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## FISCAL IMPACT REPORT

**SPONSOR** Hochman-Vigil/Chandler      **ORIGINAL DATE** 02/15/21  
**LAST UPDATED** 02/22/21      **HB** 268/ec/aHLVMC  
**SHORT TITLE** Coronavirus & Workers' Comp      **SB** \_\_\_\_\_  
**ANALYST** Bachechi

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	Indeterminate					

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to Senate Bill 261

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Office of the Attorney General (NMAG)

State Personnel Office (SPO)

Public Safety Department (PSD)

Workers' Compensation Administration (WCA)

### SUMMARY

#### Synopsis of HLVMC Amendment

The House Labor, Veterans' and Military Affairs Committee amendment to House Bill 268 clarifies that the contraction of the coronavirus disease is presumed to be an "injury by accident arising out of and in the course of employment" if the employee establishes the employer did not strictly comply with the related public health orders and the employer fails to rebut the presumption.

The amendment also strikes the term "then existent" wherever it appears to be modifying the term "public health orders" and instead modifies "public health orders" with the more precise term "in effect at any time during the fourteen days prior to the diagnosis."

The amendment also strikes "court of competent jurisdiction", such that an employer at any time and not only in a judicial proceeding may rebut the presumption that an employee contracted the coronavirus during the course of their employment. This change addresses the conflict with WCA Section 52-1-6 by removing the requirement that the rebuttal of a statutory presumption be

determined by a court of competent jurisdiction.

Finally, the committee amendment strikes and replaces the definition of “essential employee”, to include any public safety employee, school employee or “employee of any business declared to be an essential business” or “a business that has been permitted to operate with limitations pursuant to a public health order.” The amendment adds that “essential employees” who work for a business whose testing and tracing plans have been approved by the department of health are not included in the definition of “essential employee.”

### Synopsis of Original Bill

House Bill 268 (HB 268) amends Section 52-1-19 NMSA 1978 of the Workers’ Compensation Act to create the rebuttable presumption that contraction of Covid-19 by an essential employee is an injury arising by accident out of and in the course of employment, provided the employee can establish that the employer has not strictly complied with the existing public health orders. An essential worker is defined as any public safety employee or school employee or an employee declared to be an essential employee pursuant to a public health order of the governor or the Secretary of Health. The employer may rebut the presumption by a preponderance of the evidence that the worker substantially violated a public health order related to Covid-19. Section 2 prohibits insurers from using Covid-19 claims arising in the course of employment in developing rating plans.

The bill’s amended provisions would be effective from the date of passage of the bill until January 31, 2023.

This bill contains an emergency clause and would become effective immediately upon signature by the governor.

### **FISCAL IMPLICATIONS**

The exact fiscal implications of the bill are indeterminate at this time.

### **SIGNIFICANT ISSUES**

Workers’ compensation is designed to benefit both employees and employers by providing reliable insurance coverage with predictable, timely payments and reduced legal costs. Beyond providing medical treatment at no cost to the employee, workers’ compensation also provides wage replacement benefits for lost wages resulting from time away from work, and in some cases the worker’s family could be eligible for financial death benefits.

Generally, workers’ compensation does not cover routine community-spread illnesses like a cold or the flu because they usually cannot be directly tied to the workplace. The Covid-19 pandemic presents a unique circumstance where many jobs that are not typically considered hazardous have suddenly become very dangerous for workers. Workers deemed essential including health care workers, mass transit operators and grocery store workers are at a high risk of exposure to the virus while at work. But the more hazardous working conditions under the current statute do not guarantee that a Covid-19 infection would be covered under workers’ compensation.<sup>1</sup>

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<sup>1</sup> <https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx>

In total, 17 states and Puerto Rico have taken action to extend workers compensation coverage to include Covid-19 as a work-related illness. Nine states have enacted legislation creating a presumption of coverage for various types of workers. Minnesota, Utah and Wisconsin limit the coverage to first responders and health care workers. Illinois, New Jersey and Vermont cover all essential workers while California and Wyoming cover all workers.<sup>2</sup>

Currently, in New Mexico employers do not have presumed liability for their essential employees' contraction of Covid-19. This bill creates a presumption of eligibility, but requires the employee to first prove substantial non-compliance by the employer before there is a presumption of eligibility. Importantly, essential employees would not be required to prove that they were actually exposed to Covid-19 at work.

This presumption significantly increases employers' potential liability. An uptick in workers' compensation claims due to infection with Covid-19 could result in additional expenses to employers, including increased insurance premiums, interruptions to business operations, and other associated administrative costs. While this bill explicitly prohibits insurers from using Covid-19 claims arising in the course of employment in developing rating plans, insurance premiums may increase for all employers as a result, not only for those with significant numbers of essential employees.

WCA notes that many employers have not been able to strictly adhere to the public health orders, for example shortages of personal protective equipment in a hospital or health care setting. In some scenarios the non-adherence to the health order may be intentional, while others could be potentially unavoidable.

SPO notes, while employer compliance with public health orders is to be encouraged, this presumption seems unduly broad at a time when there is community spread of Covid-19. Not all essential employees face a greater risk of exposure at work than they face in their everyday community interactions.

WCA reports current statistics indicate insurers are paying Covid-19 claims and the introduction of a presumption of this type is likely to create new issues and new litigation. For example, the meaning of "strict compliance" with a public health order could be contested. The potential increase in formal litigation could result in employees experiencing longer periods for the resolution of their case.

HB268 provides the Covid-19 presumption will be in effect through January 31, 2023. SPO contends this is an unnecessarily long period of time for employers to be presumed liable for their essential employees' contraction of Covid-19, and suggest that once a Covid-19 vaccine is widely available, employers should no longer be held liable.

## **ADMINISTRATIVE IMPLICATIONS**

Covering employees who have contracted Covid-19 through a work-related infection due to the agency's negligence in strictly adhering to the public health order could impact the operations of a number of state agencies.

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<sup>2</sup> Id.

WCA reports the bill could result in increased caseloads in the dispute resolution and the medical cost containment bureaus and points out that strict adherence to health orders and changing OSHA standards could increase the demand for safety inspections; increasing the workload of the administration's safety bureau.

GSD contends the new presumption created under this bill will significantly increase the workload of the Human Resources Bureau and Leave Management Unit.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

This bill relates to House Bill 44, Unemployment Compensation Restriction Changes, which amends eligibility restrictions for unemployment through January 1, 2023 and in the future when a federal or state public health emergency is declared pursuant to the Public Health Emergency Response Act. HB44 creates a presumption related to an individual's absence from work due to exposure or diagnosis with a communicable disease that may overlap and/or duplicate payments to be made under this bill.

Senate Bill 261, addressing firefighter Covid-19 presumptions, includes a different standard and fact set for presumption of Covid-19 for firefighters.

### **TECHNICAL ISSUES**

HB268's provision allowing employers to go to court to rebut the statutory presumption, may conflict with WCA Section 52-1-6, *Application of provisions of act* which states compliance with the WCA shall be construed as a surrender by the employer and the worker to any other cause of action or remedy or proceeding and conflicts with WCA statutory provisions which state the WCA provides exclusive remedies for both employer and employee.

The bill's eligibility requirement that employees worked at the physical location of employment at any time, up to twenty days prior to the Covid-19 infection, may be over broad. It is unclear whether it means twenty consecutive days of work, twenty consecutive days in the same work area, or twenty days that include regular work schedules, etc.

### **ALTERNATIVES**

WCA suggests creating an emergency fund for essential workers, similar to the 9/11 Emergency Workers fund, could provide essential workers relief without imposing a burden on the Workers' Compensation system.

### **AMENDMENTS**

WCA suggests:

1. Modify the date of expiration to the "duration of the state of emergency".
2. Provide clear definitions of what would constitute substantial non-compliance with a health order by both employee and employer.
3. Require diagnosis of Covid 19 to be confirmed by a positive test result.