.09 and affirmed by Florida's First District Court of Appeals, "a claimant's burden of proof in workers' compensation cases has been and is (unless modified by statute) significantly less than proof by a preponderance of evidence."[30] Employees also carry the burden to establish the injury, disability and/or symptoms stemming therefrom, to a "reasonable degree of medical certainty;" the injury must also be the "major contributing cause"[31] of the medical treatment or benefits claimed.[32]

[25] Fla. Stat. § 440.09(1) (2020).
[26] Strother v. Morrison Cafeteria, 383 So. 2d 623 (Fla. 1980).
[27] *Strother*, 383 So. 2d at 628.
[28] Fla. Stat. § 440.185 (2020).
[29] Schafrath v. Marco Bay Resort, Ltd., 608 So. 2d 97, 102 (Fla. 1st DCA 1992); *see also* Johnson v. Koffee Kettle Restaurant, 125 So. 2d 297, 299 (Fla.1960).
[30] *Schafrath*, 608 So. 2d at 102 (Fla. 1st DCA 1992) ("An employee is only required to present, by competent, substantial evidence, a state of facts from which it may be found, consonant with logic and reason, that an injury was sustained during the course of and arising out of the employee's employment.").
[31] Fla. Stat. § 440.09 (2020) ("Major contributing cause" means the cause which is more than 50% responsible for the injury as compared to all other causes combined for which treatment or benefits are sought, and must be established by medical evidence only).
[32] *Id.*

A. "Exposure" and "Occupational Disease" Claims

It is important to note that Florida Workers' Compensation Law sets a higher standard in determining compensability for cases involving theories of "exposure" and/or "occupational disease."[33]

Florida Statute § 440.02 states that "[a]n injury or disease caused by exposure . . . is not an injury by accident arising out of the employment unless there is clear and convincing evidence establishing that exposure . . . at the levels which the employee was exposed can cause the . . . disease sustained."[34] The Florida Supreme Court in *Univ. of Florida v. Massie*, clarified that,

> [f]or a claimant to recover under the exposure theory of accident, he must show 1) prolonged exposure, 2) the cumulative effect of which is injury . . . [35] and 3) that he has been subjected to a hazard greater than that to which the general public is exposed. Alternatively, he must demonstrate a series of occurrences, the cumulative effect of which is injury.[36]

The Court further clarified that "[i]n the case of [an] exposure which . . . [37] causes a new injury, that exposure must be of a physical nature, be it some deleterious substance or extreme environmental condition."[38] Further, the First DCA, in *Moore v. Pasco Cty. Bd. of Comm'rs,* determined that no minimum exposure time is needed to satisfy "prolonged exposure."[39]

Florida Workers' Compensation Law likewise distinguishes compensability standards for cases involving diseases which are "due to causes and conditions which are characteristic of and peculiar to a particular trade, . . . or employment," such are referred to as cases under an "occupational disease" theory.[40] Florida Workers' Compensation Law, § 440.151, specifies that "[i]n no case shall an employer be liable . . . unless such disease has resulted from the nature of the employment in which the employee was engaged under such employer, was actually contracted while so engaged, and the nature of the employment was the major contributing cause of the disease."[41] The statute further states that "[o]ccupational disease means only a disease for which there are epidemiological studies showing that exposure to the specific substance involved at the levels to which the employee was exposed may cause the precise disease sustained by the

[33] Fla. Stat. § 440.09(1) (2020).
[34] Fla. Stat. § 440.02(1) (2020).
[35] Language involving preexisting condition omitted as out of range of discussion and depth of article.
[36] Univ. of Florida v. Massie, 602 So. 2d 516, 524 (Fla. 1992).
[37] Language involving preexisting condition omitted as out of range of discussion and depth of article.
[38] Univ. of Florida v. Massie, 602 So. 2d 516, 524 (Fla. 1992).
[39] Moore v. Pasco Cty. Bd. of Comm'rs, 854 So. 2d 256 (Fla. 1st DCA 2003) ("The primary issue in this case is whether Appellant suffered a "prolonged exposure" as required by this Court's opinion in *Festa v. Teleflex, Inc.*, 382 So. 2d 122, 124 (Fla. 1st DCA 1980). In *J & J Enterprises v. Oweis*, 733 So. 2d 1149, 1150 (Fla. 1st DCA 1999), this Court held that the "prolonged exposure" factor can be satisfied by either a single-dose exposure or a repeated exposure and that Festa, supra, "does not impose a minimum temporal threshold" for determining a "prolonged exposure." This Court also held in *Florida Power Corp. v. Stenholm*, 577 So. 2d 977, 981-82 (Fla. 1st DCA 1991), that "the factor of 'prolonged exposure' may be satisfied in any given case by a showing of any exposure—either a single dose exposure or a repeated exposure.").
[40] Fla. Stat. § 440.151(1)-(2) (2020).
[41] *Id*.

employee."[42] By statute, occupational disease excludes "[a]ll ordinary diseases of life to which the general public is exposed, unless the incidence of the disease is substantially higher in the particular trade, . . . than for the general public."[43] Florida's First District Court of Appeal, in *City of Port Orange v. Sedacca*, restated that "not every disease or adverse medical condition where employment is a contributing cause, or even the major contributing cause, qualifies as an occupational disease."[44] The court further asserted that a workers' compensation claimant either "meets the [statutory] requirements for [occupational disease] coverage under section 440.151, or he does not," and that the court will not look beyond the statute to define its terms.[45] Specifically, in cases involving a theory of occupational disease, claimants carry the burden of satisfying a four-prong test as outlined in *Lake v. Irwin Yacht & Marine Corp.*.[46]

In cases involving the theories of compensability outlined above, the burden to establish the claim remains on the employee.[47] However, the burden is slightly different than that of other claims that are not brought under such theories. The employee seeking medical coverage and/or compensability under an occupational disease or exposure claim theory must establish their claim through "clear and convincing evidence."[48] This statutory modification to the generally applied burden, makes these cases more difficult for injured employees to establish when compared with more readily observable injuries in which causation and work-relatedness may be more easily ascertained.[49] The clear and convincing requirement for workers' compensation cases has been clarified as "[s]uch evidence . . . of a quality and character so as to produce in the mind of the [judge] a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established."[50] Under a clear and convincing evidentiary requirement, the employees' burden of proof to establish a viable claim is "stricter than the often-described standard of competent substantial evidence" generally applicable in workers' compensation cases.[51] In these claims involving an occupational disease or exposure theory an employee must still establish the injury to a reasonable degree of medical certainty, and also that the injury is the major contributing cause of the treatment or benefit being sought.[52] Further, it is important to note that under an

[42] Fla. Stat. § 440.151(2) (2020).
[43] *Id*.
[44] City of Port Orange v. Sedacca, 953 So. 2d 727, 729 (Fla. 1st DCA 2007).
[45] *Id*.
[46] Lake v. Irwin Yacht & Marine Corp., 398 So. 2d 902, 904 (Fla. 1st DCA 1981) (outlining the four-prong test: (1) the disease must be actually caused by employment conditions that are characteristic of and peculiar to a particular occupation; (2) the disease must be actually contracted during employment in the particular occupation; (3) the occupation must present a particular hazard of the disease occurring so as to distinguish that occupation from usual occupations, or the incidence of the disease must be substantially higher in the occupation than in usual occupations; and (4) if the disease is an ordinary disease of life, the incidence of such a disease must be substantially higher in the particular occupation than in the general public.); *see also City of Port Orange*, 953 So. 2d at 729 (instructing that for a medical condition to be eligible for coverage as an occupational disease the claimant would need to establish the four-prong test as enunciated in *Irwin Yacht & Marine Corp.*, 398 So. 2d).
[47] Fla. Stat. § 440.09(1) (2020).
[48] *Id*.
[49] McKesson Drug Co. v. Williams, 706 So. 2d 352, 353 (Fla. 1st DCA 1998).
[50] *Id*. at 353 (citing *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); *see also* Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991).
[51] *McKesson Drug Co.*, 706 So. 2d at 353.
[52] Fla. Stat. § 440.09 (2020).

occupational disease theory specifically, the major contributing cause must be established through medical evidence alone (i.e., physical examination and/or diagnostic tests).[53]

II. Florida Presumption Statutes

A discussion on Florida presumption statutes is pertinent as to provide a glimpse into the public policy considerations as well as the procedural underpinnings of the newly enacted, and later discussed, presumption regarding COVID-19.

Florida Statutes provide for a presumption of compensability for specific diseases and conditions in concerning workers' compensation claims made by statutorily specified employees, creating alternate standards in the establishment of compensable claims for specified state employees who contract specified diseases.[54] Though these statutes are not located within Florida Statute Chapter 440, which governs workers' compensation, courts have been clear that these presumption statutes apply to workers' compensation cases.[55] Fla. Stat. § 112.18 provides that:

> Any condition or impairment of health of any Florida state, municipal, county, port authority, special tax district, or fire control district firefighter or any law enforcement officer, correctional officer, . . . caused by tuberculosis, heart disease, or hypertension shall be presumed to have been accidental and to have been suffered in the line of duty unless the contrary be shown by competent evidence.[56]

Additionally, Fla. Stat. § 112.181 provides a similar presumption for "emergency rescue or public safety worker[s]"[57] stating that:

> Any emergency rescue or public safety worker who suffers a condition or impairment of health that is caused by hepatitis, meningococcal meningitis, or tuberculosis, that requires medical treatment, and that results in total or partial disability or death shall be presumed to have a disability suffered in the line of duty, unless the contrary is shown by competent evidence.[58]

In cases involving the aforementioned diseases, an employee seeking remedy may establish compensability under the requirements set forth in the presumption statute or may choose to

[53] Fla. Stat. § 440.151(1)(a) (2020).
[54] Fla. Stat. § 112.18(1)(a) (2020); Fla. Stat § 112.181(2) (2020).
[55] *See* South Trail Fire Control Dist. v. Johnson, 449 So. 2d 947 (Fla. 1st DCA 1984); *see also* City of Miami v. Thomas, 657 So. 2d 927, 928 (Fla. 1st DCA 1995).
[56] Fla. Stat. § 112.18(1)(a) (2020).
[57] Fla. Stat. § 112.181(1)(b) (2020) ("any person employed full time by the state or any political subdivision of the state as a firefighter, paramedic, emergency medical technician, law enforcement officer, or correctional officer who, in the course of employment, runs a high risk of occupational exposure to hepatitis, meningococcal meningitis, or tuberculosis and who is not employed elsewhere in a similar capacity. However, the term 'emergency rescue or public safety worker' does not include any person employed by a public hospital licensed under Chapter 395 or any person employed by a subsidiary thereof.").
[58] Fla. Stat § 112.181(2) (2020).

establish employer liability under an alternate theory in satisfying the requirements of an occupational disease theory.[59]

These statutory presumptions place the burden on the employer, after an employee has met the statutory requirements, to refute the work-relatedness of the injury and/or the disease claimed.[60] The Florida Supreme Court has clearly stated that, "[t]o rebut the statutory presumption, it is necessary [to] show that the disease [at issue] was caused by a specific, non-work-related event or exposure."[61] The Court further recognized that presumption legislation exemplifies the social and public policy of the state which acknowledges that certain employees are perpetually faced with the possibility of extreme danger as it is inherent in their jobs, and certified that the presumption legislation "dispose[s] of the need to introduce proof that the enumerated diseases were occupational hazards of the particular [employee] involved by assuming that they are hazards faced by all [employees covered by the presumption]."[62]

III. Florida's COVID-19 Presumption: CFO Directive 2020-05

On March 30, 2020 Florida CFO, Jimmy Patronis, directed the establishment of a presumption of compensability for COVID-19 claims brought by specified state employees providing workers' compensation coverage and benefits to many of those on the front lines of the fight against COVID-19.[63] This directive was Florida's first step in addressing the compensability of claims brought in relation to the novel coronavirus. For purposes of coverage, the CFO directive limited the presumption to what is termed as a "Frontline State Employee,"[64] who has tested positive for the virus "through a reliable method."[65] Under the CFO directive, claims made by these individuals would be compensable "unless the State of Florida can show, by preponderance of the evidence, that [the] Frontline State Employee contracted COVID-19 outside [the] scope of employment as a state employee."[66] The document further instructed the finding and processing of compensability and approval of such claims as provided for "without regard to whether any other non-compensable factor may have contributed to the employee contracting COVID-19," specifying that "compensation shall not be reduced because of any other potential causative factors."[67]

[59] *See* Seminole County Gov't v. Bartlett, 933 So. 2d 550, 551 (Fla. 1st DCA 2006).
[60] Fla. Stat. § 112.181(2) (2020); Fla. Stat. § 112.18(1)(a) (2020).
[61] Caldwell v. Div. of Ret., Florida Dep't. of Admin., 372 So. 2d 438, 441 (Fla. 1979).
[62] *Id*. at 440-41 (discussing specifically firefighters under the presumption, but such concept can be extrapolated to all such employees covered under the Florida presumption laws.).
[63] Patronis, *supra* note 18.
[64] *Id*. ("(a) First Responders, as defined in Section 112.1815, Florida Statutes, including: law enforcement officers, as defined in Section 943.10, Florida Statutes; firefighters, as defined in Section 633.102, Florida Statutes; and emergency medical technicians or paramedics. (b) Corrections officers, as defined in Section 943.10, Florida Statutes, and other employees, whose official duties require physical presence in a state-operated detention facility. (c) State Employees working in the healthcare field, whose duties require contact with persons as they are being tested for COVID-19 or otherwise known to be infected with COVID-19. (d) Child Safety Investigators, whose duties require them to conduct welfare checks on behalf of minors. (e) Members of the Florida National Guard, who are called to active duty for service in the State of Florida in response to COVID-19.") (Formatting modified).
[65] Patronis, *supra* note 18.
[66] *Id*.
[67] *Id*.

After entering the CFO directive, Mr. Patronis was quoted saying "[i]f we're going to ask our public servants to fight this pandemic . . . they have to know we've got their backs."[68] However, the document, nor any further action of Florida government, extends the presumption any further than the employees specified.[69] Glen Wieland, immediate past Chair of the Florida Bar's workers' compensation division, commented on the new presumption, "it's a good first step," further stating that "the next step [would be for] the government to come out and say, 'if these (private sector) [employees] working in the hospitals and dealing with these patients get [the virus], they need to be covered.'"[70] Glen Wieland is in effect calling for an extension of the presumption to the private sector; these views are likely shared by many plaintiff attorneys dealing with clients suffering adverse effects as a result of contracting COVID-19 while on the job.

With the aforementioned in tow, only a month after Florida CFO, Jimmy Patronis, directed the COVID-19 presumption covering State employees, he issued a press release wherein stating, "[w]e can't allow our state's recovery to be inhibited by the constant threat of lawsuits that will . . . inevitably jack up insurance rates," promising future legislation that will "get Florida back to work" by "shield[ing] small businesses from liability for COVID-19-related claims."[71] Mr. Patronis' statements are a direct blow to nurses and doctors at private hospitals, supermarket workers, paramedics working with private companies, restaurant workers, and nearly any other employee who was deemed "essential" and is employed in the private sector, individuals who do not have an option to work from home and are unfortunately not covered by Mr. Patronis' directive. The fact that these essential workers are not provided a presumption as are state workers means that they may well face challenges in seeking workers' compensation benefits from a COVID-19 related injury/illness. Mark Ingram, a Sarasota-based workers' compensation attorney, pointed to the trivial issue that has undoubtedly been highlighted by many attorneys in the field, "how do you prove you actually contracted [COVID-19] on the job?"[72]

IV. Workers' Compensation Claims Involving COVID-19

According to the Florida Division of Workers' Compensation 2020 COVID-19 Report, roughly 3,800 workers' compensation insurance claims have been filed (as of May 31, 2020) in relation to COVID-19, amounting to a total payout of over $3.4 million in, compensable, non-contested claims.[73] Of the reported 3,807 claims filed in connection with the virus, 2,089 claims have been determined compensable, and over 88% of the claims found compensable have been categorized as being brought by healthcare workers and first responders.[74] Further, over 60%

[68] Malena Carollo, *Catch coronavirus on the job? In Florida, workers' comp may not cover you*, TAMPA BAY TIMES (Apr. 2, 2020), https://www.tampabay.com/news/business/2020/04/02/catch-coronavirus-on-the-job-in-florida-workers-comp-may-not-cover-you/.
[69] Patronis, *supra* note 18.
[70] *Id*. (at that time Florida Division of Risk Management had recorded only 36 workers' compensation claims related to the coronavirus).
[71] Jimmy T. Patronis, *In Case You Missed It…. Florida Politics: "Jimmy Patronis vows legislation combating 'the constant threat' of COVID-19 lawsuits"*, FLORIDA DEPARTMENT OF FINANCIAL SERVICES OFFICE OF THE CHIEF FINANCIAL OFFICER (May 20, 2020), https://www.myfloridacfo.com/sitePages/newsroom/pressRelease.aspx?id=5552.
[72] Carollo, *supra* note 68; *see also* Robert, *supra* note 15 (comments of Ms. Steele).
[73] Patronis, *supra* note 20 at 10.
[74] *Id*.

(63.6%) of the total claims reported by the division as to relating to COVID-19 were in the tri-county area of Miami-Dade, Broward, and Palm Beach counties.[75] Deputy Chief Judge of Compensation Claims, The Honorable David Langham,[76] has noted that "[a] significant volume of Florida claims have been totally denied."[77]

According to the information provided by the Florida Division of Workers' Compensation, workers in the service industry who try to bring claims in relation to the virus are being denied benefits at a rate of over 73%.[78] In contrast, the claims brought by healthcare workers are being found compensable at a rate closer to 70%.[79] This disparity can come at no shock in light of the limited scope of the CFO directive.[80] In my opinion, the disparity of compensability being seen in cases related to the virus is obviously directly attributable to the underlying laws allowing for the establishment of a viable and compensable claim. As previously outlined, qualified state employees who contract the novel virus are afforded a presumption of work-relatedness, contrasted with employees who do not work for the State who do not receive the luxury of the COVID presumption, be that whether they are employed in the healthcare field or not.[81] Instead, these non-state employees would need to sufficiently establish compensability under one of the aforementioned theories, likely through that of an exposure or alternatively an occupational disease theory under Fla. Stat. § 440.151, carrying with them the burden of establishing that they contracted the virus at work as well as many other statutory requirements.

When an individual is denied benefits by his employer or there is a dispute as to the benefits being provided, the individual may seek review in court.[82] As of late May 2020, a search of workers' compensation lawsuits filed within the state showed many employees taking legal action in seeking benefits through claiming injury by occupational disease related to COVID-19.[83] It is well established that when an employee seeks to establish a claim by way of occupational disease theory "[e]ven where a condition of employment causes a permanent disease, failure to meet the statutory requirements of section 440.151 means the claimant would not be entitled to compensation or benefits under the Act."[84] Appeals courts, as well as the trial judge, reviewing workers' compensation claims brought under an occupational disease theory of Fla. Stat. § 440.151 apply a four-factor test.[85] Under an occupational disease theory the employee must establish that:

> (1) the disease must be actually caused by employment conditions that are characteristic of and peculiar to a particular occupation; (2) the disease must be

[75] Patronis, *supra* note 20 at 8-9.
[76] The Office of the Judges of Compensation Claims, *Information for Judge David W. Langham*, OFFICE OF THE JUDGES OF COMPENSATION CLAIMS, https://www.jcc.state.fl.us/JCC/Judges/judgeDetails.asp?jid=24.
[77] Judge David Langham, *Florida COVID-19 Litigation*, WORKERSCOMPENSATION.COM (June 15, 2020), https://www.workerscompensation.com/news_read.php?id=36119.
[78] Patronis, *supra* note 20 at 10.
[79] *Id*. at 10
[80] *See* Patronis, *supra* note 18 (applying presumption of compensability to State Employees only).
[81] *Id.*
[82] Fla. Stat. § 440.192 (2020)
[83] Langham, *supra* note 77 (The claims that have sought review in court include "a police officer, two patient care assistants, a physical therapist, a care-giver, a certified nursing assistant (CNA), a delivery driver, a driver/guard, two other drivers, a behavioral health technician, a professor, a fleet service clerk, and a food server.").
[84] City of Port Orange v. Sedacca, 953 So. 2d 727, 729 (Fla. 1st DCA 2007).
[85] Lake v. Irwin Yacht & Marine Corp., 398 So. 2d 902, 904 (Fla. 1st DCA 1981); *see also* Broward Indus. Plating, Inc. v. Weiby, 394 So. 2d 1117 (Fla. 1st DCA 1981).

> actually contracted during employment in the particular occupation; (3) the occupation must present a particular hazard of the disease occurring so as to distinguish that occupation from usual occupations, or the incidence of the disease must be substantially higher in the occupation than in usual occupations; and (4) if the disease is an ordinary disease of life, the incidence of such a disease must be substantially higher in the particular occupation than in the general public.[86]

An employee seeking benefits related to a COVID-19 related claim would not only need to establish that they have the virus, and that they got it at work, but would also need to establish that the virus caused them to suffer disablement or death.[87] Merely being diagnosed with the novel coronavirus and satisfying the elements above is unlikely to result in compensability.[88]

However, in my opinion, individuals faced with the burden of establishing that they contracted the novel virus at work are faced with an even greater hurdle in the fourth prong of the test as applied by courts in these cases. In *Glassrock Home Health Care v. Leiva,* Florida's First District Court of Appeals indicated that the wording of Fla. Stat. § 440.151 determined that "a disease to which the general public is exposed is an ordinary disease of life."[89] As such, in order for an individual to succeed in a claim under an occupational disease theory the individual would need to establish that the prevalence of the COVID-19 is substantially higher in their occupation than in other such situations.[90] The establishment of compensability under an occupational disease theory is not an easy task, as outlined in many cases.[91]

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[86] *Irwin Yacht & Marine Corp.*, 398 So. 2d at 904.

[87] City of Port Orange v. Sedacca, 953 So. 2d 727, 729-30 (Fla. 1st DCA 2007) ("Since disablement or death is required by the statute, neither compensation nor benefits are available until the employee suffers disablement or death[,]" noting further that a "disease or medical condition where employment is the major contributing cause will not qualify as an occupational disease unless Claimant meets the statute's definition of disablement.").

[88] *See* Fla. Power Corp. v. Brown, 863 So. 2d 364, 365 (Fla. 1st DCA 2003) (finding that even though the employee was diagnosed with a permanent disease caused by his employment, since the employee did not suffer a "disablement," his disease was not a compensable occupational disease, pointing out that "in occupational disease cases, it is the disability caused by the disease, not the diagnosis of the disease, which determines compensability").

[89] Glasrock Home Health Care v. Leiva, 578 So. 2d 776, 779 (Fla. 1st DCA 1991).

[90] *Id*. at 778 ("[T]his court's case law has convincingly established it is the claimant's burden to prove the [disease is not an 'ordinary disease of life'], or that the occurrence "of such disease is substantially higher in claimant's occupation than in other occupations.").

[91] *Glasrock Home Health Care*, 578 So. 2d at 779 (Fla. 1st DCA 1991) (determining that at any one time 15-20% of the general population was exposed to the disease in question, but were immune to its effects, as such finding the claimed disease to be a non-compensable ordinary disease of life.); *see also* Florida State Hospital v. Potter, 391 So. 2d 322 (Fla. 1st DCA 1981) (finding that the disease in question was an "ordinary communicable infectious disease to which the general public is exposed" and because "[t]here was no evidence that the incidence of [the disease in question] was substantially greater among employees at the hospital than for the general public" the court reversed the award of benefits granted by the lower tribunal categorizing the disease as an ordinary disease of life.); *see also* City of Tamarac v. Varellan, 463 So. 2d 479 (Fla. 1st DCA 1985) (Determination that the claimant contracted the disease in question while swimming in an algae-laden swimming pool during first responder training was reversed based on the courts finding that there was no evidence that the swimming pool was contaminated with the virus.); *see also* Hillsborough Cty. Sch. Bd. v. Bigos, 396 So. 2d 848 (Fla. 1st DCA 1981) (Determination of compensability for disease was reversed because the record failed to show a causal connection between the disease in question and the teacher's employment; the doctor could not say whether the teacher was infected by her student, or vice-versa, or even whether they both got it from someone else).

V. Establishment of a New Presumption? What Can Be Done?

In extending a presumption of work-relatedness to state employees who contract the novel coronavirus, Florida CFO Jimmy Patronis stated that the employees covered by the coronavirus presumption "perform critical functions, which cannot be deferred or performed remotely, and require substantial contacts with populations known or suspected of carrying COVID-19."[92] This is undoubtedly true, however, non-state employees and individuals working in the private sector also perform critical functions which cannot be deferred or performed remotely and require substantial contact with persons known or suspected of carrying the novel coronavirus; such as medical staff at private hospitals and supermarket workers. It can hardly be said that nurses and doctors at private hospitals, caregivers, supermarket workers, and many other individuals working in private sector positions are considered to be performing non-critical functions.

One option in facing this issue would be for Florida to establish a presumption in the area of workers' compensation to address the issue(s) faced by the private sector employees; California recently extended such a presumption for coronavirus claims.[93] [94] California's coronavirus presumption covers all employees who are diagnosed or test positive for the virus "within 14 days after a day that the employee performed labor or services at the employee's place of employment," an obvious caveat included is that the employees' place of employment cannot be their home.[95] Such a presumption provides access to a wide range of benefits, including but not limited to medical treatment and hospitalizations, and because medical care under workers' compensation systems comes without any deductibles charged to an employee these individuals can seek much needed medical care without the burden of facing medical costs.[96] However, it must be noted that California's actions have been described as some of "the most aggressive" in the nation, and possibly even more pressing is the fact that the California governor may have just handed down a bill to California companies to the tune of over $33 billion.[97] This figure represents a more than doubling of the total paid in workers' compensation claims during previous years.[98]

In discussing a possible extension of a presumption to non-state employees here in Florida, one specific issue appears trivial: Florida's workers' compensation system for non-state employees

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[92] Patronis, *supra* note 20.

[93] Caroline Dickey, *California Creates Workers' Compensation Presumption of Coverage for COVID-19 Illnesses*, THE NATIONAL LAW REVIEW (May 9, 2020), https://www.natlawreview.com/article/california-creates-workers-compensation-presumption-coverage-covid-19-illnesses.

[94] California Exec. Order No. N-62-20 (May 6, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/05/5.6.20-EO-N-62-20-text.pdf.

[95] *Id*.

[96] Arent Fox et al., *California Presumes Workers' Comp Covers Employee COVID-19*, JD SUPRA (May 11, 2020), https://www.jdsupra.com/legalnews/california-presumes-workers-comp-covers-91966/.

[97] Jim Sams, *Work Comp May Need Backstop as Presumptions Push Claim Costs into Billions*, CLAIMS JOURNAL (May 11, 2020), https://www.claimsjournal.com/news/national/2020/05/11/296987.htm (depicting the worst-case scenario projected by the state's ratemaking agency, "if every essential worker who is diagnosed with COVID-19 files a claim and is paid benefits." The midrange projection is over $11 billion, and with an optimistic best-case scenario of $2.2 billion in losses for California, in that scenario, only 4 percent of health care workers and less than 1 percent of other workers would file COVID-19 claims.).

[98] Louise Esola, *California comp report shows drop in medical costs*, BUSINESS INSURANCE (July 2, 2020), https://www.businessinsurance.com/article/00010101/NEWS08/912329402/California-comp-report-shows-drop-in-medical-costs (explaining that insurer combined losses and expenses incurred by workers compensation payers in California in 2018 were over $14 billion).

is dominated by private insurance companies, as such, the state cannot force these companies to preemptively or presumptively cover COVID-19 claims without enacting specific legislation amending or made applicable to Chapter 440 of the Florida Statutes.[99] Jeff Edinger, senior division executive for the National Council on Compensation Insurance, which sets rates for Florida's workers' compensation insurance, recently commented that Florida can mandate that the insurance companies "not . . . cancel coverage [during the pandemic]," but beyond that, according to the Council, "[Florida cannot] mandate that [private workers' compensation insurance companies] cover claims such as those for COVID-19."[100] Though obvious, it must be mentioned that an increase in compensable workers' compensation claims will inevitably mean higher insurance premiums, impacting all businesses.[101]

Currently, it is clear, Florida's coronavirus presumption only applies to the previously outlined state employees.[102] In order to extend that coverage into the private sector, Florida would likely need to enact legislation or alternatively have insurance companies accept these claims as compensable upon their own volition. Additionally, from a legal standpoint, many issues remain unanswered, possibly the most important issue being whether the CFO's directive is even enforceable. Regardless of this, one thing is for certain, litigation on these issues will span for years to come. Presently, we may seek guidance by way of the Florida Supreme Court decision in *Univ. of Florida v. Massie,* affirming the Court's hardline stance on judicial legislation in the area at issue here; "the legislature . . . is the proper branch to broaden the purpose of chapter 440."[103]

It is without doubt that both young and experienced attorneys will be carefully navigating the novel issues posed by the virus. One thing should remain clear, compensability of an employee's workers' compensation claim related to the novel coronavirus should be scrutinized, and each looked at on a case-by-case basis, dissected for work-relatedness. Most of the claims, as mentioned, will likely seek refuge in Florida's occupational disease theory of compensability, generally a more difficult theory to establish, as outlined above. This novel issue is ripe for litigation and judicial decisions providing guidance are inevitable in the coming months.

[99] Carollo, *supra* note 68.
[100] *Id*.
[101] *See* Donelson, *supra* note 19.
[102] Patronis, *supra* note 18.
[103] Univ. of Florida v. Massie, 602 So. 2d 516, 526 (Fla. 1992) (finding it improper for the court to amend or extend existing workers' compensation statute by way of judicial decision, citing to an earlier attempt at same in *Leon Cty. Sch. Bd. v. Grimes*, 548 So. 2d 205 (Fla.1989) (affirming the fact that they refused "to engage in such judicial legislation then, and we refuse to do so now.")).