



**In The Circuit Court  
For The Seventh Judicial Circuit of Illinois  
Sangamon County, Springfield, Illinois**

**PROOF OF SERVICE**

ILLINOIS MANUFACTURERS' ASSOCA

VS.

Case Number: 2020-CH-000098

ILLINOIS WORKERS' COMPENSATION

The undersigned certifies that service of the foregoing,  
along with a copy of:

Docket Entry Dated April 22, 2020

Entry Regarding Reassignment

Referred to herein, was made by enclosing a true copy thereof  
plainly addressed to:

Judge: JACK DAVIS

On the following date: 04/22/2020

Sent by US Mail to the address listed above:

Sent by electronic mail: Yes

To the following e-mail address: jackd@co.sangamon.il.us



Sangamon County Circuit Clerk

By Deputy Clerk: AA

PAUL PALAZZOLO  
SANGAMON COUNTY, CLERK OF CIRCUIT COURT  
200 SOUTH 9TH STREET ROOM 405  
SPRINGFIELD, IL 62701

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Case: 2020-CH-000098	Type: Injunction (Except i	Assigned Judge: GIGANTI
Filed: 04/22/2020	Status: Open	Report: Open

	Case Participant	Attorney
Plaintiff	ILLINOIS MANUFACTURERS' ASSOCA	Lead: SCOTT CRUZ
Plaintiff	ILLINOIS RETAIL MERCHANTS ASSO	Lead: SCOTT CRUZ

	vs.
Defendant	ILLINOIS WORKERS' COMPENSATION
Defendant	MICHAEL J. BRENNAN

04/22/2020 Entry Regarding Reassignment

Cause comes before this Court as presiding judge of Sangamon County on the recusal of Judge Giganti due to the limited availability and restricted rotation of the judiciary as a result of the implementation of Covid-19 Coronavirus Procedures in response to the global pandemic. This case shall be transferred to the docket of the Honorable Jack Davis for all further proceedings. Judge Davis will receive notice of this docket Order and obtain the contact information for the parties and the Court shall be directed to contact the parties to schedule a hearing on the request for injunctive relief in an expedited manner.

Judge: MADONIA Reporter: N Clerk: N

**IN THE CIRCUIT COURT  
 FOR THE SEVENTH JUDICIAL CIRCUIT OF ILLINOIS  
 SANGAMON COUNTY, ILLINOIS**

ILLINOIS MANUFACTURERS'	)	
ASSOCIATION and ILLINOIS RETAIL	)	
MERCHANTS ASSOCIATION,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 2020CH000098
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION and MICHAEL J. BRENNAN,	)	
COMMISSIONER, IN HIS OFFICIAL	)	
CAPACITY,	)	
	)	
Defendants.	)	

**VERIFIED COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF**

Plaintiffs, Illinois Manufacturers' Association and Illinois Retail Merchants Association, through their attorneys, Greensfelder, Hemker & Gale, P.C., state as their Verified Complaint for Injunctive and Other Relief against Defendants Illinois Workers' Compensation Commission and Michael J. Brennan, Commissioner, in his official capacity, as follows:

**COUNT I – VIOLATION OF THE ILLINOIS ADMINISTRATIVE PROCEDURE ACT**

**NATURE OF THE CASE**

1. Plaintiffs seek to enjoin the Defendants from usurping authority vested solely with the Illinois Legislature and unlawfully implementing its recent emergency amendments to the Illinois Workers' Compensation Act ("IWCA") that provide sweeping substantive legal reform granting new rights to employees and infringing on the protectable interests of employers (including Plaintiffs' employer members) by declaring COVID-19 to be a prima facie Workplace Occupational Disease under the IWCA and the Workers' Occupational Disease Act. Defendants' brazen usurp of authority now creates a virtually irrefutable rebuttable presumption

under the IWCA that COVID-19 was in fact contracted *in the workplace*. These emergency amendments unlawfully create new substantive rights for employees and new liabilities for employers in violation of the Illinois Administrative Procedure Act, because Defendants have not been vested with the authority under the Illinois Administrative Procedures Act to create new substantive rights: a power solely vested with the Illinois Legislature. As a result, such emergency amendments are void as a matter of law, should be invalidated and the Defendants should be enjoined from implementing these emergency amendments.

## **PARTIES**

2. Plaintiff Illinois Manufacturers' Association ("IMA") is a private not-for-profit manufacturing trade association that represents its members' interests on various matters of importance to Illinois manufacturers, including but not limited to, tax policy, environmental regulations, health care reform, and labor law. . It is the only association in Illinois dedicated exclusively to manufacturing. IMA is also the oldest and one of the largest manufacturing associations in the nation, representing nearly 4,000 companies and facilities that employ nearly 600,000 workers. The majority of its members are private corporations and have between 50 and 249 employees. Its members are manufacturers in the following industries: heavy equipment, fabricated metal, food/beverage, chemical, paper, plastics, steel, electronics, transportation equipment, petroleum/energy, wholesale durable goods, printing, and wholesale non-durable goods.

3. The IMA has offices in Springfield and Oak Brook, Illinois and has members in Sangamon County, Illinois.

4. Plaintiff Illinois Retail Merchants Association ("IRMA") is a private not-for-profit association that benefits Illinois retailing through effective management with retailers, the

general public, policy makers, and the media regarding the impact legislative and regulatory proposals will have on the success of retail operations. IRMA is the only statewide organization exclusively representing retailers in Illinois. IRMA closely monitors legislative and regulatory activity, voicing opposition to anti-business proposals and supporting and passing business friendly initiatives. In addition to serving as retail lobbyists, IRMA provides services and resources to its members to assist with the development of their businesses.

5. IRMA has offices in Springfield and Chicago, Illinois and has members in Sangamon County, Illinois.

6. Defendant Illinois Workers' Compensation Commission ("Commission") is an administrative agency of the State of Illinois that administers the judicial process that resolves workers' compensation disputes between employees and employers regarding work related injuries and illnesses. The Commission acts as an administrative court system for the resolution of such disputes.

7. Defendant, Michael J. Brennan, is the Chairman of the Commission and is named as a Defendant in this action in his official capacity. As Chairman, Brennan is responsible for the oversight of the Commission and ensuring that the Commission complies with Illinois law, including statutory law, among other things.

#### **Jurisdiction and Venue**

8. Jurisdiction is proper in the courts of this state.

9. Venue is proper in this Court as the Commission has an office at 4500 S. Sixth Street, Frontage Road, Springfield, Sangamon County, Illinois.

#### **The Commission Exceeded Its Statutory Authority In Enacting the Amendments**

10. Any and all actions taken by the Commission must be specifically authorized by statute.

11. The Illinois Administrative Procedure Act applies to and governs the actions of the Commission. (5 ILCS 100 §1-5 and §1-20).

12. The Illinois Administrative Procedure Act requires that all rules enacted by the Commission comply with the provisions of Article 10 of the Illinois Administrative Procedure Act.

13. The Illinois Administrative Procedure Act only authorizes the Commission to enact rules that either (1) establish procedures governing the cases before the Commission or (2) implement or prescribe existing law or policy.

14. Article 10, Section 5, of the Illinois Administrative Procedure Act provides in part:

Rules required for hearings. All agencies shall adopt rules establishing **procedures** for contested case hearings.

(5 ILCS 100 §10-5)(Emphasis added).

15. Article 10, Section 10, of the Illinois Administrative Procedure Act provides in part:

Components of rules. All agency rules establishing **procedures** for contested cases shall at a minimum comply with the provisions of this Article 10.

(5 ILCS 100 §10-10)(Emphasis added).

16. The Illinois Administrative Procedures Act defines a “rule” as:

**"Rule" means each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy**, but does not include (i) statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency, (ii) informal advisory rulings issued under Section 5-150, (iii) intra-agency memoranda, (iv) the prescription of standardized forms, (v) documents

prepared or filed or actions taken by the Legislative Reference Bureau under Section 5.04 of the Legislative Reference Bureau Act, or (vi) guidance documents prepared by the Illinois Environmental Protection Agency under Section 39.5 or subsection (s) of Section 39 of the Environmental Protection Act.

(5 ILCS 100 §1-20)(Emphasis added).

17. The Illinois Administrative Procedure Act does not give the Commission the statutory authority to enact rules that change the law or that violate to the provisions of the Illinois Administrative Procedure Act and or that are not procedural.

18. The strict limitations on the Commission's power to enact only procedural and interpretive rules is expressly recognized in the Illinois Workers' Compensation Act and the Illinois Workers' Occupational Diseases Act.

19. Section 16 of the Illinois Workers' Compensation Act and Illinois Workers' Occupational Diseases Act are similar and provide in part:

**The Commission shall make and publish procedural rules** and orders for carrying out the duties imposed upon it by law and for determining the extent of disability sustained, which rules and orders shall be deemed prima facie reasonable and valid.

(820 ILCS 305 §16)(Emphasis added).

20. Section 13 of the Illinois Workers' Compensation Act provides for the selection and appointment of members to the Commission and references "promulgation of **procedural** rules" by the Commission. (820 ILCS 305 §13)(Emphasis added).

#### **Emergency Amendments to the Illinois Workers' Compensation Act**

21. On April 15, 2020, the Commission published a Notice of Emergency Amendments to the Illinois Workers' Compensation Act effective April 16, 2020 ("Amendments" attached hereto as Exhibit A).

22. The Amendments provide as follows:

ILLINOIS REGISTER  
WORKERS' COMPENSATION COMMISSION  
NOTICE OF EMERGENCY AMENDMENTS

- a) The Illinois Rules of Evidence shall apply in all proceedings before the Commission, either upon Arbitration or Review, except to the extent they conflict with the Act, the Workers' Occupational Diseases Act [820 ILCS 310], or the Rules Governing Practice Before the Workers' Compensation Commission (50 Ill. Adm. Code Chapter VI).

1) In any proceeding before the Commission in which the petitioner is a COVID-19 First Responder or Front-Line Worker as defined in Section (a)(2), if the petitioner's injury, occupational disease, or period of incapacity resulted from exposure to the COVID-19 virus during the Gubernatorial Disaster Proclamation 2020-38 and any subsequent COVID-19 disaster proclamations, the exposure will be rebuttably presumed to have arisen out of and in the course of the petitioner's COVID-19 First Responder or Front-Line Worker employment and, further, will be rebuttably presumed to be causally connected to the hazards or exposures of the petitioner's COVID-19 First Responder or Front-Line Worker employment.

2) The term "COVID-19 First Responder or Front-Line Worker" means any individuals employed as police, fire personnel, emergency medical technicians, or paramedics and all individuals employed and considered as first responders, health care providers engaged in patient care, corrections officers, and the crucial personnel identified under Section 1 Parts 7, 8, 9, 10, 11, and 12 of Executive Order 2020-10 dated March 20, 2020

- b) Exhibits offered in evidence, whether admitted or rejected, shall be retained by the assigned Arbitrator or Commissioner until a decision is issued in the matter. Exhibits may not be removed by the parties. Once a final decision is rendered, exhibits shall be retained by the Commission pursuant to the requirements of Section 17 of the Act.

(Source: Amended by emergency rulemaking at 44 Ill. Reg. \_\_\_\_\_, effective April 16, 2020, for a maximum of 150 days)

(Amended language denoted by underlining).

23. The Amendments violate the Illinois Administrative Procedure Act in that the Amendments change the burden of proof as set forth in the Illinois Administrative Procedure Act by creating a rebuttable presumption in favor of the claimant that the claimant in fact contracted COVID-19 in the course of his/her employment.



24. All disputes that come before the Commission are “contested cases” and the procedures for those contested cases must follow Article 10 of the Illinois Administrative Procedures Act.

25. The Illinois Administrative Procedures Act defines a “contested case” as:

"Contested case" means an adjudicatory proceeding (not including ratemaking, rulemaking, or quasi-legislative, informational, or similar proceedings) in which the individual legal rights, duties, or privileges of a party are required by law to be determined by an agency only after an opportunity for a hearing.

(5 ILCS 100 §1-30)(Emphasis added).

26. Article 10 of the Illinois Administrative Procedure Act requires that the Commission follow the same rules of evidence as are applied in civil cases in Illinois circuit courts.

27. Specifically, the Illinois Administrative Procedure Act provides:

(a) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. **The rules of evidence and privilege as applied in civil cases in the circuit courts of this State shall be followed.** Evidence not admissible under those rules of evidence may be admitted, however, (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced, any part of the evidence may be received in written form.

5 ILCS 100 §10-40(a) (Emphasis added).

28. The rules of evidence as applied in civil cases in the circuit courts of the State of Illinois place the burden of proof on the claimant or plaintiff to establish the elements of each claim.

29. Prior to the Amendments, in proceedings before the Commission, the claimant had the burden of proof to establish that his/her injuries arose out of and in the course of employment. The only exceptions to this rule in the Illinois Workers’ Compensation Act are

exceptions that were made through the legislative process when enacted by the Legislature, not through the unilateral actions of the Commission.

30. The Amendments violate the Illinois Administrative Procedure Act because they unlawfully remove the burden of proof from the claimant having the exclusive burden to establish that he/she contracted COVID-19 as a result of their employment, require the employer to have to rebut the virtually irrefutable presumption that the claimant contracted COVID-19 through the workplace, and require the employer to provide evidence that the claimant did not in fact contract COVID-19 as a result of their employment.

31. For the same reason, the Amendments violate the Illinois Administrative Procedure Act or the Illinois Workers' Compensation Act because the Amendments create a substantive change in the law, which the Commission does not have the authority to enact.

32. In addition, the Amendments violate the Illinois Administrative Procedure Act as the Commission has unilaterally declared that COVID-19 is an Occupational Disease.

33. Because the Amendments violate the Illinois Administrative Procedure Act and the Commission exceeded its statutory authority in enacting the Amendments, the Amendments are invalid and void.

34. The implementation of the Amendments will cause immediate and irreparable damage to Defendants' members as, among other things, creating a rebuttable presumption in favor of the claimants with regard to COVID-19 will significantly increase the costs of insurance to employers.

35. In addition, upon receipt of a COVID-19 workers' compensation claim, Defendants' members will face a daunting Sophie's Choice: acquiesce to paying the employee's

medical bills at the outset, or face harsh penalties for attempting to overcome the virtually irrefutable rebuttable presumption regarding COVID-19 claims. These penalties include:

- a) a 1% per month penalty paid to a medical provider if the medical bill is not paid within 30 days of receipt of the bill (820 ILCS 305/8.2(d)(3));
- b) 50% of the award for any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay (820 ILCS 305/19 (k)); and,
- c) \$30 per day up to \$10,000 total where medical or certain indemnity benefits have been demanded by the employee and its determined that the employer has without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits.

36. Plaintiffs will suffer irreparable injuries based on the implementation of the Amendments because the Amendments infringe on Plaintiffs' members substantive rights and because they also have an interest in not being subject to improper rule making.

37. Plaintiffs have no adequate remedy at law because even in the highly unlikely scenario in which the employers somehow or someway manage to overcome this virtually irrefutable presumption, the amount incurred in doing so will never be recoverable.

38. Plaintiffs are entitled to recover their attorneys' fees pursuant to 5 ILCS 100 §10-55(c), which provides as follows:

- (c) In any case in which a party has any administrative rule invalidated by a court for any reason, including but not limited to the agency's exceeding its statutory authority or the agency's failure to follow statutory procedures in the adoption of the rule, the court shall award the party bringing the action the reasonable expenses of the litigation, including reasonable attorney's fees.

WHEREFORE, Plaintiffs Illinois Manufacturers' Association and Illinois Retail Merchants Association request that an order be entered in their favor and against Defendants that grants Plaintiffs the following relief:

- (a) A temporary, preliminary and mandatory injunction that prohibits the Illinois Workers' Compensation Commission from enforcing the Amendments;
- (b) A finding that the Amendments are void;
- (c) An award of attorneys' fees pursuant to 5 ILCS 100 §10-55(c);
- (d) An award of costs; and
- (e) Such other relief as this Court deems to be equitable and just.

## **COUNT II –DECLARATORY JUDGMENT**

39. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 38 above as their allegations of this paragraph 39.

40. A justiciable controversy exists between the Plaintiffs and the Defendants concerning the authority of the Commission to enact the Amendments to Section 9030.70 of the Illinois Workers' Compensation Act and validity of the Amendments to Section 9030.70 of the Illinois Workers' Compensation Act.

41. Under the provisions of 735 ILCS 5 §2-701, this Court is vested with the power to declare the rights and liabilities of the parties and to provide such other and further relief as may be necessary to enforce the same.

WHEREFORE, Plaintiffs Illinois Manufacturers' Association and Illinois Retail Merchants Association request that an order be entered:

- (a) Declaring that the Illinois Workers' Compensation Commission exceeded its authority under the Illinois Administrative Procedure Act in changing the burden of proof to find that exposure to COVID-19 "will be rebuttably presumed to have arisen out of an in the course of the claimant's COVID-19 First Responder or Front-Line Worker employment and, further, will be rebuttably presumed to be causally

- connected to the hazards or exposures of the petitioner’s COVID-19 First Responder or Front-Line Worker employment”;
- (b) Declaring that the Illinois Workers’ Compensation Commission exceeded its authority under the Illinois Workers’ Compensation Act in changing the burden of proof to find that exposure to Covid-19 “will be rebuttably presumed to have arisen out of an in the course of the petitioner’s COVID-19 First Responder or Front-Line Worker employment and, further, will be rebuttably presumed to be causally connected to the hazards or exposures of the petitioner’s COVID-19 First Responder or Front-Line Worker employment”;
- (c) Declaring that the Amendments to Section 9030.70 of the Illinois Workers’ Compensation Act are void and invalid;
- (d) An award of attorneys’ fees pursuant to 5 ILCS 100 §10-55(c);
- (e) An award of costs; and
- (f) Such other relief as this Court deems to be equitable and just.

Respectfully submitted,

ILLINOIS MANUFACTURER’S ASSOCIATION  
and ILLINOIS RETAIL MERCHANTS  
ASSOCIATION

By: /s/ Scott Cruz  
One of Their Attorneys

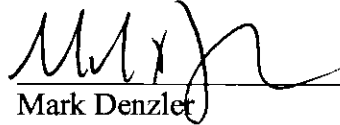
Scott Cruz – ARDC No. 6277314  
[scruz@greensfelder.com](mailto:scruz@greensfelder.com)  
Thadford A. Felton – ARDC No. 6224896  
[taf@greensfelder.com](mailto:taf@greensfelder.com)  
Kevin F. Hormuth – ARDC No. 6278862  
[kfh@greensfelder.com](mailto:kfh@greensfelder.com)  
Greensfelder, Hemker & Gale, P.C.  
200 West Madison Street, #3300  
Chicago, IL 60606  
(312) 419-9090

**Section 1-109 Verification**

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I, Mark Denzler, certify that the statements set forth in this Verified Complaint for Injunctive and Other Relief are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

4-21-2020


Date

  
Mark Denzler

**Section 1-109 Verification**

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I, Rob Karr, certify that the statements set forth in this Verified Complaint for Injunctive and Other Relief are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

April 21, 2020  
Date

  
Rob Karr

**EXHIBIT A**  
**to Verified Complaint**



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ILLINOIS REGISTER

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WORKERS' COMPENSATION COMMISSION

NOTICE OF EMERGENCY AMENDMENTS

- 1) Heading of the Part: Arbitration
- 2) Code Citation: 50 Ill. Adm. Code 9030
- 3) Section Numbers: 9030.70      Emergency Action: Emergency Amendment
- 4) Statutory Authority: Implementing and authorized by Sections 1.1(b), 13 and 16 of the Illinois Workers' Compensation Act [820 ILCS 305] and Section 16 of the Illinois Workers' Occupational Diseases Act [820 ILCS 310].
- 5) Effective Date of Emergency Rules: April 16, 2020
- 6) If this emergency rule is to expire before the end of the 150-day period, please specify the date on which it is to expire: This rule will not expire before the end of the 150-day period.
- 7) Date Filed with the Index Department: April 16, 2020
- 8) A copy of the emergency rules, including any material incorporated by reference, is on file in the Workers' Compensation Commission's principal office and is available for public inspection.
- 9) Reason for Emergency: The rapid spread of COVID-19 and uncertainty created within regulated industry has necessitated the modification of evidentiary rules regarding practice before the Commission to ensure first responders and essential front-line workers, who are most susceptible to exposure to COVID-19, are afforded the full protections of the Workers' Compensation Act in the event they are exposed to or contract the virus.

Due to the unprecedented and extreme exigencies created by the nature and timeline of the spread of COVID-19, going through the normal proposed rulemaking process under section 5–40 of the Illinois Administrative Procedure Act (5 ILCS 100/5-40) would create the potential for causing irreparable and irreversible harm to the public interest, public safety, and public welfare. Without the passage of this emergency rule, the uncertainty associated with the prior rules may put an individual in the untenable position of balancing their need to receive a continued paycheck to support their family and making the correct decision to miss work and self-isolate and self-quarantine. Without the emergency rule, individuals may feel forced to act against the public interest,

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ILLINOIS REGISTER

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WORKERS' COMPENSATION COMMISSION

NOTICE OF EMERGENCY AMENDMENTS

potentially creating an even more dire hazard than the State already faces. There is also the further potential that an individual who is a first responder or essential front-line worker and is capable of providing essential services may choose to miss work or to temporarily withdraw from the workforce out of fear of contracting the virus and being uncertain whether or not they would be afforded the protections of the Workers' Compensation Act—protections that every working Illinoisan deserves to be confident in and reassured by.

The rule is written to be narrowly tailored to only apply to those people who are first responders or essential front-line workers, to only apply to their employment as first responders or essential front-line workers, and to only apply to exposures that occur during a COVID-19-related state of emergency declared by the Governor. Further, the emergency rule does not guarantee or assure an award of benefits to any individual who suspects he or she has contracted COVID-19 or self-isolates and self-quarantines due to an alleged or suspected exposure to COVID-19, but, instead, creates a reasonable rebuttable presumption that a first responder or front-line worker's exposure to the virus is connected to their employment.

The emergency rule does not create or diminish any substantive rights of any party, but, instead, speaks to the rules of evidence and procedural rules to be followed by the Commission's hearing officers for carrying out the duties imposed upon the Commission in the conduct of hearings.

- 10) A Complete Description of the Subjects and Issues Involved: The proposed rules are designed to ensure in any case before the Workers' Compensation Commission where any COVID-19 First Responder or Front-Line Worker, defined within the Rule, is exposed to COVID-19 during the State of Emergency, it will be rebuttably presumed that the individual's exposure arises out of and in the course of their COVID-19 First Responder or Front-Line Worker employment and rebuttably presumed to be causally connected to their COVID-19 First Responder or Front-Line Worker employment.
- 11) Are there any other rulemakings pending on this Part? No
- 12) Statement of Statewide Policy Objective: This rulemaking neither creates nor expands any state mandates on units of local government.
- 13) Information and questions regarding these emergency rules shall be directed to:

Cole D. Garrett  
Deputy General Counsel

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ILLINOIS REGISTER

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WORKERS' COMPENSATION COMMISSION

NOTICE OF EMERGENCY AMENDMENTS

Illinois Workers' Compensation Commission  
100 W. Randolph St., Suite 8-200  
Chicago, IL 60601  
e-mail: [Cole.Garrett@illinois.gov](mailto:Cole.Garrett@illinois.gov)

The full text of the Emergency Amendments begins on the next page:

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ILLINOIS REGISTER

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WORKERS' COMPENSATION COMMISSION

NOTICE OF EMERGENCY AMENDMENTS

TITLE 50: INSURANCE

CHAPTER VI: WORKERS' COMPENSATION COMMISSION

PART 9030  
ARBITRATION

Section

9030.10 Arbitration Assignments

9030.20 Setting a Case for Trial

9030.30 Disqualification of Commissioners and Arbitrators

9030.40 Request for Hearing

9030.50 Subpoena Practice

9030.60 Depositions

9030.70 Rules of Evidence

EMERGENCY

9030.80 Briefs, Arbitrators' Decisions

9030.90 Opening and/or Closing Statements

9030.100 Voluntary Arbitration under Section 19(p) of the Workers' Compensation Act and  
Section 19(m) of the Workers' Occupational Diseases Act

**AUTHORITY:** Implementing and authorized by the Workers' Compensation Act [820 ILCS 305] and the Workers' Occupational Diseases Act [820 ILCS 310].

**SOURCE:** Filed and effective March 1, 1977; amended at 4 Ill. Reg. 26, p. 159, effective July 1, 1980; emergency amendment at 5 Ill. Reg. 8547, effective August 3, 1981, for a maximum of 150 days; amended at 6 Ill. Reg. 3570, effective March 22, 1982; emergency amendment at 6 Ill. Reg. 5820, effective May 1, 1982, for a maximum of 150 days; amended at 6 Ill. Reg. 8040, effective July 7, 1982; amended at 6 Ill. Reg. 11909, effective September 20, 1982; codified at 7 Ill. Reg. 2514; amended at 9 Ill. Reg. 19722, effective December 6, 1985; emergency amendment at 14 Ill. Reg. 4913, effective March 9, 1990, for a maximum of 150 days; emergency expired August 6, 1990; amended at 14 Ill. Reg. 13141, effective August 1, 1990; amended at 15 Ill. Reg. 8214, effective May 17, 1991; amended at 20 Ill. Reg. 4053, effective February 15, 1996; amended at 36 Ill. Reg. 17913, effective December 4, 2012; recodified from 50 Ill. Adm. Code 7030 to 50 Ill. Adm. Code 9030 at 39 Ill. Reg. 9605; amended at 40 Ill. Reg. 15732, effective November 9, 2016; emergency amendment at 44 Ill. Reg. \_\_\_\_\_, effective April 16, 2020, for a maximum of 150 days.

**Section 9030.70 Rules of Evidence**

EMERGENCY

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ILLINOIS REGISTER

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WORKERS' COMPENSATION COMMISSION

NOTICE OF EMERGENCY AMENDMENTS

- a) The Illinois Rules of Evidence shall apply in all proceedings before the Commission, either upon Arbitration or Review, except to the extent they conflict with the Act, the Workers' Occupational Diseases Act [820 ILCS 310], or the Rules Governing Practice Before the Workers' Compensation Commission (50 Ill. Adm. Code Chapter VI).
  - 1) In any proceeding before the Commission in which the petitioner is a COVID-19 First Responder or Front-Line Worker as defined in Section (a)(2), if the petitioner's injury, occupational disease, or period of incapacity resulted from exposure to the COVID-19 virus during the Gubernatorial Disaster Proclamation 2020-38 and any subsequent COVID-19 disaster proclamations, the exposure will be rebuttably presumed to have arisen out of and in the course of the petitioner's COVID-19 First Responder or Front-Line Worker employment and, further, will be rebuttably presumed to be causally connected to the hazards or exposures of the petitioner's COVID-19 First Responder or Front-Line Worker employment.
  - 2) The term "COVID-19 First Responder or Front-Line Worker" means any individuals employed as police, fire personnel, emergency medical technicians, or paramedics and all individuals employed and considered as first responders, health care providers engaged in patient care, corrections officers, and the crucial personnel identified under Section 1 Parts 7, 8, 9, 10, 11, and 12 of Executive Order 2020-10 dated March 20, 2020
- b) Exhibits offered in evidence, whether admitted or rejected, shall be retained by the assigned Arbitrator or Commissioner until a decision is issued in the matter. Exhibits may not be removed by the parties. Once a final decision is rendered, exhibits shall be retained by the Commission pursuant to the requirements of Section 17 of the Act.

(Source: Amended by emergency rulemaking at 44 Ill. Reg. \_\_\_\_\_, effective April 16, 2020, for a maximum of 150 days)

**IN THE CIRCUIT COURT  
 FOR THE SEVENTH JUDICIAL CIRCUIT OF ILLINOIS  
 SANGAMON COUNTY, ILLINOIS**

ILLINOIS MANUFACTURERS'	)	
ASSOCIATION and ILLINOIS RETAIL	)	
MERCHANTS ASSOCIATION,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Cause No. 2020CH000098
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION and MICHAEL J.	)	
BRENNAN, COMMISSIONER, IN HIS	)	
OFFICIAL CAPACITY,	)	
	)	
Defendants.	)	

**PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING  
 ORDER AND PRELIMINARY INJUNCTION**

Plaintiffs Illinois Manufacturers' Association and Illinois Retail Merchants Association, by their counsel Greensfelder, Hemker & Gale, P.C., for the reasons set forth in their Verified Complaint and Memorandum in Support of Their Motion for a Temporary Restraining Order and Preliminary Injunction, both of which are adopted and incorporated herein by reference, respectfully request that this Court issue a temporary restraining order and preliminary injunction against Defendants. In support of this Motion, Plaintiffs state as follows:

1. As set forth more fully in the Verified Complaint and Memorandum, on April 15, 2020, the Illinois Workers' Compensation Commission ("Commission") published a Notice of Emergency Amendments to the Illinois Workers' Compensation Act ("IWCA"), which went into effect on April 16, 2020 ("Amendments").
2. The Amendments mandate sweeping substantive legal reform, grant new rights to a broad class of employees, and infringe on protectable interests of their employers by declaring

COVID-19 a *prima facie* Occupational Disease under the IWCA and Illinois Workers' Occupational Disease Act ("IODA"), and by affording employees a burden-shifting rebuttable presumption that COVID-19 was in fact contracted *in the workplace*.

3. In enacting the Amendments, the Commission has exceeded its authority under IWCA and IODA in violation of the Illinois Administrative Procedure Act.

4. If left unchecked, the Commission's unlawful usurp of power reserved solely for the legislature will result in immediate, irreparable harm to both employees and employers as, among other things, creating a rebuttable presumption in favor of the claimants with regard to COVID-19 will significantly increase the costs of insurance to employers. In addition, Defendants' members, upon receipt of a COVID-19 claim, will have to either acquiesce to paying the employee's medical bills at the outset, or face harsh penalties for attempting to overcome the virtually irrefutable rebuttable presumption regarding COVID-19 claims.

5. Plaintiffs have no adequate remedy at law because even in the highly unlikely scenario in which the employers somehow or someway manage to overcome this virtually irrefutable presumption, the amount incurred in doing so will never be recoverable.

6. Plaintiffs and there members have protectable rights and interests at stake to be free from invalid lawmaking that requires employers to carry the healthcare load of a public pandemic.

7. Plaintiffs are likely to succeed on the merits as the IWCA did not have the authority to enact the Amendments and therefore, such Amendments are void.

WHEREFORE, Plaintiffs respectfully request that this Court enjoin the Commission from invoking the Amendments in favor of or against any person or entity until this Court has the opportunity to fully and finally declare the Amendments as a nullity.

Respectfully submitted,

ILLINOIS MANUFACTURER'S ASSOCIATION  
and ILLINOIS RETAIL MERCHANTS  
ASSOCIATION

By: /s/ Scott Cruz  
One of Their Attorneys

Scott Cruz – ARDC No. 6277314  
[scruz@greensfelder.com](mailto:scruz@greensfelder.com)  
Thadford A. Felton – ARDC No. 6224896  
[taf@greensfelder.com](mailto:taf@greensfelder.com)  
Kevin F. Hormuth – ARDC No. 6278862  
[kfh@greensfelder.com](mailto:kfh@greensfelder.com)  
Greensfelder, Hemker & Gale, P.C.  
200 West Madison Street  
Suite 3300  
Chicago, IL 60606  
(312) 419-9090



**IN THE CIRCUIT COURT  
FOR THE SEVENTH JUDICIAL CIRCUIT OF ILLINOIS  
SANGAMON COUNTY, ILLINOIS**

ILLINOIS MANUFACTURERS'  
ASSOCIATION and ILLINOIS RETAIL  
MERCHANTS ASSOCIATION,

Plaintiffs,

v.

ILLINOIS WORKERS' COMPENSATION  
COMMISSION and MICHAEL J.  
BRENNAN, COMMISSIONER, IN HIS  
OFFICIAL CAPACITY,

Defendants.

Case No. 2020CH000098

**PLAINTIFFS' MEMORANDUM IN SUPPORT  
OF A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Scott Cruz – ARDC No. 6277314  
[scruz@greensfelder.com](mailto:scruz@greensfelder.com)  
Thadford A. Felton – ARDC No. 6224896  
[taf@greensfelder.com](mailto:taf@greensfelder.com)  
Kevin F. Hormuth – ARDC No. 6278862  
[kfh@greensfelder.com](mailto:kfh@greensfelder.com)  
Greensfelder, Hemker & Gale, P.C.  
200 West Madison Street  
Suite 3300  
Chicago, IL 60606  
(312) 419-9090

Plaintiffs Illinois Manufacturers' Association and Illinois Retail Merchants Association, by their counsel Greensfelder, Hemker & Gale, P.C., state the following as their Memorandum in Support of a Motion for a Temporary Restraining Order and Preliminary Injunction:

## **I. INTRODUCTION**

On April 15, 2020, the Illinois Workers' Compensation Commission ("Commission") published a Notice of Emergency Amendments to the Illinois Workers' Compensation Act ("IWCA"), which went into effect on April 16, 2020 ("Amendments" attached hereto as Exhibit A). The Amendments mandate sweeping substantive legal reform, grant new rights to a broad class of employees, and infringe on protectable interests of employers by declaring COVID-19 a *prima facie* Occupational Disease under the IWCA and Illinois Workers' Occupational Disease Act ("IODA"), and by affording employees a burden-shifting rebuttable presumption that COVID-19 was in fact contracted *in the workplace*. Although the Commission attempted to disguise its legal reform merely as a "modification of evidentiary rules regarding practice before the Commission" (Ex. A. ¶ 9), there is no doubt that the Amendments create substantive new rights for employees and new liabilities for employers. There also is no doubt that the Commission's substantive law making exceeds its authority and violates the Illinois Administrative Procedure Act ("IAPA").

As set forth more fully below, if left unchecked, the Commission's unlawful usurp of power reserved solely for the legislature will result in immediate, irreparable harm to both employees and employers. To be clear, this case is not about the wisdom of the substantive new law expressed by the Commission. This case is about the Commission far-exceeding its rulemaking authority. The substantive law of Illinois, and the wisdom of implementing it, is for the legislature, after proper discourse, and not the whim of the Commission.

## **II. STANDARD FOR ISSUING A TRO**

In considering whether to issue injunctive relief, the court must consider four factors: (1) whether the movant has a right or interest that needs to be protected, (2) whether the movant has an adequate remedy at law, (3) the threat of irreparable harm to the movant if the injunction is not granted, and (4) the reasonable likelihood of success on the merits. *Arcor, Inc. v. Haas*, 363 Ill. App. 3d 396, 399 (1<sup>st</sup> Dist. 2005). The movant need not show an actual injury before an injunction may issue. The threat of such injury is sufficient. *Gannett Outdoor of Chicago v. Baise*, 163 Ill. App. 3d 717, 722 (1<sup>st</sup> Dist. 1987).

A temporary restraining order (“TRO”) is an equitable remedy that is issued when necessary to preserve the status quo until the court has an opportunity to rule on a motion for preliminary injunction after an evidentiary hearing. “Status quo” is defined as the last actual, peaceable, uncontested status preceding the controversy. *NW Steel & Wire Co. v. Indus. Comm’n*, 254 Ill. App. 3d 472, 476 (1<sup>st</sup> Dist. 1993). Plaintiffs seek to preserve the status quo of the IWCA, the IODA, and the IAPA prior to the controversy at issue here: the Commission’s unlawful usurp of power reserved for the legislature by exceeding its rulemaking authority under, and in violation of, the IAPA.

## **III. PLAINTIFFS LIKELIHOOD OF SUCCESS ON THE MERITS**

To show a likelihood of success on the merits, a party only needs to raise “a fair question about the existence of his right and that the court should preserve the status quo until the case can be decided on the merits. *In re Estate of Wilson*, 373 Ill. App. 3d 1066, 1075 (1<sup>st</sup> Dist. 2007); *see also Arpac Corp. v. Murray*, 226 Ill. App. 3d 65, 72 (1<sup>st</sup> Dist. 1992). As set forth below, Plaintiffs’ Verified Complaint raises more than fair questions about the existence of the rights of Plaintiffs’ members, the limitations on the Commission’s authority, the substantive nature of the

Amendments, the Commission's violations of the IAPA, and the resulting nullity of the Amendments where the Commission has exceeded its jurisdiction.

**A. The Commission Only Has Authority To Publish Procedural Rules And The Amendments Are Facially Substantive**

The Notice of Emergency Amendments provides that the purported authority to implement the Amendments is found in Sections 1.1(b), 13 and 16 of the IWCA [820 ILCS 305 *et seq.*] and Section 16 of IODA [820 ILCS 310 *et seq.*]. (See Exhibit A, ¶ 4). There is nothing, however, in these cited sections which authorizes the Commission to undertake substantive rule making. In fact, the opposite is true. These sections expressly limit the Commission's authority to procedural rule making. See 820 ILCS 305/16 ("The Commission shall make and publish **procedural rules and orders** for carrying out the duties imposed upon it by law and for determining the extent of disability sustained, which rules and orders shall be deemed prima facie reasonable and valid"); 820 ILCS 310, Section 16 ("The Commission shall make and publish **procedural rules and orders** for carrying out the duties imposed upon it by law, which rules and orders shall be deemed prima facie reasonable and valid."); 820 ILCS 305/13(k) ("In the **promulgation of procedural rules**, the determination of cases heard en banc, and other matters determined by the full Commission, the Chairman's vote shall break a tie in the event of a tie vote.") (emphasis in each section added).

Not only is there a void of statutory authority allowing the Commission to make substantive law, courts in Illinois have long-held that the Commission cannot, "by any rule or custom extend the substantive provisions of the [Workers'] Compensation Act." *Hamilton Eng'g Co. v. Indus. Comm'n*, 399 Ill. 30, 41 (1947); see also *Madsen v. Indus. Comm'n*, 383 Ill. 590, 597 (1943) ("While the Industrial Commission is vested with the power to make rules for carrying out its statutory duties it is without power to make rules creating substantive rights. It is

restricted to making only such rules as will aid in carrying out the duties imposed upon the commission by the statute.”).

Limiting the Commission’s rule making authority to procedural, not substantive, rules assures that the rule making power of the Commission is not “superior to the legislative power of the General Assembly.” *Madsen*, 383 Ill. at 597.<sup>1</sup> “The power to make the laws is a sovereign power vested in the legislature,” and this power cannot be delegated to an administrative body. *People v. Tibbitts*, 56 Ill.2d 56, 58 (1973). The Commission is an administrative body created by legislative enactment for the purposes of administering the IWCA. It can only make such orders as are within the powers granted to it by the General Assembly. *Trigg v. Indus. Comm’n*, 364 Ill. 581, 588 (1936). An administrative agency cannot, by its rules or regulations, extend the substantive provisions of a legislative enactment, nor can it create substantive rights thereby. *People v. Kueper*, 111 Ill. App. 2d 42, 47 (5<sup>th</sup> Dist. 1969).<sup>2</sup> The Commission is an administrative agency, and therefore, has no general or common law powers. *Alvarado v. The Industrial Commission*, 216 Ill.2d 547, 553 (2005) (citing *Chicago v. Fair Employment Practices Comm’n*, 65 Ill.2d 108, 113 (1976)); see also *Business & Professional People for the Public Interest v. Illinois Commerce Comm’n*, 136 Ill.2d 192, 243-44 (1989); *Interstate Scaffolding, Inc. v. The Illinois Workers Compensation Commission*, 236 Ill.2d 132, 145 (2010).

Having established that the Commission has no authority to create substantive law, the issue turns to whether the Amendments are merely procedural, or whether they establish new

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<sup>1</sup> The Commission has implicitly acknowledged the limitations on its rule making authority by attempting to characterize the Amendments as relating to evidentiary and procedural rules. (See Exhibit A, ¶ 9). As set forth more fully below, the Commission’s self-serving characterization is a façade.

<sup>2</sup> Although the Commission has not cited the IAPA in connection with its authority to enact the Amendments, to be clear, the IAPA does not confer any such authority. Section 5-10 of the IAPA allows for the making of rules of procedure for hearings; Section 5-15 allows for the making of rules regarding organization, information requests and rulemaking; and Section 10-5 allows for the making of rules for the handling of contested cases. None of these provisions, nor any other in the IAPA, expressly authorizes any agency to promulgate substantive rules relating to the implementation or enforcement of particular statutes within their jurisdiction. Rather, the IAPA merely provides the procedure for making rules which are otherwise authorized by law.

substantive rights and obligations. The Amendments at issue are clearly substantive in that they create new rights for employees and new obligations for employers. Employers have a protectable interest in being free from invalid lawmaking that blatantly requires employers to carry the healthcare load of a public pandemic. That is exactly what is going on here. Even Governor Pritzker has acknowledged as much in making the following comments regarding the Amendments: “In the middle of an emergency, the only way you have to operate is to protect people as best you can. And to the extent that it is required that someone has to pick up the tab for that, sometimes that will fall on the people who are most able to pick up the tab.”<sup>3</sup>

Although the Commission attempts to mask the Amendments as procedural or evidentiary, the Commission ignores the very clear, very substantive impact of the Amendments. Prior to the Amendments, there was nothing in the IWCA that afforded the substantive right to employees to claim COVID-19 as a *prima facie* compensable workplace injury and/or occupational disease. In other words, the Commission is not applying a rebuttable presumption to a specific substantive right that was already expressed in the IWCA. Instead, the Commission, as a matter of law, has declared that COVID-19 is a *prima facie* Occupational Disease and not a disease common to the public. That declaration of law, coupled with the burden-shifting rebuttable presumption the Commission attaches to it, is entirely substantive in nature.<sup>4</sup>

“Occupational Disease,” as defined in the IODA, “means a disease arising out of and in the course of employment or which has become aggravated or rendered disabling as a result of the exposure of the employment. Such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public.” 820 ILCS 310/1(d). The

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<sup>3</sup> Ben Orner, *Illinois Essential Employees Guaranteed Workers’ Compensation During Pandemic*, HERALD&REVIEW (April 14, 2020), [https://herald-review.com/news/state-and-regional/illinois-essential-employees-guaranteed-workers-compensation-during-pandemic/article\\_4796a4f6-3608-5c09-8b85-83d473cdce43.html](https://herald-review.com/news/state-and-regional/illinois-essential-employees-guaranteed-workers-compensation-during-pandemic/article_4796a4f6-3608-5c09-8b85-83d473cdce43.html).

<sup>4</sup> The substantive burden-shifting in violation of the IAPA is discussed more fully in Section III.B, below.

Amendments declare that COVID-19 is, in fact, a “disease arising out of and in the course of employment” whereas the law otherwise states that “a mere possibility of contamination in the course of employment is not sufficient to as award of compensation.” *City of Chicago v. Indus. Comm’n*, 403 Ill. 105, 107 (1949). Whereas before an employee had to present all elements of his or her claim, including proof that he or she suffered an injury in the course and scope of his or her employment<sup>5</sup>, a COVID-19 employee can now bring a claim merely for having contracted COVID-19.

The only section in the IWCA that is analogous to what the Commission is attempting to accomplish through the Amendments is Section (6)(f). 820 ILCS 305/6(f). Section 6(f) provides a rebuttable presumption, under limited circumstances, for respiratory and other illnesses contracted by and narrowly tailored to firefighters, emergency medical technicians and paramedics. Notably, the enactment of Section 6(f) was appropriately implemented by the legislature, not the Commission. *See* 95th Ill. Gen. Assem., House Bill 928, 2007 Sess.; Public Act 95-316 (eff. Jan. 1, 2008); *Johnson v. Illinois Workers’ Compensation Commission*, 2017 IL App (2d) 160010WC, ¶ 43. Tellingly, all other references to rebuttal presumptions found in the IWCA also were enacted by the legislature.<sup>6</sup> The Amendments at issue even alter the substantive rights of the Section 6(f) class of workers because the legislature only afforded a rebuttable presumption to firefighters, emergency medical technicians, and paramedics employed in such capacity for more than five (5) years, and the legislature excluded such employees

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<sup>5</sup> *Nee v. Illinois Workers’ Compensation Commission*, 2015 IL App (1<sup>st</sup>) 132609WC, ¶19.

<sup>6</sup> 820 ILCS 305/8.7(j)— 94th Ill. Gen. Assem., House Bill 2137; Public Act 94-277 (eff. July 20, 2005) (creating a rebuttable presumption regarding denial of payments in compliance with the utilization review program); 820 ILCS 305/11— 97th Ill. Gen. Assem., House Bill 1698; Public Act 97-18 (eff. June 28, 2011) (creating a rebuttable presumption regarding employee intoxication); 820 ILCS 305/16— 94th Ill. Gen. Assem., House Bill 2137; Public Act 94-277 (eff. July 20, 2005) (creating a rebuttable presumption regarding certified medical records); and 820 ILCS 305/19(l)— 94th Ill. Gen. Assem., House Bill 2137; Public Act 94-277 (eff. July 20, 2005) (creating a rebuttable presumption regarding delay in payment of benefits).

engaged in medical transfers between medical care facilities. Thus the Amendments unlawfully rewrite this piece of legislation, too.

Although the Amendments at issue even pronounce substantive changes relative to the class of Section 6(f) employees, the larger point is that the Amendments at issue create new, substantive rights for an expansive category of employees, including police, fire personnel, emergency medical technicians, paramedics “and all individuals employed and considered as first responders, health care providers engaged in patient care, corrections officers, and the crucial personnel identified under Section 1 Parts 7, 8, 9, 10, 11, and 12 of Executive Order 2020-10 dated March 20, 2020.” Those parts of the Executive Order, attached hereto as Exhibit B include broadly defined Healthcare and Public Health Operations; Human Services Operations; Essential Infrastructure; Essential Government Functions; and Essential Businesses and Operations, including stores that sell groceries and medicine; food, beverage and cannabis production and agriculture; organizations that provide charitable and social services; media; gas stations and businesses needed for transportation, financial institutions; hardware and supply stores; critical trades; mail, post, shipping logistics, delivery, and pick-up services; educational institutions; laundry services; restaurants for consumption off-premises; supplies to work from home; supplies for essential business and operations; transportation; home-based care and services; residential facilities and shelters; professional services; day care centers; manufacture, distribution, and supply chain for critical products and industries; critical labor union functions; hotels and motels; and funeral services.

The Executive Order is so broad that that the laundry list of excepted employees nearly swallows the rule, and under the Commission’s Amendments, this entire body of employees has been vested with new, substantive rights and compensable claims under the Workers’



Compensation Act. And, the Amendments concomitantly impose new obligations on a swath of employers. The creation of such rights and accompanying obligations, however, is vested solely with the legislature (as it did with Section 6(f) of the IWCA and every other section of the IWCA in which a rebuttable presumption was created). *See*, footnote 5, *supra*.

The Commission has no authority to pass-off the substantive changes to the IWCA as merely procedural. A "procedure" is the machinery for carrying on a suit, including pleading, process, evidence and practice. By contrast, a "substantive" act establishes, creates or defines rights. *Doe v. Univ. of Chicago*, 404 Ill.App.3d 1006, 1012 (1<sup>st</sup> Dist. 2010). Stated another way, "procedure" generally prescribes the means for enforcing rights and the practice of legal rules which direct the course of proceedings whereas "substantive law" involves the rights underlying the lawsuit. *United City of Yorkville v. Vill. of Sugar Grove*, 376 Ill. App. 3d 9, 21 (2<sup>nd</sup> Dist. 2007); *People v. Atkins*, 217 Ill.2d 66, 71-72 (2005) (*quoting Rivard v. Chicago Fire Fighters Union, Local No. 2*, 122 Ill.2d 303, 310–11 (1988)); *see also, Royal Imperial Grp., Inc. v. Joseph Blumberg & Assoc., Inc.*, 240 Ill. App. 3d 360, 364 (1<sup>st</sup> Dist. 1992).

Although the Amendments are facially substantive, another hallmark of a substantive rule is that it cannot be applied retroactively. Section 4 of the Statute on Statutes (5 ILCS 70/4) instructs that if new legislation or an amendment is procedural, it may be applied retrospectively, but if it is substantive, it may not be so applied. *See also, Alwan v. Kickapoo-Edwards Land Tr.*, 2018 IL App (3d) 170165, ¶ 12; *Caveney v. Bower*, 207 Ill.2d 82 (2003); *Grigsby v. Industrial Commission*, 76 Ill.2d 528 (1979); *Royal Imperial Grp., Inc.*, 240 Ill. App. 3d at 364; *Rivard*, 122 Ill.2d at 310–11; *Maiter v. Chicago Board of Education*, 82 Ill.2d 373 (1980). With respect to the Amendments at issue, the Commission has conceded that the Amendments will only be applied prospectively, not retroactively, thus implicitly acknowledging the substantive nature of

the Amendments. After the Commission held a reading of the Amendments on April 15, 2020, the Commission left open the submission of public comments and questions due to the difficulty in managing the reading with hundreds of people via conference call. After the reading, Mark Denzler, President of the Illinois Manufacturers' Association, sent the Commission an email inquiry regarding the prospective versus retroactive nature of the Amendments. In response, Mr. Denzler was informed that "Our rule is prospective, not retroactive." *See* Affidavit of Mark Denzler, Para. 9, attached as Exhibit C.

The Amendments at issue are facially substantive as they establish, create, and define new rights and corresponding obligations. To reiterate what Governor Pritzker said about the Amendments, they impose an obligation on employers to "pick up the tab" for COVID-19. To be clear, the policy underlying the Commission's unlawful Amendments is debatable, but not at issue in this case. The issue in this case is striking down a substantive law that clearly exceeds the Commission's rulemaking authority. The policy debate and substantive law making is reserved solely for the legislature, not an emergency amendment by the Commission with no such authority and no public discourse.

The Commission has rewritten the law to affirmatively state that a mere possibility of contamination is sufficient for COVID-19. This pronouncement of new law is not only inconsistent with black letter law in Illinois, but presumes on nothing more than a hunch that contamination did in fact occur in the workplace. The Commission has supplied a causal connection that the employee must otherwise have to prove. This standing alone is substantive, but when coupled with the presumption afforded to COVID-19 cases discussed below, the substantive nature of the Amendments is even more pronounced.

**B. The Commission Must Adhere To The Administrative Procedure Act And Did Not Do So With Respect To The Amendments**

The Notice of Emergency Amendments is noticeably silent on the Commission acting on authority derived from, or in accordance with, the IAPA. That is because the Amendments were published in total disregard of the IAPA and in violation of the IAPA. The Commission is subject to the IAPA. 5 ILCS 100/1 – 5; 5 ILCS 100/1-20; *Berrios v. Rybacki*, 190 Ill. App. 3d 338 (1<sup>st</sup> Dist. 1989); *see also*, authority cited in Section III.A., *supra*. As such, while the Commission may make procedural rules of the type addressed above, it cannot enact rules establishing procedures that do not minimally comply with the IAPA—regardless of whether the lack of compliance is substantive or merely procedural.

Section 10-10 of the IAPA provides that “[a]ll agency rules establishing procedures for contested cases shall at a minimum comply with the provisions of this Article 10.” 5 ILCS 100/10-10. As claims before the Commission are “contested cases,” the procedures for those cases must follow Article 10 of the IAPA. *See* 5 ILCS 100/1-30. Accordingly, the workers’ compensation cases that are brought before the Commission must comply with the procedural rules of the IAPA.

The IAPA requires that the Commission follow the rules of evidence in the proceedings before it. 5 ILCS 100/10-40(a) (“The rules of evidence and privilege as applied in civil cases in the circuit courts of this State shall be followed.”); *Scott v. Depart. of Commerce and Comm. Affairs*, 84 Ill.2d 42, 53 (1981). In addition, the Illinois Supreme Court has construed the IAPA to require that the moving party have the burden in asserting a claim (*Id.*) and a claimant with an action before the Commission has the burden to present evidence in support of each element of his or her right to compensation. *Navistar International Transportation Corp. v. The Industrial Commission*, 315 Ill. App. 3d 1197, 1202-03 (1<sup>st</sup> Dist. 2000). Accordingly, in order to justify compensation, a claimant is required to present evidence to establish that his/her injuries arose

out of and in the course of their employment. *Id.* at 1203; *Nee v. Illinois Workers' Compensation Commission*, 2015 IL App (1<sup>st</sup>) 132609WC, ¶19.

The Amendments eviscerate and remove a substantive element of a claimant's workers' compensation claim with regard to COVID-19, i.e., that the injury arose out of and in the course and scope of employment, and also shift the burden of proof on this issue to the employer. The Amendments create the rebuttable presumption that the claimant in fact contracted COVID-19 in the workplace. A presumption is a rule of law that requires the fact finder to take as established the existence of a fact, unless sufficient evidence is introduced tending to rebut the presumed fact. *In re B.B. and K.B.*, 2011 IL App (4<sup>th</sup>) 110521, ¶24 (citing *People v. Funches*, 212 Ill.2d 334, 341 (2004)). Thus, the Amendments require the Commission to accept as true at the outset and without any supporting evidence that the claimant contracted COVID-19 in the workplace unless the employer can provide evidence to rebut a virtually irrefutable presumption. *English v. Village of Northfield*, 172 Ill. App. 3d 344, 347 (1<sup>st</sup> Dist. 1988). In *People v. Watts*, the Illinois Supreme Court defined this type of presumption as a mandatory presumption that shifts the burden of proof to the defendant. *People v. Watts*, 181 Ill.2d 133, 142 (1988).

The presumption establishes a substantive change to the IWCA that the Commission is without the authority to enact. A substantive change in the law establishes, creates or defines rights, whereas a procedural change merely prescribes a method of enforcing rights or involves pleadings, evidence and practice. *Doe Three v. Depart. of Public Health*, 2017 IL App (1<sup>st</sup>) 162548, ¶ 34. Except for certain narrow legislatively made exceptions (e.g., Section 6(f) of the IWCA), the IAPA requires that the claimant in a workers' compensation claim first present evidence to establish that his or her injury was the result of his or her employment. The Amendments remove this as claimants are no longer required to produce evidence to support

their claim that their injury arose in the workplace. Instead, the Commission must assume that this element of the claim has been established by the claimant unless the employer, through the burden shifting mechanism of the Amendments, can present evidence to rebut this presumption. And only in the unlikely event that the employer can bear this new burden and present such evidence to rebut this presumption, would the claimant have to present evidence to establish this element of a workers' compensation claim. As a result, the Amendments—whether labeled substantive or procedural—are beyond the authority of the Commission because the Amendments alter the minimal requirements of the IAPA with respect to the burden of proving the essential elements of a workers' compensation claim. Only the legislature can enact such rebuttable presumptions. *See* footnote 5, *supra*.

When, as here, the Commission acts outside of its specific statutory authority, it acts without “jurisdiction” and “[i]ts actions are void, a nullity from their inception.” *Daniels v. The Industrial Commission*, 201 Ill.2d 160, 165 (2002); *Alvarado*, 216 Ill.2d at 553. “Rules not properly promulgated are invalid, not effective against any person or entity, and may not be invoked by an administrative agency for any purpose.” *Walk v. Illinois Dept. of Children and Family Services*, 399 Ill. App. 3d 1174, 1184 (4<sup>th</sup> Dist. 2010) (*quoting Champaign-Urbana Public Health Dist. v. Illinois Labor Relations Bd. State Panel*, 354 Ill. App. 3d 482, 488 (4<sup>th</sup> Dist. 2004)). Here, Plaintiffs’ burden to obtain a TRO is merely to raise fair questions of their likelihood of success on the merits. Plaintiffs have established more than fair questions in this respect. If the Court applies the principles of law set forth above, the Amendments are a nullity and the Court should enjoin the Commission from giving any effect to the Amendments or invoking the Amendments in any manner.

#### **IV. PROTECTABLE RIGHTS AND INTERETS ARE AT STAKE**

It should go without saying that Plaintiffs' members have protectable rights and interests at stake. As set forth more fully above, Plaintiffs' members have a protectable right and interest in being free from invalid lawmaking that blatantly requires employers to carry the healthcare load of a public pandemic. The Commission has substantively declared that employers should "pick up the tab" for providing the citizens of Illinois with what the State has deemed essential services in this time of crisis.

#### **V. IRREPARABLE HARM EXISTS FOR WHICH THERE IS NO ADEQUATE REMEDY AT LAW**

Once a protectable interest has been established, **"irreparable injury [or harm] is presumed** if that interest is not protected." *Guns Save Life, Inc. v. Raoul*, 2019 IL App (4<sup>th</sup>) 190334, ¶ 51 (*quoting Cameron v. Bartels*, 214 Ill. App. 3d 69, 73 (4<sup>th</sup> Dist. 1991)) (emphasis added). Moreover, for harm that is of a continuous nature, and involves a right for which monetary compensation would be inadequate, courts have considered it to be *per se* irreparable harm. *C.J. v. Dept. of Human Services*, 331 Ill. App. 3d 871, 891-92 (1<sup>st</sup> Dist. 2002). Here, the harm is of a continuing nature as long as the Amendments are left unchecked and capable of being enforced by the Commission. Moreover, Plaintiffs' members face an unnecessary Sophie's Choice: acquiesce to paying the employee's medical bills at the outset or face harsh penalties for trying to overcome the virtually irrefutable presumption regarding COVID-19 claims. See IWCA, § 19; *see also* Exhibits C and D. Note that this rebuttable presumption, as well as all rebuttable presumptions found in the IWCA, was passed by the legislature, not the Commission. *See* footnote 5, *supra*. Point being, even though where, as here, irreparable harm is presumed for the protectable interests at stake, the substantive changes enacted by the Commission, coupled with the substantive procedure enacted by the legislature, also puts

employers in danger of immediate irreparable harm for which there is no adequate remedy at law.

This case also is unique in that it presents issues of irreparable harm for which there is no adequate remedy at law that would befall *both employers and employees*, and the public interest would be served by an injunction. In Section 9 of the Notice of the Amendments (Ex. A. hereto), the Commission attempts to justify exceeding its rule making authority by explaining the “potential for irreparable and irreversible harm to the public interest” as follows:

Without the passage of this emergency rule, the uncertainty associated with the prior rules may put an individual in the untenable position of balancing their need to receive a continued paycheck to support their family and making the correct decision to miss work and self-isolate and self-quarantine. Without the emergency rule, individuals may feel forced to act against the public interest, potentially creating an even more dire hazard that the State already faces. There is also the further potential that an individual who is a responder or essential front-line worker and is capable of providing essential services may choose to miss work or to temporarily withdraw from the workforce out of fear of contracting the virus and being uncertain whether or not they will be afforded the protections of the Workers’ Compensation Act—protections that every working Illinoisan deserves to be confident in and reassured by.

The irony is that the Commission’s illegal lawmaking is in conflict with the Commission’s stated purpose of the Amendments: to create certainty. The further irony is that the stated purpose of resolving “uncertainty associated with the prior rules” is demonstrative of the Commission’s intention to declare with certainty, and as a matter of law, that COVID 19 is an Occupation Disease whereas the law previously excluded the mere possibility that a disease common to the public was contracted in the course of employment.

The Notice of Emergency Amendments suggests that employees now can choose with confidence to continue their essential-services employment with certainty that they will be afforded the protections of the IWCA. The uncertainties created by the Commission’s illegal law making, however, conflict with the stated purpose of the Amendments. In the absence of an

injunction and an expedited final ruling on the merits, employees will make misguided decisions on assurances that the Commission has no business and/or authority providing. Employees who guess wrong about the validity of the Commission's assurances will be irreparably impacted.

The Commission also has overlooked the chilling effect on employers who are, according to the State, providing essential services during the crisis. In only citing the public interest of self-isolation and self-quarantine, the Commission ignores the public interest in essential services that Illinoisans are dependent upon in this time of crisis. The financial impact the Amendments will have on employers put them in the untenable position of providing essential services (as deemed essential by the Governor's March 20, 2020 Order) or closing their doors because they are unable to "pick up the tab."

The Commission also overlooks the public interest in not being subject to rogue lawmaking. This is exactly why the Commission's attempt at sweeping reform should be rejected in favor of the proper legislative process. Again, this case is not about whether the Commission's legal reform is good policy, balancing all of the interests involved, but whether the Commission has the authority to undertake such legal reform. The answer is no, and the Commission should be enjoined from enforcing the Amendments.

WHEREFORE, Plaintiffs respectfully request that this Court enjoin the Commission from invoking the Amendments in favor of or against any person or entity until this Court has the opportunity to fully and finally declare the Amendments as a nullity.



Respectfully submitted,

ILLINOIS MANUFACTURER'S ASSOCIATION  
and ILLINOIS RETAIL MERCHANTS  
ASSOCIATION

By: /s/ Scott Cruz  
One of Their Attorneys

Scott Cruz – ARDC No. 6277314  
[scruz@greensfelder.com](mailto:scruz@greensfelder.com)  
Thadford A. Felton – ARDC No. 6224896  
[taf@greensfelder.com](mailto:taf@greensfelder.com)  
Kevin F. Hormuth – ARDC No. 6278862  
[kfh@greensfelder.com](mailto:kfh@greensfelder.com)  
Greensfelder, Hemker & Gale, P.C.  
200 West Madison Street  
Suite 3300  
Chicago, IL 60606  
(312) 419-9090

**EXHIBIT A**  
**to Memorandum in**  
**Support**

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ILLINOIS REGISTER

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WORKERS' COMPENSATION COMMISSION

NOTICE OF EMERGENCY AMENDMENTS

- 1) Heading of the Part: Arbitration
- 2) Code Citation: 50 Ill. Adm. Code 9030
- 3) Section Numbers: 9030.70      Emergency Action: Emergency Amendment
- 4) Statutory Authority: Implementing and authorized by Sections 1.1(b), 13 and 16 of the Illinois Workers' Compensation Act [820 ILCS 305] and Section 16 of the Illinois Workers' Occupational Diseases Act [820 ILCS 310].
- 5) Effective Date of Emergency Rules: April 16, 2020
- 6) If this emergency rule is to expire before the end of the 150-day period, please specify the date on which it is to expire: This rule will not expire before the end of the 150-day period.
- 7) Date Filed with the Index Department: April 16, 2020
- 8) A copy of the emergency rules, including any material incorporated by reference, is on file in the Workers' Compensation Commission's principal office and is available for public inspection.
- 9) Reason for Emergency: The rapid spread of COVID-19 and uncertainty created within regulated industry has necessitated the modification of evidentiary rules regarding practice before the Commission to ensure first responders and essential front-line workers, who are most susceptible to exposure to COVID-19, are afforded the full protections of the Workers' Compensation Act in the event they are exposed to or contract the virus.

Due to the unprecedented and extreme exigencies created by the nature and timeline of the spread of COVID-19, going through the normal proposed rulemaking process under section 5–40 of the Illinois Administrative Procedure Act (5 ILCS 100/5-40) would create the potential for causing irreparable and irreversible harm to the public interest, public safety, and public welfare. Without the passage of this emergency rule, the uncertainty associated with the prior rules may put an individual in the untenable position of balancing their need to receive a continued paycheck to support their family and making the correct decision to miss work and self-isolate and self-quarantine. Without the emergency rule, individuals may feel forced to act against the public interest,

WORKERS' COMPENSATION COMMISSION

NOTICE OF EMERGENCY AMENDMENTS

potentially creating an even more dire hazard than the State already faces. There is also the further potential that an individual who is a first responder or essential front-line worker and is capable of providing essential services may choose to miss work or to temporarily withdraw from the workforce out of fear of contracting the virus and being uncertain whether or not they would be afforded the protections of the Workers' Compensation Act—protections that every working Illinoisan deserves to be confident in and reassured by.

The rule is written to be narrowly tailored to only apply to those people who are first responders or essential front-line workers, to only apply to their employment as first responders or essential front-line workers, and to only apply to exposures that occur during a COVID-19-related state of emergency declared by the Governor. Further, the emergency rule does not guarantee or assure an award of benefits to any individual who suspects he or she has contracted COVID-19 or self-isolates and self-quarantines due to an alleged or suspected exposure to COVID-19, but, instead, creates a reasonable rebuttable presumption that a first responder or front-line worker's exposure to the virus is connected to their employment.

The emergency rule does not create or diminish any substantive rights of any party, but, instead, speaks to the rules of evidence and procedural rules to be followed by the Commission's hearing officers for carrying out the duties imposed upon the Commission in the conduct of hearings.

- 10) A Complete Description of the Subjects and Issues Involved: The proposed rules are designed to ensure in any case before the Workers' Compensation Commission where any COVID-19 First Responder or Front-Line Worker, defined within the Rule, is exposed to COVID-19 during the State of Emergency, it will be rebuttably presumed that the individual's exposure arises out of and in the course of their COVID-19 First Responder or Front-Line Worker employment and rebuttably presumed to be causally connected to their COVID-19 First Responder or Front-Line Worker employment.
- 11) Are there any other rulemakings pending on this Part? No
- 12) Statement of Statewide Policy Objective: This rulemaking neither creates nor expands any state mandates on units of local government.
- 13) Information and questions regarding these emergency rules shall be directed to:

Cole D. Garrett  
Deputy General Counsel

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ILLINOIS REGISTER

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WORKERS' COMPENSATION COMMISSION

NOTICE OF EMERGENCY AMENDMENTS

Illinois Workers' Compensation Commission  
100 W. Randolph St., Suite 8-200  
Chicago, IL 60601  
e-mail: [Cole.Garrett@illinois.gov](mailto:Cole.Garrett@illinois.gov)

The full text of the Emergency Amendments begins on the next page:

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ILLINOIS REGISTER

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WORKERS' COMPENSATION COMMISSION

NOTICE OF EMERGENCY AMENDMENTS

TITLE 50: INSURANCE

CHAPTER VI: WORKERS' COMPENSATION COMMISSION

PART 9030  
ARBITRATION

Section

9030.10 Arbitration Assignments

9030.20 Setting a Case for Trial

9030.30 Disqualification of Commissioners and Arbitrators

9030.40 Request for Hearing

9030.50 Subpoena Practice

9030.60 Depositions

9030.70 Rules of Evidence

EMERGENCY

9030.80 Briefs, Arbitrators' Decisions

9030.90 Opening and/or Closing Statements

9030.100 Voluntary Arbitration under Section 19(p) of the Workers' Compensation Act and  
Section 19(m) of the Workers' Occupational Diseases Act

**AUTHORITY:** Implementing and authorized by the Workers' Compensation Act [820 ILCS 305] and the Workers' Occupational Diseases Act [820 ILCS 310].

**SOURCE:** Filed and effective March 1, 1977; amended at 4 Ill. Reg. 26, p. 159, effective July 1, 1980; emergency amendment at 5 Ill. Reg. 8547, effective August 3, 1981, for a maximum of 150 days; amended at 6 Ill. Reg. 3570, effective March 22, 1982; emergency amendment at 6 Ill. Reg. 5820, effective May 1, 1982, for a maximum of 150 days; amended at 6 Ill. Reg. 8040, effective July 7, 1982; amended at 6 Ill. Reg. 11909, effective September 20, 1982; codified at 7 Ill. Reg. 2514; amended at 9 Ill. Reg. 19722, effective December 6, 1985; emergency amendment at 14 Ill. Reg. 4913, effective March 9, 1990, for a maximum of 150 days; emergency expired August 6, 1990; amended at 14 Ill. Reg. 13141, effective August 1, 1990; amended at 15 Ill. Reg. 8214, effective May 17, 1991; amended at 20 Ill. Reg. 4053, effective February 15, 1996; amended at 36 Ill. Reg. 17913, effective December 4, 2012; recodified from 50 Ill. Adm. Code 7030 to 50 Ill. Adm. Code 9030 at 39 Ill. Reg. 9605; amended at 40 Ill. Reg. 15732, effective November 9, 2016; emergency amendment at 44 Ill. Reg. \_\_\_\_\_, effective April 16, 2020, for a maximum of 150 days.

**Section 9030.70 Rules of Evidence**

EMERGENCY

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ILLINOIS REGISTER

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WORKERS' COMPENSATION COMMISSION

NOTICE OF EMERGENCY AMENDMENTS

- a) The Illinois Rules of Evidence shall apply in all proceedings before the Commission, either upon Arbitration or Review, except to the extent they conflict with the Act, the Workers' Occupational Diseases Act [820 ILCS 310], or the Rules Governing Practice Before the Workers' Compensation Commission (50 Ill. Adm. Code Chapter VI).
  - 1) In any proceeding before the Commission in which the petitioner is a COVID-19 First Responder or Front-Line Worker as defined in Section (a)(2), if the petitioner's injury, occupational disease, or period of incapacity resulted from exposure to the COVID-19 virus during the Gubernatorial Disaster Proclamation 2020-38 and any subsequent COVID-19 disaster proclamations, the exposure will be rebuttably presumed to have arisen out of and in the course of the petitioner's COVID-19 First Responder or Front-Line Worker employment and, further, will be rebuttably presumed to be causally connected to the hazards or exposures of the petitioner's COVID-19 First Responder or Front-Line Worker employment.
  - 2) The term "COVID-19 First Responder or Front-Line Worker" means any individuals employed as police, fire personnel, emergency medical technicians, or paramedics and all individuals employed and considered as first responders, health care providers engaged in patient care, corrections officers, and the crucial personnel identified under Section 1 Parts 7, 8, 9, 10, 11, and 12 of Executive Order 2020-10 dated March 20, 2020
- b) Exhibits offered in evidence, whether admitted or rejected, shall be retained by the assigned Arbitrator or Commissioner until a decision is issued in the matter. Exhibits may not be removed by the parties. Once a final decision is rendered, exhibits shall be retained by the Commission pursuant to the requirements of Section 17 of the Act.

(Source: Amended by emergency rulemaking at 44 Ill. Reg. \_\_\_\_\_, effective April 16, 2020, for a maximum of 150 days)

**EXHIBIT B**  
**to Memorandum in**  
**Support**





March 20, 2020

Executive Order 2020-10

**EXECUTIVE ORDER IN RESPONSE TO COVID-19**  
**(COVID-19 EXECUTIVE ORDER NO. 8)**

**WHEREAS**, I, JB Pritzker, Governor of Illinois, declared all counties in the State of Illinois as a disaster area on March 9, 2020 (Gubernatorial Disaster Proclamation) in response to the outbreak of Coronavirus Disease 2019 (COVID-19); and,

**WHEREAS**, in a short period of time, COVID-19 has rapidly spread throughout Illinois, necessitating updated and more stringent guidance from federal, state, and local public health officials; and,

**WHEREAS**, for the preservation of public health and safety throughout the entire State of Illinois, and to ensure that our healthcare delivery system is capable of serving those who are sick, I find it necessary to take additional measures consistent with public health guidance to slow and stop the spread of COVID-19;

**WHEREAS**, COVID-19 has resulted in significant economic impact, including loss of income and wages, that threaten to undermine housing security and stability;

**WHEREAS**, the enforcement of eviction orders for residential premises is contrary to the interest of preserving public health and ensuring that individuals remain in their homes during this public health emergency;

**THEREFORE**, by the powers vested in me as the Governor of the State of Illinois, and pursuant to Sections 7(1), 7(2), 7(8), 7(10), and 7(12) of the Illinois Emergency Management Agency Act, 20 ILCS 3305, and consistent with the powers in public health laws, I hereby order the following, effective March 21, 2020 at 5:00 pm and for the remainder of the duration of the Gubernatorial Disaster Proclamation, which currently extends through April 7, 2020:

**Section 1. Stay at Home; Social Distancing Requirements; and Essential Businesses and Operations**

1. **Stay at home or place of residence.** With exceptions as outlined below, all individuals currently living within the State of Illinois are ordered to stay at home or at their place of residence except as allowed in this Executive Order. To the extent individuals are using shared or outdoor spaces when outside their residence, they must at all times and as much as reasonably possible maintain social distancing of at least six feet from any other person, consistent with the Social Distancing Requirements set forth in this Executive Order. All persons may leave their homes or place of residence only for Essential Activities, Essential Governmental Functions, or to operate Essential Businesses and Operations, all as defined below.

Individuals experiencing homelessness are exempt from this directive, but are strongly urged to obtain shelter, and governmental and other entities are strongly urged to make

such shelter available as soon as possible and to the maximum extent practicable (and to use in their operation COVID-19 risk mitigation practices recommended by the U.S. Centers for Disease Control and Prevention (CDC) and the Illinois Department of Public Health (IDPH)). Individuals whose residences are unsafe or become unsafe, such as victims of domestic violence, are permitted and urged to leave their home and stay at a safe alternative location. For purposes of this Executive Order, homes or residences include hotels, motels, shared rental units, shelters, and similar facilities.

2. **Non-essential business and operations must cease.** All businesses and operations in the State, except Essential Businesses and Operations as defined below, are required to cease all activities within the State except Minimum Basic Operations, as defined below. For clarity, businesses may also continue operations consisting exclusively of employees or contractors performing activities at their own residences (i.e., working from home).

All Essential Businesses and Operations are encouraged to remain open. To the greatest extent feasible, Essential Businesses and Operations shall comply with Social Distancing Requirements as defined in this Executive Order, including by maintaining six-foot social distancing for both employees and members of the public at all times, including, but not limited to, when any customers are standing in line.

3. **Prohibited activities.** All public and private gatherings of any number of people occurring outside a single household or living unit are prohibited, except for the limited purposes permitted by this Executive Order. Pursuant to current guidance from the CDC, any gathering of more than ten people is prohibited unless exempted by this Executive Order. Nothing in this Executive Order prohibits the gathering of members of a household or residence.

All places of public amusement, whether indoors or outdoors, including but not limited to, locations with amusement rides, carnivals, amusement parks, water parks, aquariums, zoos, museums, arcades, fairs, children's play centers, playgrounds, funplexes, theme parks, bowling alleys, movie and other theaters, concert and music halls, and country clubs or social clubs shall be closed to the public.

This Executive Order supersedes Section 2 of Executive Order 2020-07 (COVID-19 Executive Order No. 5), which prohibited gatherings of 50 people or more.

4. **Prohibited and permitted travel.** All travel, including, but not limited to, travel by automobile, motorcycle, scooter, bicycle, train, plane, or public transit, except Essential Travel and Essential Activities as defined herein, is prohibited. People riding on public transit must comply with Social Distancing Requirements to the greatest extent feasible. This Executive Order allows travel into or out of the State to maintain Essential Businesses and Operations and Minimum Basic Operations.
5. **Leaving the home for essential activities is permitted.** For purposes of this Executive Order, individuals may leave their residence only to perform any of the following Essential Activities:
  - a. **For health and safety.** To engage in activities or perform tasks essential to their health and safety, or to the health and safety of their family or household members (including, but not limited to, pets), such as, by way of example only and without limitation, seeking emergency services, obtaining medical supplies or medication, or visiting a health care professional.
  - b. **For necessary supplies and services.** To obtain necessary services or supplies for themselves and their family or household members, or to deliver those services or supplies to others, such as, by way of example only and without limitation, groceries and food, household consumer products, supplies they need

to work from home, and products necessary to maintain the safety, sanitation, and essential operation of residences.

- c. **For outdoor activity.** To engage in outdoor activity, provided the individuals comply with Social Distancing Requirements, as defined below, such as, by way of example and without limitation, walking, hiking, running, or biking. Individuals may go to public parks and open outdoor recreation areas. However, playgrounds may increase spread of COVID-19, and therefore shall be closed.
  - d. **For certain types of work.** To perform work providing essential products and services at Essential Businesses or Operations (which, as defined below, includes Healthcare and Public Health Operations, Human Services Operations, Essential Governmental Functions, and Essential Infrastructure) or to otherwise carry out activities specifically permitted in this Executive Order, including Minimum Basic Operations.
  - e. **To take care of others.** To care for a family member, friend, or pet in another household, and to transport family members, friends, or pets as allowed by this Executive Order.
6. **Elderly people and those who are vulnerable as a result of illness should take additional precautions.** People at high risk of severe illness from COVID-19, including elderly people and those who are sick, are urged to stay in their residence to the extent possible except as necessary to seek medical care. Nothing in this Executive Order prevents the Illinois Department of Public Health or local public health departments from issuing and enforcing isolation and quarantine orders pursuant to the Department of Public Health Act, 20 ILCS 2305.
7. **Healthcare and Public Health Operations.** For purposes of this Executive Order, individuals may leave their residence to work for or obtain services through Healthcare and Public Health Operations.

Healthcare and Public Health Operations includes, but is not limited to: hospitals; clinics; dental offices; pharmacies; public health entities, including those that compile, model, analyze and communicate public health information; pharmaceutical, pharmacy, medical device and equipment, and biotechnology companies (including operations, research and development, manufacture, and supply chain); organizations collecting blood, platelets, plasma, and other necessary materials; licensed medical cannabis dispensaries and licensed cannabis cultivation centers; reproductive health care providers; eye care centers, including those that sell glasses and contact lenses; home healthcare services providers; mental health and substance use providers; other healthcare facilities and suppliers and providers of any related and/or ancillary healthcare services; and entities that transport and dispose of medical materials and remains.

Specifically included in Healthcare and Public Health Operations are manufacturers, technicians, logistics, and warehouse operators and distributors of medical equipment, personal protective equipment (PPE), medical gases, pharmaceuticals, blood and blood products, vaccines, testing materials, laboratory supplies, cleaning, sanitizing, disinfecting or sterilization supplies, and tissue and paper towel products.

Healthcare and Public Health Operations also includes veterinary care and all healthcare services provided to animals.

Healthcare and Public Health Operations shall be construed broadly to avoid any impacts to the delivery of healthcare, broadly defined. Healthcare and Public Health Operations does not include fitness and exercise gyms, spas, salons, barber shops, tattoo parlors, and similar facilities.

8. **Human Services Operations.** For purposes of this Executive Order, individuals may leave their residence to work for or obtain services at any Human Services Operations, including any provider funded by the Illinois Department of Human Services, Illinois Department of Children and Family Services, or Medicaid that is providing services to the public and including state-operated, institutional, or community-based settings providing human services to the public.

Human Services Operations includes, but is not limited to: long-term care facilities; all entities licensed pursuant to the Child Care Act, 225 ILCS 10, except for day care centers, day care homes, group day care homes, and day care centers licensed as specified in Section 12(s) of this Executive Order; residential settings and shelters for adults, seniors, children, and/or people with developmental disabilities, intellectual disabilities, substance use disorders, and/or mental illness; transitional facilities; home-based settings to provide services to individuals with physical, intellectual, and/or developmental disabilities, seniors, adults, and children; field offices that provide and help to determine eligibility for basic needs including food, cash assistance, medical coverage, child care, vocational services, rehabilitation services; developmental centers; adoption agencies; businesses that provide food, shelter, and social services, and other necessities of life for economically disadvantaged individuals, individuals with physical, intellectual, and/or developmental disabilities, or otherwise needy individuals.

Human Services Operations shall be construed broadly to avoid any impacts to the delivery of human services, broadly defined.

9. **Essential Infrastructure.** For purposes of this Executive Order, individuals may leave their residence to provide any services or perform any work necessary to offer, provision, operate, maintain and repair Essential Infrastructure.

Essential Infrastructure includes, but is not limited to: food production, distribution, and sale; construction (including, but not limited to, construction required in response to this public health emergency, hospital construction, construction of long-term care facilities, public works construction, and housing construction); building management and maintenance; airport operations; operation and maintenance of utilities, including water, sewer, and gas; electrical (including power generation, distribution, and production of raw materials); distribution centers; oil and biofuel refining; roads, highways, railroads, and public transportation; ports; cybersecurity operations; flood control; solid waste and recycling collection and removal; and internet, video, and telecommunications systems (including the provision of essential global, national, and local infrastructure for computing services, business infrastructure, communications, and web-based services).

Essential Infrastructure shall be construed broadly to avoid any impacts to essential infrastructure, broadly defined.

10. **Essential Governmental Functions.** For purposes of this Executive Order, all first responders, emergency management personnel, emergency dispatchers, court personnel, law enforcement and corrections personnel, hazardous materials responders, child protection and child welfare personnel, housing and shelter personnel, military, and other governmental employees working for or to support Essential Businesses and Operations are categorically exempt from this Executive Order.

Essential Government Functions means all services provided by the State or any municipal, township, county, subdivision or agency of government and needed to ensure the continuing operation of the government agencies or to provide for or support the health, safety and welfare of the public, and including contractors performing Essential Government Functions. Each government body shall determine its Essential Governmental Functions and identify employees and/or contractors necessary to the performance of those functions.

This Executive Order does not apply to the United States government. Nothing in this Executive Order shall prohibit any individual from performing or accessing Essential Governmental Functions.

11. **Businesses covered by this Executive Order.** For the purposes of this Executive Order, covered businesses include any for-profit, non-profit, or educational entities, regardless of the nature of the service, the function it performs, or its corporate or entity structure.
12. **Essential Businesses and Operations.** For the purposes of this Executive Order, Essential Businesses and Operations means Healthcare and Public Health Operations, Human Services Operations, Essential Governmental Functions, and Essential Infrastructure, and the following:<sup>1</sup>
  - a. **Stores that sell groceries and medicine.** Grocery stores, pharmacies, certified farmers' markets, farm and produce stands, supermarkets, convenience stores, and other establishments engaged in the retail sale of groceries, canned food, dry goods, frozen foods, fresh fruits and vegetables, pet supplies, fresh meats, fish, and poultry, alcoholic and non-alcoholic beverages, and any other household consumer products (such as cleaning and personal care products). This includes stores that sell groceries, medicine, including medication not requiring a medical prescription, and also that sell other non-grocery products, and products necessary to maintaining the safety, sanitation, and essential operation of residences and Essential Businesses and Operations;
  - b. **Food, beverage, and cannabis production and agriculture.** Food and beverage manufacturing, production, processing, and cultivation, including farming, livestock, fishing, baking, and other production agriculture, including cultivation, marketing, production, and distribution of animals and goods for consumption; licensed medical and adult use cannabis dispensaries and licensed cannabis cultivation centers; and businesses that provide food, shelter, and other necessities of life for animals, including animal shelters, rescues, shelters, kennels, and adoption facilities;
  - c. **Organizations that provide charitable and social services.** Businesses and religious and secular nonprofit organizations, including food banks, when providing food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities;
  - d. **Media.** Newspapers, television, radio, and other media services;
  - e. **Gas stations and businesses needed for transportation.** Gas stations and auto-supply, auto-repair, and related facilities and bicycle shops and related facilities;
  - f. **Financial institutions.** Banks, currency exchanges, consumer lenders, including but not limited, to payday lenders, pawnbrokers, consumer installment lenders and sales finance lenders, credit unions, appraisers, title companies, financial markets, trading and futures exchanges, affiliates of financial institutions, entities that issue bonds, related financial institutions, and institutions selling financial products;
  - g. **Hardware and supply stores.** Hardware stores and businesses that sell electrical, plumbing, and heating material;

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<sup>1</sup> On March 19, 2020, the U.S. Department of Homeland Security, Cybersecurity & Infrastructure Security Agency, issued a *Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response*. The definition of Essential Businesses and Operations in this Order is meant to encompass the workers identified in that Memorandum.

- h. **Critical trades.** Building and Construction Tradesmen and Tradeswomen, and other trades including but not limited to plumbers, electricians, exterminators, cleaning and janitorial staff for commercial and governmental properties, security staff, operating engineers, HVAC, painting, moving and relocation services, and other service providers who provide services that are necessary to maintaining the safety, sanitation, and essential operation of residences, Essential Activities, and Essential Businesses and Operations;
- i. **Mail, post, shipping, logistics, delivery, and pick-up services.** Post offices and other businesses that provide shipping and delivery services, and businesses that ship or deliver groceries, food, alcoholic and non-alcoholic beverages, goods or services to end users or through commercial channels;
- j. **Educational institutions.** Educational institutions—including public and private pre-K-12 schools, colleges, and universities—for purposes of facilitating distance learning, performing critical research, or performing essential functions, provided that social distancing of six-feet per person is maintained to the greatest extent possible. This Executive Order is consistent with and does not amend or supersede Executive Order 2020-05 (COVID-19 Executive Order No. 3) or Executive Order 2020-06 (COVID-19 Executive Order No. 4) except that affected schools are ordered closed through April 7, 2020;
- k. **Laundry services.** Laundromats, dry cleaners, industrial laundry services, and laundry service providers;
- l. **Restaurants for consumption off-premises.** Restaurants and other facilities that prepare and serve food, but only for consumption off-premises, through such means as in-house delivery, third-party delivery, drive-through, curbside pick-up, and carry-out. Schools and other entities that typically provide food services to students or members of the public may continue to do so under this Executive Order on the condition that the food is provided to students or members of the public on a pick-up and takeaway basis only. Schools and other entities that provide food services under this exemption shall not permit the food to be eaten at the site where it is provided, or at any other gathering site due to the virus's propensity to physically impact surfaces and personal property. This Executive Order is consistent with and does not amend or supersede Section 1 of Executive Order 2020-07 (COVID-19 Executive Order No. 5) except that Section 1 is ordered to be extended through April 7, 2020;
- m. **Supplies to work from home.** Businesses that sell, manufacture, or supply products needed for people to work from home;
- n. **Supplies for Essential Businesses and Operations.** Businesses that sell, manufacture, or supply other Essential Businesses and Operations with the support or materials necessary to operate, including computers, audio and video electronics, household appliances; IT and telecommunication equipment; hardware, paint, flat glass; electrical, plumbing and heating material; sanitary equipment; personal hygiene products; food, food additives, ingredients and components; medical and orthopedic equipment; optics and photography equipment; diagnostics, food and beverages, chemicals, soaps and detergent; and firearm and ammunition suppliers and retailers for purposes of safety and security;
- o. **Transportation.** Airlines, taxis, transportation network providers (such as Uber and Lyft), vehicle rental services, paratransit, and other private, public, and commercial transportation and logistics providers necessary for Essential Activities and other purposes expressly authorized in this Executive Order;

- p. **Home-based care and services.** Home-based care for adults, seniors, children, and/or people with developmental disabilities, intellectual disabilities, substance use disorders, and/or mental illness, including caregivers such as nannies who may travel to the child's home to provide care, and other in-home services including meal delivery;
  - q. **Residential facilities and shelters.** Residential facilities and shelters for adults, seniors, children, and/or people with developmental disabilities, intellectual disabilities, substance use disorders, and/or mental illness;
  - r. **Professional services.** Professional services, such as legal services, accounting services, insurance services, real estate services (including appraisal and title services);
  - s. **Day care centers for employees exempted by this Executive Order.** Day care centers granted an emergency license pursuant to Title 89, Section 407.400 of the Illinois Administrative Code, governing Emergency Day Care Programs for children of employees exempted by this Executive Order to work as permitted. The licensing requirements for day care homes pursuant to Section 4 of the Child Care Act, 225 ILCS 10/4, are hereby suspended for family homes that receive up to 6 children for the duration of the Gubernatorial Disaster Proclamation.
  - t. **Manufacture, distribution, and supply chain for critical products and industries.** Manufacturing companies, distributors, and supply chain companies producing and supplying essential products and services in and for industries such as pharmaceutical, technology, biotechnology, healthcare, chemicals and sanitization, waste pickup and disposal, agriculture, food and beverage, transportation, energy, steel and steel products, petroleum and fuel, mining, construction, national defense, communications, as well as products used by other Essential Businesses and Operations.
  - u. **Critical labor union functions.** Labor Union essential activities including the administration of health and welfare funds and personnel checking on the well-being and safety of members providing services in Essential Businesses and Operations – provided that these checks should be done by telephone or remotely where possible.
  - v. **Hotels and motels.** Hotels and motels, to the extent used for lodging and delivery or carry-out food services.
  - w. **Funeral services.** Funeral, mortuary, cremation, burial, cemetery, and related services.
13. **Minimum Basic Operations.** For the purposes of this Executive Order, Minimum Basic Operations include the following, provided that employees comply with Social Distancing Requirements, to the extent possible, while carrying out such operations:
- a. The minimum necessary activities to maintain the value of the business's inventory, preserve the condition of the business's physical plant and equipment, ensure security, process payroll and employee benefits, or for related functions.
  - b. The minimum necessary activities to facilitate employees of the business being able to continue to work remotely from their residences.
14. **Essential Travel.** For the purposes of this Executive Order, Essential Travel includes travel for any of the following purposes. Individuals engaged in any Essential Travel must comply with all Social Distancing Requirements as defined in this Section.

- a. Any travel related to the provision of or access to Essential Activities, Essential Governmental Functions, Essential Businesses and Operations, or Minimum Basic Operations.
- b. Travel to care for elderly, minors, dependents, persons with disabilities, or other vulnerable persons.
- c. Travel to or from educational institutions for purposes of receiving materials for distance learning, for receiving meals, and any other related services.
- d. Travel to return to a place of residence from outside the jurisdiction.
- e. Travel required by law enforcement or court order, including to transport children pursuant to a custody agreement.
- f. Travel required for non-residents to return to their place of residence outside the State. Individuals are strongly encouraged to verify that their transportation out of the State remains available and functional prior to commencing such travel.

15. **Social Distancing Requirements.** For purposes of this Executive Order, Social Distancing Requirements includes maintaining at least six-foot social distancing from other individuals, washing hands with soap and water for at least twenty seconds as frequently as possible or using hand sanitizer, covering coughs or sneezes (into the sleeve or elbow, not hands), regularly cleaning high-touch surfaces, and not shaking hands.

- a. **Required measures.** Essential Businesses and Operations and businesses engaged in Minimum Basic Operations must take proactive measures to ensure compliance with Social Distancing Requirements, including where possible:
  - i. **Designate six-foot distances.** Designating with signage, tape, or by other means six-foot spacing for employees and customers in line to maintain appropriate distance;
  - ii. **Hand sanitizer and sanitizing products.** Having hand sanitizer and sanitizing products readily available for employees and customers;
  - iii. **Separate operating hours for vulnerable populations.** Implementing separate operating hours for elderly and vulnerable customers; and
  - iv. **Online and remote access.** Posting online whether a facility is open and how best to reach the facility and continue services by phone or remotely.

16. **Intent of this Executive Order.** The intent of this Executive Order is to ensure that the maximum number of people self-isolate in their places of residence to the maximum extent feasible, while enabling essential services to continue, to slow the spread of COVID-19 to the greatest extent possible. When people need to leave their places of residence, whether to perform Essential Activities, or to otherwise facilitate authorized activities necessary for continuity of social and commercial life, they should at all times and as much as reasonably possible comply with Social Distancing Requirements. All provisions of this Executive Order should be interpreted to effectuate this intent.

17. **Enforcement.** This Executive Order may be enforced by State and local law enforcement pursuant to, *inter alia*, Section 7, Section 18, and Section 19 of the Illinois Emergency Management Agency Act, 20 ILCS 3305.

18. **No limitation on authority.** Nothing in this Executive Order shall, in any way, alter or modify any existing legal authority allowing the State or any county, or local government



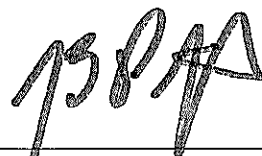
body from ordering (1) any quarantine or isolation that may require an individual to remain inside a particular residential property or medical facility for a limited period of time, including the duration of this public health emergency, or (2) any closer of a specific location for a limited period of time, including the duration of this public health emergency. Nothing in this Executive Order shall, in any way, alter or modify any existing legal authority allowing a county or local government body to enact provisions that are stricter than those in this Executive Order.

## **Section 2. Order ceasing evictions.**

Pursuant to the Illinois Emergency Management Agency Act, 20 ILCS 3305/7(2), (8), and (10), all state, county, and local law enforcement officers in the State of Illinois are instructed to cease enforcement of orders of eviction for residential premises for the duration of the Gubernatorial Disaster Proclamation. No provision contained in this Executive Order shall be construed as relieving any individual of the obligation to pay rent, to make mortgage payments, or to comply with any other obligation that an individual may have under tenancy or mortgage.

## **Section 3. Savings clause.**

If any provision of this Executive Order or its application to any person or circumstance is held invalid by any court of competent jurisdiction, this invalidity does not affect any other provision or application of this Executive Order, which can be given effect without the invalid provision or application. To achieve this purpose, the provisions of this Executive Order are declared to be severable.



JB Pritzker, Governor

Issued by the Governor March 20, 2020

Filed by the Secretary of State March 20, 2020

**FILED**  
INDEX DEPARTMENT  
MAR. 20 2020  
IN THE OFFICE OF  
SECRETARY OF STATE

**EXHIBIT C**  
**to Memorandum in**  
**Support**

**IN THE CIRCUIT COURT  
FOR THE SEVENTH JUDICIAL CIRCUIT OF ILLINOIS  
SANGAMON COUNTY, ILLINOIS**

ILLINOIS MANUFACTURERS'	)	
ASSOCIATION and ILLINOIS RETAIL	)	
MERCHANTS ASSOCIATION,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Cause No.
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION and MICHAEL J.	)	
BRENNAN, COMMISSIONER, IN HIS	)	
OFFICIAL CAPACITY,	)	
	)	
Defendants.	)	

**AFFIDAVIT OF MARK DENZLER**

I, Mark Denzler, do herein attest, under penalties of perjury as provided by law, as follows:

1. I am over the age of 18 and under no legal incapacity. I am the President and Chief Executive Officer of the Illinois Manufacturers' Association ("IMA") and have personal knowledge of the facts stated herein. I have held this position since January 2019. Prior to serving in that capacity, I was Vice President and Chief Operating Officer ("COO") for the IMA, a position I held from 2006 to 2019.
2. The IMA is a private not-for-profit manufacturing trade association that represents its members' interest on various matters of importance to Illinois manufacturers, including but not limited to, tax policy, environmental regulations, health care reform, and labor law. It is the only statewide association in Illinois dedicated exclusively to manufacturing.

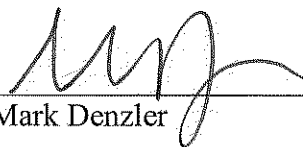
3. IMA is also the oldest and one of the largest manufacturing associations in the nation, representing nearly 4,000 companies and facilities that employ nearly 600,000 workers.
4. The majority of its members are private corporations and have between 50 and 249 employees. Its members are manufacturers in the following industries: heavy equipment, fabricated metal, food/beverage, chemical, paper, plastics, steel, electronics, transportation equipment, petroleum/energy, wholesale durable goods, printing, and wholesale non-durable goods.
5. In addition, many of the IMA's members are self-insured for paying workers compensation claims.
6. In my roles as President of the IMA since January 2019 and Vice President and COO from 2006 through 2019, I have regular and constant communication with IMA members and have personal knowledge of their manufacturing operations.
7. I have read and familiarized myself with the Amendments to the Illinois Workers' Compensation Act that went into effect on April 16, 2020.
8. If the Amendments are permitted to remain in effect, IMA members will suffer irreparable harm, including but not limited to the following:
  - a. The costs of workers compensation insurance to IMA members will increase substantially and dramatically for so long as the rebuttable presumption is in effect, as the insurance carriers must pass on to all employers, including IMA members, and even those with no COVID-19 related claims, the costs related to the overall increase in compensable claims being paid out.

- b. IMA members, upon receipt of a COVID-19 workers' compensation claim, will have to either acquiesce to paying the employee's medical bills at the outset, or face harsh penalties for attempting to overcome the virtually irrefutable rebuttable presumption regarding COVID-19 claims.
9. On April 15, 2020, I emailed Ronald Rascia, the General Counsel for the Illinois Workers Compensation Commission. A true and accurate copy of the April 15, 2020 email exchange between Mr. Rascia and me is attached as Exhibit A to my Affidavit.
10. In my email to Mr. Rascia, I asked if the Commission's Amendment to the IWCA is intended to be applied retroactively or prospectively.
11. Mr. Rascia responded, in part, "Our rule is prospective not retroactive."

### VERIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I, Mark Denzler, certify that the statements set forth in this Affidavit are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

4-21-2020  
Date

  
Mark Denzler

**EXHIBIT A**  
**to Affidavit of Denzler**

[REDACTED]

---

[REDACTED]

[REDACTED]

[REDACTED]

**From:** "Rascia, Ronald" <Ronald.Rascia@Illinois.gov>  
**Date:** April 15, 2020 at 5:19:47 PM CDT  
**To:** Mark Denzler <mdenzler@ima-net.org>, "Brennan, Michael" <Michael.Brennan@Illinois.gov>  
**Cc:** Mark Denzler <mdenzler@ima-net.org>  
**Subject:** RE: IWCC question

Mark

The emergency rulemaking provisions 5 ILCS 100/5-45 do not contemplate retroactive application. They only speak of a prospective effective date as either upon filing or up to 10 days in the future.

Our rule is prospective not retroactive. The effective date is April 16, 2020.  
Ron

-----Original Message-----

From: Mark Denzler <mdenzler@ima-net.org>  
Sent: Wednesday, April 15, 2020 5:00 PM  
To: Brennan, Michael <Michael.Brennan@Illinois.gov>; Rascia, Ronald <Ronald.Rascia@Illinois.gov>  
Cc: EXT Denzler, Mark <mdenzler@ima-net.org>  
Subject: [External] IWCC question

Mike,

Thank you for the call. It was difficult to hear at times. Can you clarify for me.

Is this rule change retroactive or prospective?

Thanks

Mark



Mark Denzler  
President & CEO  
Illinois Manufacturers' Association  
217-522-1240 ext 3726

Sent from my iPhone

State of Illinois - CONFIDENTIALITY NOTICE: The information contained in this communication is confidential, may be attorney-client privileged or attorney work product, may constitute inside information or internal deliberative staff communication, and is intended only for the use of the addressee. Unauthorized use, disclosure or copying of this communication or any part thereof is strictly prohibited and may be unlawful. If you have received this communication in error, please notify the sender immediately by return e-mail and destroy this communication and all copies thereof, including all attachments. Receipt by an unintended recipient does not waive attorney-client privilege, attorney work product privilege, or any other exemption from disclosure.

**EXHIBIT D**  
**to Memorandum in**  
**Support**

**IN THE CIRCUIT COURT  
FOR THE SEVENTH JUDICIAL CIRCUIT OF ILLINOIS  
SANGAMON COUNTY, ILLINOIS**

ILLINOIS MANUFACTURERS'  
ASSOCIATION and ILLINOIS RETAIL  
MERCHANTS ASSOCIATION,

Plaintiffs,

v.

Cause No.

ILLINOIS WORKERS' COMPENSATION  
COMMISSION and MICHAEL J.  
BRENNAN, COMMISSIONER, IN HIS  
OFFICIAL CAPACITY,

Defendants.

**AFFIDAVIT OF ROB KARR**

I, Rob Karr, do herein attest, under penalties of perjury as provided by law, as follows:

1. I am over the age of 18 and under no legal incapacity. I am the President and Chief Executive Officer of the Illinois Retail Merchants Association ("IRMA") and have personal knowledge of the facts stated herein. I have held this position since January 2014.
2. IRMA is a private not-for-profit association that benefits Illinois retailing through effective management with retailers, the general public, policy makers, and the media regarding the impact legislative and regulatory proposals will have on the success of retail operations.
3. IRMA is the only statewide organization exclusively representing retailers in Illinois. IRMA closely monitors legislative and regulatory activity, voicing opposition to anti-business proposals and supporting and passing business friendly initiatives. In

addition to serving as retail lobbyists, IRMA provides services and resources to its members to assist with the development of their businesses.

4. Many of IRMA's members are self-insured for paying workers compensation claims.
5. In my roles as President of IRMA since January 2014, I have regular and constant communication with IRMA members and have personal knowledge of their retailing operations.
6. I have read and familiarized myself with the Amendments to the Illinois Workers' Compensation Act that went into effect on April 16, 2020.
7. If the Amendments are permitted to remain in effect, IRMA members will suffer irreparable harm, including but not limited to the following:
  - a. The costs of workers compensation insurance to IRMA members will increase substantially and dramatically for so long as the rebuttable presumption is in effect, as the insurance carriers must pass on to all employers, including IRMA members, and even those with no COVID-19 related claims, the costs related to the overall increase in compensable claims being paid out.
  - b. IRMA members, upon receipt of a COVID-19 workers' compensation claim, will have to either acquiesce to paying the employee's medical bills at the outset, or face harsh penalties for attempting to overcome the virtually irrefutable rebuttable presumption regarding COVID-19 claims.

### VERIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I, Rob Karr, certify that the statements set forth in this Affidavit are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Date

April 21, 2020

Rob Karr

[Signature]

<b>STATE OF ILLINOIS, CIRCUIT COURT</b>  <u>Sangamon</u> COUNTY	<b>SUMMONS</b>	<i>For Court Use Only</i>
<b>Instructions ▼</b> Enter above the county name where the case was filed. Enter your name as Plaintiff/Petitioner. Enter the names of all people you are suing as Defendants/Respondents. Enter the Case Number given by the Circuit Clerk.	ILLINOIS MANUFACTURERS' ASSOCIATION , et.al. <b>Plaintiff / Petitioner</b> (First, middle, last name)  V.  ILLINOIS WORKERS' COMPENSATION COMISSION <b>Defendant / Respondent</b> (First, middle, last name)	2020CH00098 <b>Case Number</b>

In 1, if your lawsuit is for money, enter the amount of money you seek from the Defendant/Respondent.
In 2, enter your contact information. If more than 1 person is bringing this lawsuit, attach an <i>Additional Plaintiff/Petitioner Contact Information</i> form.
In 3, enter the name of the person you are suing and their address. If more than 1 person is being sued, attach an <i>Additional Defendant/Respondent Contact Information</i> form.

**1. Information about the lawsuit:**

Amount claimed: \$ \_\_\_\_\_

**2. Contact information for the Plaintiff/Petitioner:**

Name (First, Middle, Last): Scott Cruz of Greensfelder, Hemker & Gale, P.C.

Street Address, Apt #: 200 W. Madison St., #3300

City, State, ZIP: Chicago, IL 60606

Telephone: (312) 345-5008

☐ See attached for additional Plaintiff/Petitioner contact information

**3. Contact information for the Defendant/Respondent:**

Name (First, Middle, Last): Cole D. Garrett, Deputy General Counsel, Illinios Workers' Comp.

Street Address, Apt #: 100 W. Randolph Street, Suite 8-200,

City, State, ZIP: Chicago, IL 60601

Telephone: \_\_\_\_\_

☒ See attached for additional Defendant/Respondent contact information

**Important Information for the person receiving this form:**

You have been sued.

Follow the instructions on the next page on how to appear/answer.

- If you do not appear/answer the court may decide the case without hearing from you and enter a judgment against you for what the plaintiff/petitioner is asking.
- Your written appearance/answer must be filed on time and in the proper form.
- Forms for a written appearance/answer are available here:  
<http://www.illinoiscourts.gov/forms/approved/default.asp>

If you cannot afford to pay the fee for filing your appearance/answer, ask the circuit clerk for an *application for waiver of court fees*.

You should read all of the documents attached.

In 4, the Circuit Clerk will give you the court date or appearance date, check any boxes that apply, and include the address of the court building and room where the Defendant/Respondent must file their response.

**4. Instructions for person receiving this form (Defendant/Respondent):**To respond to this *Summons* you must:

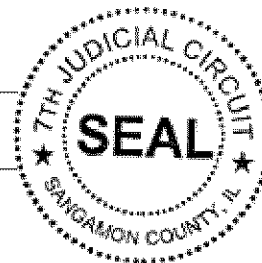
- ☒ Go to court:  
 On this date: \_\_\_\_\_ at this time: \_\_\_\_\_ ☐ a.m. ☐ p.m.  
 Address: \_\_\_\_\_ Court Room: \_\_\_\_\_  
 City, State, ZIP: \_\_\_\_\_
- ☐ File a written *Appearance* and *Answer/Response* with the court:  
 On or before this date: \_\_\_\_\_ at this time: \_\_\_\_\_ ☐ a.m. ☐ p.m.  
 Address: \_\_\_\_\_  
 City, State, ZIP: \_\_\_\_\_
- ☒ File a written *Appearance* and *Answer/Response* with the court within 30 days from the day you receive this *Summons* (listed below as the "Date of Service").  
 On this date: \_\_\_\_\_ at this time: \_\_\_\_\_ ☐ a.m. ☐ p.m.  
 Address: \_\_\_\_\_  
 City, State, ZIP: \_\_\_\_\_

**STOP!**

The Circuit Clerk will fill in this section.

Witness this Date: 4/22/2020

Clerk of the Court: \_\_\_\_\_

Seal of Court

**STOP!**

The officer or process server will fill in the Date of Service.

**This *Summons* must be served within 30 days of its date, listed above.**

Date of Service: \_\_\_\_\_  
 (Date to be entered by an officer or process server on the copy of this *Summons* left with the Defendant/Respondent or other person.)

**Plaintiff/Petitioner:**

To serve this *Summons*, you must hire the sheriff (or a private process server outside of Cook County) to deliver it and your Complaint/Petition to the Defendant/Respondent. If the sheriff (or private process server outside of Cook County) tries but can't serve the *Summons*, fill out another summons and repeat this process.

**Attention:**

E-Filing is now mandatory for documents in civil cases with limited exemptions. To e-file, you must first create an account with an e-filing service provider. Visit <http://efile.illinoiscourts.gov/service-providers.htm> to learn more and to select a service provider. If you need additional help or have trouble e-filing, visit <http://www.illinoiscourts.gov/faq/gethelp.asp>, or talk with your local circuit clerk's office.

<b>STATE OF ILLINOIS, CIRCUIT COURT</b>  <u>Sangamon</u> <b>COUNTY</b>		<b>AFFIDAVIT OF SERVICE OF SUMMONS AND COMPLAINT/PETITION</b>		<i>For Court Use Only</i>
<b>Instructions</b>  Enter above the county name where the case was filed.  Enter your name as Plaintiff/Petitioner.  Enter the name of the person you are suing as Defendant/Respondent.  Enter the Case Number given by the Circuit Clerk.	ILLINOIS MANUFACTURERS' ASSOCIATION , et.al. <u>Plaintiff / Petitioner (First, middle, last name)</u>  v.  ILLINOIS WORKERS' COMPENSATION COMISSION <u>Defendant / Respondent (First, middle, last name)</u>			2020CH00098 <u>Case Number</u>

**\*\*Stop. Do not complete the form. The sheriff will fill in the form.\*\***

**DO NOT** complete this section. The sheriff will complete it.

My name is \_\_\_\_\_ and I swear under oath  
*First, Middle, Last*  
 that I served the **Summons** and Complaint/Petition on the Defendant/Respondent

\_\_\_\_\_ as follows:  
First, Middle, Last

- ☐ Personally on the Defendant/Respondent:  
Male: ☐ Female: ☐ Approx. Age: \_\_\_\_\_ Hair Color: \_\_\_\_\_  
Height: \_\_\_\_\_ Weight: \_\_\_\_\_  
On this date: \_\_\_\_\_ at this time: \_\_\_\_\_ ☐ a.m. ☐ p.m.  
Address: \_\_\_\_\_  
City, State, ZIP: \_\_\_\_\_
- ☐ At the Defendant/Respondent's home:  
On this date: \_\_\_\_\_ at this time: \_\_\_\_\_ ☐ a.m. ☐ p.m.  
Address: \_\_\_\_\_  
City, State, ZIP: \_\_\_\_\_  
And left it with: \_\_\_\_\_  
*First, Middle, Last*  
Male: ☐ Female: ☐ Approx. Age: \_\_\_\_\_  
and by sending a copy to this defendant in a postage-paid, sealed envelope to the  
above address on \_\_\_\_\_, 20\_\_\_\_.
- ☐ On the Corporation's agent, \_\_\_\_\_  
*First, Middle, Last*  
On this date: \_\_\_\_\_ at this time: \_\_\_\_\_ ☐ a.m. ☐ p.m.  
Address: \_\_\_\_\_  
City, State, ZIP: \_\_\_\_\_



**DO NOT** complete this section. The sheriff, or private process server will complete it.

**By:**

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Print Name*

**FEES**

By certified/registered	\$
Service and Return	\$
Miles:	\$
Total	\$

Case No. 2020-CH-00098

Illinois Manufacture's Association, et. al. v. Illinois Workers's Compensation Commission, et.a.

**SUMMONS ADDENDUM**

PLEASE SERVE:

ILLINOIS WORKERS' COMPENSATION COMMISSION

c/o Cole D. Garrett, Deputy General Counsel, Illinois Workers' Compensation Commission,  
100 W. Randolph Street, Suite 8-200,  
Chicago, IL 60601

<b>STATE OF ILLINOIS, CIRCUIT COURT</b>  <u>Sangamon</u> COUNTY	<b>SUMMONS</b>	<i>For Court Use Only</i>
<b>Instructions ▼</b> Enter above the county name where the case was filed. Enter your name as Plaintiff/Petitioner. Enter the names of all people you are suing as Defendants/Respondents. Enter the Case Number given by the Circuit Clerk.	ILLINOIS MANUFACTURERS' ASSOCIATION , et.al. <b>Plaintiff / Petitioner</b> (First, middle, last name)  V.  ILLINOIS WORKERS' COMPENSATION COMISSION <b>Defendant / Respondent</b> (First, middle, last name)	2020CH00098 <b>Case Number</b>

In 1, if your lawsuit is for money, enter the amount of money you seek from the Defendant/Respondent.

In 2, enter your contact information. If more than 1 person is bringing this lawsuit, attach an *Additional Plaintiff/Petitioner Contact Information* form.

In 3, enter the name of the person you are suing and their address. If more than 1 person is being sued, attach an *Additional Defendant/Respondent Contact Information* form.

**1. Information about the lawsuit:**

Amount claimed: \$ \_\_\_\_\_

**2. Contact information for the Plaintiff/Petitioner:**

Name (First, Middle, Last): Scott Cruz of Greensfelder, Hemker & Gale, P.C.

Street Address, Apt #: 200 W. Madison St., #3300

City, State, ZIP: Chicago, IL 60606

Telephone: (312) 345-5008

☐ See attached for additional Plaintiff/Petitioner contact information

**3. Contact information for the Defendant/Respondent:**

Name (First, Middle, Last): Cole D. Garrett, Deputy General Counsel, Illinios Workers' Comp.

Street Address, Apt #: 100 W. Randolph Street, Suite 8-200,

City, State, ZIP: Chicago, IL 60601

Telephone: \_\_\_\_\_

☒ See attached for additional Defendant/Respondent contact information

**Important Information for the person receiving this form:**

You have been sued.

Follow the instructions on the next page on how to appear/answer.

- If you do not appear/answer the court may decide the case without hearing from you and enter a judgment against you for what the plaintiff/petitioner is asking.
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If you cannot afford to pay the fee for filing your appearance/answer, ask the circuit clerk for an *application for waiver of court fees*.

You should read all of the documents attached.

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**4. Instructions for person receiving this form (Defendant/Respondent):**To respond to this *Summons* you must:

- ☒ Go to court:  
 On this date: \_\_\_\_\_ at this time: \_\_\_\_\_ ☐ a.m. ☐ p.m.  
 Address: \_\_\_\_\_ Court Room: \_\_\_\_\_  
 City, State, ZIP: \_\_\_\_\_
- ☐ File a written *Appearance* and *Answer/Response* with the court:  
 On or before this date: \_\_\_\_\_ at this time: \_\_\_\_\_ ☐ a.m. ☐ p.m.  
 Address: \_\_\_\_\_  
 City, State, ZIP: \_\_\_\_\_
- ☒ File a written *Appearance* and *Answer/Response* with the court within 30 days from the day you receive this *Summons* (listed below as the "Date of Service").  
 On this date: \_\_\_\_\_ at this time: \_\_\_\_\_ ☐ a.m. ☐ p.m.  
 Address: \_\_\_\_\_  
 City, State, ZIP: \_\_\_\_\_

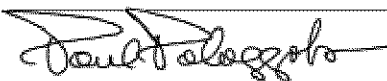
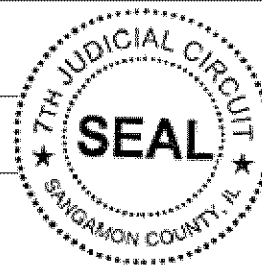
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Witness this Date:

4/22/2020

Clerk of the Court:

Seal of Court

**STOP!**

The officer or process server will fill in the Date of Service.

**This *Summons* must be served within 30 days of its date, listed above.**

Date of Service: \_\_\_\_\_

(Date to be entered by an officer or process server on the copy of this *Summons* left with the Defendant/Respondent or other person.)

**Plaintiff/Petitioner:**

To serve this *Summons*, you must hire the sheriff (or a private process server outside of Cook County) to deliver it and your Complaint/Petition to the Defendant/Respondent. If the sheriff (or private process server outside of Cook County) tries but can't serve the *Summons*, fill out another summons and repeat this process.

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E-Filing is now mandatory for documents in civil cases with limited exemptions. To e-file, you must first create an account with an e-filing service provider. Visit <http://efile.illinoiscourts.gov/service-providers.htm> to learn more and to select a service provider. If you need additional help or have trouble e-filing, visit <http://www.illinoiscourts.gov/faq/gethelp.asp>, or talk with your local circuit clerk's office.

<b>STATE OF ILLINOIS, CIRCUIT COURT</b>  <u>Sangamon</u> <b>COUNTY</b>		<b>AFFIDAVIT OF SERVICE OF SUMMONS AND COMPLAINT/PETITION</b>		<i>For Court Use Only</i>
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**\*\*Stop. Do not complete the form. The sheriff will fill in the form.\*\***

**DO NOT** complete this section. The sheriff will complete it.

My name is \_\_\_\_\_ and I swear under oath  
*First, Middle, Last*  
 that I served the **Summons** and Complaint/Petition on the Defendant/Respondent

\_\_\_\_\_ as follows:  
First, Middle, Last

- ☐ Personally on the Defendant/Respondent:  
Male: ☐ Female: ☐ Approx. Age: \_\_\_\_\_ Hair Color: \_\_\_\_\_  
Height: \_\_\_\_\_ Weight: \_\_\_\_\_  
On this date: \_\_\_\_\_ at this time: \_\_\_\_\_ ☐ a.m. ☐ p.m.  
Address: \_\_\_\_\_  
City, State, ZIP: \_\_\_\_\_
- ☐ At the Defendant/Respondent's home:  
On this date: \_\_\_\_\_ at this time: \_\_\_\_\_ ☐ a.m. ☐ p.m.  
Address: \_\_\_\_\_  
City, State, ZIP: \_\_\_\_\_  
And left it with: \_\_\_\_\_  
*First, Middle, Last*  
Male: ☐ Female: ☐ Approx. Age: \_\_\_\_\_  
and by sending a copy to this defendant in a postage-paid, sealed envelope to the  
above address on \_\_\_\_\_, 20\_\_\_\_.
- ☐ On the Corporation's agent, \_\_\_\_\_  
*First, Middle, Last*  
On this date: \_\_\_\_\_ at this time: \_\_\_\_\_ ☐ a.m. ☐ p.m.  
Address: \_\_\_\_\_  
City, State, ZIP: \_\_\_\_\_

**DO NOT** complete this section. The sheriff, or private process server will complete it.

**By:**

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Print Name*

**FEES**

By certified/registered	\$
Service and Return	\$
Miles:	\$
Total	\$

Case No. 2020-CH-00098  
Illinois Manufacture's Association, et. al. v. Illinois Workers's Compensation Commission, et.a.

**SUMMONS ADDENDUM**

PLEASE SERVE:  
MICHAEL J. BRENNAN  
c/o Cole D. Garrett, Deputy General Counsel, Illinois Workers' Compensation Commission,  
100 W. Randolph Street, Suite 8-200,  
Chicago, IL 60601

**IN THE CIRCUIT COURT  
FOR THE SEVENTH JUDICIAL CIRCUIT OF ILLINOIS  
SANGAMON COUNTY, ILLINOIS**

ILLINOIS MANUFACTURERS'  
ASSOCIATION and ILLINOIS RETAIL  
MERCHANTS ASSOCIATION,

Plaintiffs,

vs.

ILLINOIS WORKERS' COMPENSATION  
COMMISSION and MICHAEL J. BRENNAN,  
COMMISSIONER, IN HIS OFFICIAL  
CAPACITY,

Defendants.

Case No.: 2020CH000098

The Honorable John M. Madonia

**NOTICE OF APPEARANCE**

Notice is hereby given that Matthew Furton of Locke Lord LLP enters his appearance in this matter as counsel on behalf of American Property Casualty Insurance Association, National Association of Mutual Insurance Companies, Illinois Chamber of Commerce, Independent Insurance Agents of Illinois, and DRI (collectively, "Amici").

Dated: April 22, 2020

Respectfully submitted,

/s/Matthew T. Furton

Matthew T. Furton  
State Bar No. 6229285  
Locke Lord LLP  
111 South Wacker Drive  
Suite 4100  
Chicago, IL 60606  
mfurton@lockelord.com  
Telephone: 312-433-0445



**IN THE CIRCUIT COURT  
FOR THE SEVENTH JUDICIAL CIRCUIT OF ILLINOIS  
SANGAMON COUNTY, ILLINOIS**

ILLINOIS MANUFACTURERS'  
ASSOCIATION and ILLINOIS RETAIL  
MERCHANTS ASSOCIATION,

Plaintiffs,

vs.

ILLINOIS WORKERS' COMPENSATION  
COMMISSION and MICHAEL J. BRENNAN,  
COMMISSIONER, IN HIS OFFICIAL  
CAPACITY,

Defendants.

Case No.: 2020CH000098

The Honorable John M. Madonia

**NOTICE OF MOTION**

PLEASE TAKE NOTICE that the undersigned will appear before the Honorable Judge John M. Madonia in the Circuit Court of Sangamon County, Sangamon County Courthouse, or before any Judge who may be sitting in his stead, on the first available date and time scheduled via the File & Serve Illinois e-filing system, and then and there present the Amici Motion for Leave to File Amicus Brief.

Respectfully submitted,

By: /s/ Matthew T. Furton

Rowe W. Snider  
Matthew T. Furton  
Michael J. Mannion  
Locke Lord LLP  
111 S. Wacker Drive  
Chicago, IL 60606  
312.443.0700  
rsnider@lockelord.com  
mfurton@lockelord.com  
mmannion@lockelord.com

Counsel for *Amici Curiae*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on April 22, 2020, Plaintiff's counsel and Defendants' Executive Director and General Counsel were served via email within 30 minutes of filing through the following email addresses:

Attorney Scott Cruz at [scruz@greensfelder.com](mailto:scruz@greensfelder.com)

Executive Director Carolyn L. Parks at [carolyn.parks@illinois.gov](mailto:carolyn.parks@illinois.gov)

General Counsel Ronald A. Rasica at [ronald.rascia@illinois.gov](mailto:ronald.rascia@illinois.gov)

/s/ Hannah M. Oswald

LOCKE LORD LLP  
111 South Wacker Drive  
Chicago, IL 60606  
312.443.0700  
Counsel for *Amici Curiae*

**IN THE CIRCUIT COURT  
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ILLINOIS MANUFACTURERS ASSOCIATION)  
 AND ILLINOIS RETAIL MERCHANTS )  
 ASSOCIATION, )

Plaintiffs, )

vs. )

ILLINOIS WORKERS' COMPENSATION )  
 COMMISSION and MICHAEL J. BRENNAN, )  
 COMMISSIONER, IN HIS OFFICIAL )  
 CAPACITY, )

Case No.: 2020CH000098

The Honorable John M. Madonia

Defendants.

**MOTION OF CERTAIN PARTIES FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF**

The American Property Casualty Insurance Association, National Association of Mutual Insurance Companies, Illinois Chambers of Commerce, Independent Insurance Agents of Illinois, and DRI (collectively, "Amici") respectfully request that this Court grant leave to file the attached *amici curiae* brief in support of the Plaintiffs' motion for a temporary restraining order. Amici submits the attached brief to aid the Court's assessment of the Illinois Workers' Compensation Commission's ("IWCC") recent amendment to Section 9030.60 of the Illinois Administrative Code at 50 Ill. Adm. Code 9030 ("Amendment").

Amici's brief will be valuable to this Court because the Amici have unique experience analyzing the legislative and regulatory issues associated with workers' compensation systems nationwide, including in Illinois. Amici can provide important context for assessment of the Amendment.

The American Property Casualty Insurance Association ("APCIA") is the largest national trade association for home, auto, and business insurers, including those writing workers'

compensation insurance. APCIA was formed at the beginning of 2019 through a merger of two longstanding trade associations, the Chicago-based Property Casualty Insurance Association of America and the Washington, D.C.-based American Insurance Association. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies write nearly 60 percent of the entire U.S. property-casualty insurance market, 70 percent of the countrywide workers' compensation insurance market, and over 80 percent of the workers' compensation insurance market in Illinois. On issues of importance to the insurance industry and marketplace, APCIA advocates sound public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits amicus curiae briefs in significant cases before federal and state courts, including in this State.

The National Association of Mutual Insurance Companies ("NAMIC") is a national trade association consisting of more than 1,400 companies. The association supports regional and local mutual insurance companies on main streets across America and many of the country's largest national insurers. NAMIC member companies write \$268 billion in annual premiums, including writing 29 percent of the business insurance market. Through its advocacy programs, NAMIC promotes public policy solutions that benefit NAMIC member companies and the policyholders they serve.

The Illinois Chamber of Commerce ("Chamber") was created in 1919 as one of the first statewide business organizations in the nation. The Chamber is an association that advocates on behalf of Illinois businesses to achieve a competitive business environment. The Chamber membership broadly covers employers from across the State of Illinois and virtually every industry. Just as the Chamber provides its members with benefits, these organizations, in turn,

provide the State of Illinois with jobs, income, profits, and taxes that allow the State of Illinois and its residents to flourish.

The Independent Insurance Agents of Illinois (“IIA of Illinois”) represents over one thousand insurance agencies and over 15,000 licensed insurance producers in the state of Illinois. IIA of Illinois members represent hundreds of different insurance companies writing all lines of insurance in Illinois, including commercial insurance and workers' compensation insurance. The vast majority of workers' compensation insurance is written through IIA of Illinois members, and employers look to independent agents as their advisors on workers' compensation coverage and risk management issues.

DRI is the leading organization of defense attorneys and in-house counsel. DRI has served the defense bar for more than 60 years, and strives for improvement of the civil justice system through a number of means including engagement in matters of public policy that affect the administration of justice.

The IWCC Amendment could potentially inject billions of dollars of unanticipated losses into the Illinois workers' compensation system. This could affect the solvency of both self-insured employers and insurers that underwrite the coverage that protects injured workers. If the IWCC Amendment is enforced, Amici's members that write workers' compensation insurance in Illinois will suffer severe burdens, and the delicate balance that the workers' compensation system strikes between employers and employees will be upset.

It is within the Court's discretion to allow Amici to file their brief. *See Roanoke Agency, Inc. v. Edgar*, 101 Ill. 2d 315, 318, 461 N.E.2d 1365, 1366 (1984) (noting that an amicus participated in the circuit court proceedings in support of the Plaintiff's position.); *People ex rel. Northfield Park Dist. v. Glenview Park Dist.*, 222 Ill. App. 3d 35, 40, 582 N.E.2d 1272, 1275 (1st

Dist. 1991) (affirming where the trial court “received all amicus briefs filed, over [Plaintiff’s] objection.”); *In re Mortimer*, 44 Ill. App. 3d 249, 250, 358 N.E.2d 92, 93 (1st Dist. 1976) (noting that the trial judge “appointed petitioners as amici curiae to make an investigation, conduct a hearing, and to draft a rule”). Because this issue has major ramifications for both Amici member companies and the Illinois public in general, Amici respectfully requests leave to be heard.

Amici have informed all parties to this matter of its intent to submit the attached brief. Plaintiffs consented to its filing. Defendants have not yet responded to our notice of intent to file.

Respectfully submitted,

By: /s/ Matthew T. Furton

Rowe W. Snider  
Matthew T. Furton  
Michael J. Mannion  
Locke Lord LLP  
111 S. Wacker Drive  
Chicago, IL 60606  
312.443.0700  
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Counsel for *Amici Curiae*

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Attorney Scott Cruz at [scruz@greensfelder.com](mailto:scruz@greensfelder.com)

Executive Director Carolyn L. Parks at [carolyn.parks@illinois.gov](mailto:carolyn.parks@illinois.gov)

General Counsel Ronald A. Rasica at [ronald.rascia@illinois.gov](mailto:ronald.rascia@illinois.gov)

/s/ Hannah M. Oswald

LOCKE LORD LLP  
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Chicago, IL 60606  
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**Interests of the Amici**

The American Property Casualty Insurance Association, National Association of Mutual Insurance Companies, Illinois Chambers of Commerce, Independent Insurance Agents of Illinois, and DRI (collectively, "Amici") submit this brief in support of Plaintiff's motion.

The American Property Casualty Insurance Association ("APCIA") is the largest national trade association for home, auto, and business insurers, including those writing workers' compensation insurance. APCIA was formed at the beginning of 2019 through a merger of two longstanding trade associations, the Chicago-based Property Casualty Insurance Association of America and the Washington, D.C.-based American Insurance Association. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies write nearly 60 percent of the entire U.S. property-casualty insurance market, 70 percent of the countrywide workers' compensation insurance market, and over 80 percent of the workers' compensation insurance market in Illinois. On issues of importance to the insurance industry and marketplace, APCIA advocates sound



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employers look to independent agents as their advisors on workers' compensation coverage and risk management issues.

DRI is the leading organization of defense attorneys and in-house counsel. DRI has served the defense bar for more than 60 years, and strives for improvement of the civil justice system through a number of means including engagement in matters of public policy that affect the administration of justice.

Amici have a unique national and Illinois-specific perspective on the workers' compensation system, which affects the vast majority of Illinois' workers and employers and Amici's members. Amici submit this amici curiae brief to provide the Court with additional background, context and analysis of the Amendment being challenged in this action. In this brief, Amici explain the role of workers' compensation insurance in our economy, the consequences of the enforcement of the Amendment at issue, and the reasons enforcement is neither permissible nor prudent.

### **Factual Background**

Workers' compensation laws balance competing interests: Employers give up their common law defenses to negligence claims asserted by workers suffering injuries or occupational disease in exchange for limits on their liabilities; while employees give up their right to sue in civil court in exchange for prompt and certain benefits. Workers who are injured or contract occupational diseases arising out of or within the course and scope of their employment are provided with reasonable and necessary medical treatment and statutorily defined income replacement payments during any period of disability, and their survivors are entitled to benefits in the event their condition is fatal.

Workers' compensation was established as a no-fault system. The theory behind the system is that the cost of work-related injuries or illnesses should be part of the cost of an employer's product or service. State of Illinois Workers' Compensation Commission Fiscal Year 2018 Annual Report at p. 2.<sup>1</sup> As a consequence, any expenses injected into the system are ultimately borne by employers, who then incorporate those expenses into the price of their product or service.

Most Illinois employers insure their obligations under the Workers' Compensation Act, 820 ILCS 305/1 *et seq.*, and the Workers' Occupational Diseases Act 820 ILCS 310/1 *et seq.*, through the purchase of Workers' Compensation insurance. 820 ILCS 305/4. The Illinois Workers' Compensation Commission ("IWCC") was established by the Act. 820 ILCS 305/13. The IWCC is the State agency that resolves claims made by injured workers for injuries arising out of and in the course of employment. The IWCC administers the judicial process that adjudicates disputed workers' compensation claims between employees and employers, acting as an administrative court system for these claims.

Purporting to act under authority granted in the Act, the IWCC enacted a modification to the law on April 15, 2020, effective the following day (the "Amendment"). The Amendment adds the following language to Section 9030.70 of the Illinois Administrative Code at 50 Ill.

Adm. Code 9030:

1) In any proceeding before the Commission in which the petitioner is a COVID-19 First Responder or Front-Line Worker as defined in Section (a)(2), if the petitioner's injury, occupational disease, or period of incapacity resulted from exposure to the COVID-19 virus during the Gubernatorial Disaster Proclamation 2020-38 and any subsequent COVID-19 disaster proclamations, the exposure will be rebuttably presumed to have arisen out of and in the course of the petitioner's COVID-19 First Responder or Front-Line Worker employment and, further, will

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<sup>1</sup> Accessed on April 20, 2020 at <https://www2.illinois.gov/sites/iwcc/about/Documents/FY2018AnnualReport.pdf>.

be rebuttably presumed to be causally connected to the hazards or exposures of the petitioner's COVID-19 First Responder or Front-Line Worker employment.

2) The term "COVID-19 First Responder or Front-Line Worker" means any individuals employed as police, fire personnel, emergency medical technicians, or paramedics and all individuals employed and considered as first responders, health care providers engaged in patient care, corrections officers, and the crucial personnel identified under Section 1 Parts 7, 8, 9, 10, 11, and 12 of Executive Order 2020-10 dated March 20, 2020.

44 Ill. Reg. \_\_\_, effective April 16, 2020.

While this Amendment purports to be merely a procedural rule under the heading “Evidence,” it deviates from current substantive law in important ways. While an employee is deemed to have the burden of proving the work-relatedness of any injury or illness unless otherwise specified in the Workers’ Compensation Act, the Amendment violates this cardinal rule by creating rebuttable presumptions that (1) certain workers exposed to or diagnosed with COVID-19 during the current state of emergency contracted the virus in the course and scope of their employment and (2) the exposure or contraction of the virus is causally connected to the hazards or exposures of the claimant’s employment. As a practical matter, these presumptions inappropriately shift a burden of proof by requiring employers to show that incapacitated employees did not contract, or were not exposed to, COVID-19 in the course of employment. The Amendment’s presumptions contrast with the usual statutory requirement for compensability determinations, which is a showing *by the employee* of a “causal connection between the conditions under which the work is performed and the occupational disease . . . [that] had its origin or aggravation in a risk connected with the employment ....” 820 ILCS 310/1(d). The Act also contains several analogous presumptions enacted by the General Assembly, none of which are characterized as being merely evidentiary or procedural, including:

- Certain first responders including firefighters and EMTs with five years of experience are rebuttably presumed to have a condition or impairment arising out of in in the course of their employment if they have a lung or respiratory disease or condition. 820 ILCS 310/1(d);
- Certain deceased miners are rebuttably presumed to have died as a result of pneumoconiosis. 820 ILCS 310/1(d); and
- Any injury arising from the administration of a vaccine, including smallpox vaccine, to prepare for or in response to a potential bioterrorist incident as part of an inoculation program in connection with one's employment is deemed to have arisen out of and in the course of the worker's employment. 820 ILCS 310/1(d).

Except in the case of these statutory presumptions, the usual rule is that “a claimant must prove both that he or she suffers from an occupational disease and that a causal connection exists between the disease and his or her employment.” *Durbin v. Illinois Workers' Comp. Comm'n*, 2016 IL App (4th) 150088WC, ¶ 41, 56 N.E.3d 605. In order for a disease to be occupational, “it must not be an ordinary disease of life to which the public is exposed outside the employment, unless such ordinary disease follows as an incident of an occupational disease.” *Allis-Chalmers Mfg. Co. v. Indus. Comm'n*, 33 Ill. 2d 268, 270, 211 N.E.2d 276, 278 (1965). The rationale for excluding “community diseases” is that if the public in general is exposed to the disease, then it is unlikely that a person's employment caused or aggravated the disease. *Downs v. Indus. Comm'n*, 143 Ill. App. 3d 383, 389, 493 N.E.2d 595, 599 (5th Dist. 1986). The Act is only designed to cover specific, work-related diseases. *See id.* This Act was never intended to compensate workers for injuries caused by widespread public diseases that may be wholly unconnected to work conditions.

Another way the Amendment deviates from existing law is by creating a pathway to benefits for a worker with an “injury, occupational disease, or *period of incapacity* result[ing] from exposure to COVID-19 . . . .” Amendment at 1. “Period of incapacity” is not a phrase

found in the Act, and suggests that someone without an injury or disease would potentially have a compensable claim if they were merely quarantined as a result of exposure to COVID-19. In contrast, the Act only contemplates coverage for employees who, if they meet the statutory criteria, contract an occupational disease or “[a]ny condition or impairment of health.” 820 ILCS 310/1(d). Moreover, the incapacity need only arise from “exposure,” meaning a person who is exposed to but never tests positive for COVID-19 or demonstrates any symptoms may have a compensable claim for the period of incapacity.

The Amendment will have significant financial implications for the workers’ compensation system. The daily deaths from COVID-19 have exceeded the daily average death rates for heart disease and cancer since April 7, 2020. *The Coronavirus in America: The Year Ahead*, *New York Times* April 19, 2020 (“April 19 Article”). According to *The New York Times*, there are medical experts who predict 48 percent to 65 percent of all Americans will contract COVID-19, and death rates appear to be around 1 percent but may reach 5 percent. *See* April 19 Article. While there is not yet a computation of the cost of adding COVID-19 to the Illinois workers’ compensation system, a study attached as Exhibit 1 on the New York workers’ compensation system found that creating similar COVID-19 presumptions of coverage would add approximately \$31,000,000,000 in losses to a system expected to have about \$8,700,000,000 in losses. (“New York Study”).

Another study, attached as Exhibit 2, of the California system reached the following conclusion:

[T]he WCIRB estimates that the annual cost of COVID-19 claims on ECI [Essential Critical Infrastructure] workers under a conclusive presumption ranges from \$2.2 billion to \$33.6 billion with an approximate mid-range estimate of \$11.2 billion, or 61% of the annual estimated cost of the total workers’ compensation system prior to the impact of the pandemic.

Cost Evaluation of Potential Conclusive COVID-19 Presumption in California Workers' Compensation Research Brief, Workers' Compensation Insurance Rating Bureau of California, p. 1 (April 2020) ("California Study"). The cost in Illinois may be higher or lower than the cost estimates in New York or California, but data from those two states and some preliminary modeling indicate the costs in Illinois from the Amendment will exceed one billion dollars. While such quarantine measures are necessary and appropriate from a public health standpoint, the workers' compensation system was not designed to bear the massive costs associated with such a fundamental change in public policy—and certainly not based on an Emergency Amendment to the Rules of Evidence completely devoid of any public debate.

As previously noted, the Act imposes obligations on employers, many of whom shoulder this burden in whole or in part through either self-insurance authorized by the IWCC or through insurance policies with large deductibles that essentially render employers self-funded for all but catastrophic losses. Even those employers that fully insure their obligations under the Act through guaranteed-cost policies will bear the costs of those risks because workers' compensation insurers charge premiums based on loss costs. Indeed, the IWCC administers a system that is expressly designed to internalize the costs of the Act's obligations on employers on the theory that employers will incorporate the costs of the system into their goods and services. The injection of potentially billions of dollars in unanticipated losses related to the COVID-19 pandemic will have a material impact on the carefully balanced Illinois workers' compensation system that aligns the interests of employers and employees in the fair and efficient resolution of workplace injury claims. Amici respectfully submit that the IWCC should not be permitted to unilaterally alter substantive law in this crucial area, under the guise of making merely "procedural" changes.

## Argument

### I. The Amendment Should Not Be Enforced.

The Amendment should not be enforced for two independent reasons. First, the IWCC lacks authority to enact the Amendment and second, the Amendment is arbitrary and capricious.

#### a. The Rule is Substantive Law Enacted by an Agency without Authority to Enact Such a Law.

The IWCC is an administrative agency that lacks general or common law powers. *Alvarado v. Indus. Comm'n*, 216 Ill. 2d 547, 553, 837 N.E.2d 909 (2005). Consequently, all of its actions must be specifically authorized by statute. *Id.* To the extent the IWCC acts outside of its statutory authority, it acts without jurisdiction and its action is void. *Id.*; *Arnold v. Mt. Carmel Pub. Util.*, 369 Ill. App. 3d 1029, 1032, 861 N.E.2d 1015, 1018–19 (5th Dist. 2006). A void action is a complete nullity from its inception and may be attacked at any time. *Arnold*, 369 Ill. App. 3d at 1032. The Illinois Supreme Court has repeatedly found that the IWCC does not have the authority to create substantive rules or otherwise extend the substantive provisions of the Act. *Madsen v. Indus. Comm'n*, 383 Ill. 590, 597, 50 N.E.2d 707, 710 (1943); *Hamilton Eng'g Co. v. Indus. Comm'n*, 399 Ill. 30, 41, 76 N.E.2d 506, 511 (1947); *Alvarado*, 216 Ill. 2d at 553–54.

The Act, and decades of common law interpreting it, reflects a number of substantive provisions establishing that compensability for a disease is a matter of substantive law. As an initial matter, there is a general substantive rule that community diseases to which an employee may also be exposed outside of work are not compensable unless they are proven to have followed as an incident of occupational disease. *See, e.g., Allis-Chalmers Mfg. Co.*, 33 Ill. 2d at 211; *Downs*, 143 Ill. App. 3d at 389. The Amendment contradicts this long-standing substantive law. “While the Industrial Commission is vested with the power to make rules for carrying out



its statutory duties it is without power to make rules creating substantive rights.” *Madsen*, 383 Ill. at 597 (finding that the commission could not create a rule that gave it the power to review a settlement).

Similarly, the Act contains a number of rebuttable or conclusive compensability presumptions for certain workers and certain disease conditions, including fire fighters and EMTs with more than five years of experience who contract a lung or respiratory condition in the course of their employment. 820 ILCS 310/1(d). The very existence of legislatively-created presumptions similar to those the Amendment purports to create clearly demonstrates that the IWCC has impermissibly invaded the substantive lawmaking province of the Legislature, as further explained below. If this issue were joined in the Legislature, stakeholders would have been given the opportunity to participate in the lawmaking process, and potentially more appropriate alternatives to workers’ compensation benefits (such as paid leave, unemployment benefits, or specifically dedicated governmental funds) would have been considered.

The Amendment also conflicts with this substantive law by, among other things, not requiring a five-year employment history as a fire fighter. This expansion of rights to less experienced fire fighters exceeds the IWCC’s ability to make “only such rules as will aid in carrying out the duties imposed upon the commission by the statute.” *Madsen*, 383 Ill. at 597; *see also Siddens v. Indus. Comm’n*, 304 Ill. App. 3d 506, 711 N.E.2d 18 (4th Dist. 1999) (finding the IWCC exceeded its powers when it inappropriately granted attorneys’ fees); *see also Fahey v. Cook County Police Dept. Merit Bd.*, 21 Ill. App. 3d 579, 586, 315 N.E.2d 573, 578 (1st Dist. 1974) (finding an agency exceeded its powers when it issued a rule governing mandatory retirement age for certain police officers when the topic of mandatory retirement age was the subject of numerous legislative acts). *Zurich Gen. Acc. & Liab. Ins. Co. v. Indus. Comm’n*, 325

Ill. 452, 156 N.E. 307 (1927) (“The rule is not confined to a matter of procedure, but exceeds the authority conferred upon the commission and creates a liability on the part of the insurer where none may exist in fact.”).

This Court should not hesitate to find that the Amendment is a nullity and is unenforceable. That is precisely what other courts have done when Illinois agencies improperly issued regulations that affected substantive rights. *See, e.g., Bd. of Trustees of Chicago Heights Police Pension Fund v. Dep’t of Ins.*, 323 Ill. App. 3d 913, 753 N.E.2d 343 (1st Dist. 2001) (finding that a well-intentioned rule was invalid where the statute did not clearly give the agency authority); *Fahey*, 21 Ill. App. 3d at 586 (invalidating an agency’s rule where enactment was outside of the agency’s authority). Amici respectfully submit that it would be more efficient and just to nullify the Amendment before reliance interests inappropriately develop. No stakeholders are served by lingering legal uncertainty.

**b. The Amendment Is Unenforceable Because It Is Arbitrary, Unreasonable, and Capricious.**

Even where an agency has authority to enact a particular rule, the rule will be unenforceable if a court finds that the agency action was arbitrary, capricious or unreasonable. *U. S. Steel Corp. v. Pollution Control Bd.*, 64 Ill. App. 3d 34, 40, 380 N.E.2d 909, 913 (1st Dist. 1978). The Illinois Supreme Court has found that “courts should not hesitate to intervene” where an agency “has acted arbitrarily or capriciously and thereby abused the discretion vested in it.” *Greer v. Illinois Hous. Dev. Auth.*, 122 Ill. 2d 462, 497, 524 N.E.2d 561, 577 (1988). An agency action is arbitrary and capricious if the agency:

- (1) relies on factors which the legislature did not intend for the agency to consider; (2) entirely fails to consider an important aspect of the problem; or (3) offers an explanation for its decision which runs counter to the evidence before

the agency, or which is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Id.* at 505–06 (finding that an agency failed to consider economic factors, failed to use reasonable procedures in assessing the economic factors, and arbitrarily abandoned a prior policy); *See also Fahey*, 21 Ill. App. 3d at 586, 315 N.E.2d at 578 (finding that the Cook County Police Department Merit Board improperly enacted a rule requiring mandatory retirement at age 60 in violation of a statute that authorized the Board to issue neutral rules to encourage competence in civil servants).

Sudden and unexplained changes by agencies are often considered arbitrary. *Id.*; *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126, 195 L. Ed. 2d 382 (2016). Additionally, agencies must be “be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.” *Encino Motorcars, LLC*, 136 S. Ct. at 2126 (invalidating an agency regulation for arbitrariness where there was “decades of industry reliance on the Department’s prior policy” and the agency only provided a summary discussion that “fell short of the agency’s duty to explain why it deemed it necessary” to change its policy).

Here, the IWCC Rule is arbitrary and capricious because it fails to meet any of the factors set forth in *Greer*.

- The IWCC’s Notice expressly states that it was motivated by a desire to “ensure first responders and essential front-line workers . . . are afforded the full protections of the Workers’ Compensation Act . . . .” The IWCC’s own words demonstrate it is intending to benefit certain claimants. The prioritization of the interests of a particularly sympathetic group of people is noble, but nothing in the legislature’s grant of authority to the IWCC gives it the authority to “ensure” certain claimants are successful. Indeed, the IWCC’s Handbook states: “As the administrative court system, the Commission must be impartial.” IWCC Handbook at p. 3. There is simply no question that the Amendment relies on factors that the General Assembly did not intend for its neutral administrator to consider. This violates the first *Greer* factor.

- The Amendment fails to consider the massive difference between the historical practice of providing Workers' Compensation benefits to injured or ill workers pursuant to statutorily delineated criteria and providing benefits to those merely unable to work due to the current pandemic. Specifically, the Act provides benefits for those who actually contract an occupational disease, whereas the Amendment presumptively offers benefits during a "period of incapacity" resulting from COVID-19 "exposure." Such incapacity could arise when a covered employee is directed to self-quarantine after being exposed to someone, such as a family member, with COVID-19. As a result, the Amendment presumptively requires the payments of benefits to someone who may never contract the virus or never be symptomatic. Furthermore, the costs of providing benefits to those unable to work due to COVID-19 exposure are impossible to predict with precision, but may exceed the \$1,220,000,000 paid in indemnity and medical costs in 2018 by workers' compensation insurers affiliated with the National Council on Compensation of Insurance (NCCI), which the Illinois Department of Insurance has designated as the state's licensed rating and statistical organization. Workers Comp Insurance Oversight Report p. 6 (Feb 6, 2020, Illinois DOI);<sup>2</sup> The Coronavirus in America: The Year Ahead, New York Times April 19, 2020 ("April 19 Article") (noting that the daily deaths from Coronavirus from April 7, 2020 to April 18, 2020 exceed the average rate of daily deaths for heart disease and cancer). As a result of all these reasons, it is clear that the IWCC failed to consider an important aspect of the problem in violation of the second *Greer* factor.
- The IWCC's explanation for its decision focuses on a desire to protect the interests of certain front-line workers and first responders, but the scope of the Amendment is far broader. The Amendment incorporates as its definition of "COVID-19 First Responder or Front-Line Worker" *all* of the "Essential Businesses and Operations" defined in Section I, Part 12 of Executive Order 2020-10. This classification of "Essential Businesses and Operations" was drawn to identify workers who are essential to the continuing functioning of critical businesses and operations, and not to define the much narrower class of persons whose COVID-19 exposure was substantially increased by their work function, such as a nurse in an ICU unit treating patients that tested positive for COVID-19. The disconnect between the narrow explanation for the Amendment and the expansive reach of the Amendment reveals that the IWCC's explanation for its decision is implausible and certainly does not arise from the IWCC's expertise in violation of *Greer*'s third factor.

In addition to its inability to meet the *Greer* test, the Amendment violates serious reliance interests that have developed around the Act and related common law. Illinois employers and the insurers that underwrote the workers' compensation obligations of those employers structured their affairs around a system that regarded contagious diseases present in the

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<sup>2</sup> Accessed on April 20, 2020, at <https://insurance.illinois.gov/wcfu/2019PWorkCompReportOversightPartA.pdf>.

community as not compensable under the Act. *See, e.g., Allis-Chalmers Mfg. Co. v. Indus. Comm'n*, 33 Ill. 2d 268, 270, 211 N.E.2d 276, 278 (1965) (noting the difference between occupational diseases and community diseases). The Amendment upends decades of settled law regarding occupational diseases under the guise of a mere change in process. The Amendment should not be enforced because it is arbitrary and capricious.

## **II. The Public Interest in a Viable Workers' Compensation System Would Be Undermined by Enforcement of the Amendment.**

As noted by the IWCC in its most recent Annual Report, “[t]he theory behind the law is that the cost of work-related injuries or illnesses should be part of the cost of the product or service.” State of Illinois Workers’ Compensation Commission Fiscal Year 2018 Annual Report p. 2. This process of internalizing the costs of occupational injury and disease means that the new costs injected by the Amendment would fall directly on Illinois employers, and ultimately Illinois consumers, through the two primary mechanisms used to internalize the obligations of the Act.

In the first instance, this internalization of costs arises from employers bearing exclusive or primary liability under the Act. Approximately 25% of the losses arising from exposures created by the Act are entirely self-insured, IL WC Commission 2017 report, p. 12, and another large portion are insured through policies with large deductibles that render most claims effectively self-insured. Thus, the losses arising from the Amendment’s expansion of coverage will fall on many Illinois employers immediately. These employers surely did not plan on this, and their decisions to be self-insured did not include assessment of this risk. No one knows whether the large number of solely or primarily self-insured employers would be able to manage this additional risk, and insolvencies driven by these new costs cannot be ruled out. No one

would be served by Essential Businesses becoming insolvent due to massive and completely unanticipated workers' compensation costs.

Second, insurers tailor the cost of workers' compensation insurance to the characteristics of an employer as a means of differentiating between those with different risk profiles and incentivizing employers to protect the safety of workers. *See generally ABC's of Experience Rating*, National Council on Compensation Insurance.<sup>3</sup> This tailoring arises primarily from manual rating, which groups employers according to their business operations, and employer-specific "experience rating modifications," which are pricing factors that are based on individual employer experience. *Id.* These mechanisms ensure that the benefits of a safe workplace and the costs of a less safe workplace are appropriately allocated among employers.

This cost tailoring, which was carefully developed over decades, may be rendered useless if Essential Businesses are subjected to substantial new losses. The manual rates do not group employers by whether they are Essential Businesses or have front-line workers. Similarly, the experience rating modification factors have not historically captured exposure to diseases for Essential Businesses with no connection to health care or public protection, such as law firms, gun manufacturers, liquor stores, and construction firms. The new expenses injected into the system from the Amendment will introduce all manner of randomness into manual rates and experience modification factors. The interests of employers, insurers and consumers are all aligned in maintaining the integrity of the mechanisms used to efficiently allocate the costs of the workers' compensation system.

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<sup>3</sup> Accessed on April 20, 2020 at [https://www.ncci.com/Articles/Documents/UW\\_ABC\\_Exp\\_Rating.pdf](https://www.ncci.com/Articles/Documents/UW_ABC_Exp_Rating.pdf).

Moreover, the size of the expenses injected into the system by the Amendment cannot be identified with precision. The unexpected addition of potentially several billion dollars in expenses (as suggested by the New York and California Studies), for which no premium was collected could result in insolvency for some insurers and individual decisions by others over time to leave Illinois' workers' compensation market.

The Amendment does not simply move medical costs from the health care system to the workers' compensation system. Once a claim is found to be compensable, it results in payment of statutory benefits that serve as wage replacement and/or survivorship benefits. Simply put, the costs of creating a broad presumption of compensability for exposure to COVID-19 are unexpected and potentially disastrous to employers and insurers that fund a system that must remain viable beyond the current pandemic for the benefit of future injured workers.

### **Conclusion**

Amici respectfully urge the Court to declare the Amendment to be unenforceable.

Respectfully submitted,

By: /s/ Rowe W. Snider

Rowe W. Snider  
Matthew T. Furton  
Michael J. Mannion  
Locke Lord LLP  
111 S. Wacker Drive  
Chicago, IL 60606  
312.443.0700  
rsnider@lockelord.com  
mfurton@lockelord.com  
mmannion@lockelord.com

Counsel for *Amici Curiae*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on April 22, 2020, Plaintiff's counsel and Defendants' Executive Director and General Counsel were served via email within 30 minutes of filing through the following email addresses:

Attorney Scott Cruz at [scruz@greensfelder.com](mailto:scruz@greensfelder.com)

Executive Director Carolyn L. Parks at [carolyn.parks@illinois.gov](mailto:carolyn.parks@illinois.gov)

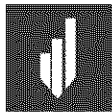
General Counsel Ronald A. Rasica at [ronald.rascia@illinois.gov](mailto:ronald.rascia@illinois.gov)

/s/ Hannah M. Oswald

LOCKE LORD LLP  
111 South Wacker Drive  
Chicago, IL 60606  
312.443.0700  
Counsel for *Amici Curiae*



# EXHIBIT 1



## **Potential Cost Impact of the COVID-19 Virus Exposure Compensability Proposal**

Given the current rate of transmission of the COVID-19 virus, the Rating Board estimates that the proposal to establish COVID-19 virus exposure as an occupational disease could exceed \$31B in costs to the workers' compensation system.

### **I. Legal Background**

The New York State workers' compensation law covers "accidents" and "occupational diseases." An "accident" is generally considered to be an illness or injury that arises from a specific work-related event or exposure over a reasonably defined period of time, whereas an "occupational disease" is an injury or illness that is associated with the nature of the occupation – a condition that many people in a particular line of work are prone to develop. Claims for occupational diseases are afforded longer filing time frames than accident claims. Further, given the nature of occupational diseases, claimants are generally not required to trace their illness to a single specific exposure as they may be required to do for accident claims.

Current case law has developed a reasonably clear set of legal rules for communicable diseases. Those rules generally divide workers into two categories: health care workers, and all other workers. In general, health care workers who contract illnesses may be covered under either an "accident theory" or an "occupational disease" theory whereas all other workers are covered only for "accidental" exposure.

### **II. Proposal to Establish COVID-19 Virus Exposure as an Occupational Disease**

The proposal creates a presumption in law that exposure to the COVID-19 virus is an occupational disease and as such is compensable under New York State Workers' Compensation Law. The categories of workers identified in the proposal that are eligible to make a claim based upon exposure is broad and encompasses much, if not all, of the State's public and private sector workforce. Further, by predicated compensability upon exposure instead of illness, the proposal makes most, if not all workers, eligible for benefits without testing positive for the illness.

### III. Rating Board Analysis<sup>1</sup>

The Rating Board's cost impact analysis of the above-described proposal includes the following general assumptions:

(a) According to the New York State Department of Labor's Quarterly Census of Employment and Wages, 3<sup>rd</sup> Quarter 2019, there are 9.5M private and public sector workers in New York State, of which approximately 1.6M are health care sector workers. Since the COVID-19 virus would likely qualify as an occupational disease for health care sector workers under current law, we have excluded them from this analysis. As such, analysis applies only to the remaining 7.9M non-health care sector workers in New York State.

(b) Governor Cuomo estimated that between 40% and 80% of New York State residents will contract the COVID-19 virus. For the purpose of this analysis, we assumed that 60% of New York State workers – the midpoint of Governor Cuomo's range – will contract the COVID-19 virus.

#### A. *Temporary Indemnity Benefits*<sup>2</sup>

The table below provides potential temporary indemnity costs resulting from the proposal. Several scenarios are presented with varying percentages of workers receiving benefits and with varying average number of weeks of benefits awarded.

The Rating Board's estimate of the cost of temporary indemnity benefits is predicated on the following assumptions: (i) the State's average temporary indemnity benefit is approximately \$600 per week; (ii) Governor Cuomo stated that approximately 15% of those infected will require hospitalization, and the Rating Board estimates that those hospitalized will be out of work for at least 6 weeks; (iii) the remaining 85% of infected workers claiming benefits will be out of work for approximately 2 weeks. Under these assumptions, the estimated total cost of temporary indemnity benefits is \$7.4B (= [60% x 7.9M x \$600 x 15% x 6] + [60% x 7.9M x \$600 x 85% x 2]).

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<sup>1</sup> At present, it is unknown whether benefits created by this proposal will be offset by any other federal or state benefit. In addition, the cost impact estimates contained herein reflect systemwide estimates (*i.e.*, the insured marketplace and self-insureds).

<sup>2</sup> The long-term health impact of the COVID-19 virus is presently unknown. Accordingly, this cost impact analysis focuses only on temporary indemnity benefits, hospitalization costs, and fatality claims. However, claims may also involve payments for long-term health treatment and wage loss related thereto and those losses are not estimated herein.

**Estimated Cost of  
Temporary Total Indemnity Benefits  
(\$ Billions)**

		Average Number of Weeks of Temporary Benefits				
		2	4	6	8	10
Percentage of Workers Receiving Benefits	10%	1.02	2.04	3.06	4.08	5.10
	20%	2.04	4.08	6.12	8.16	10.20
	30%	3.06	6.12	9.18	12.24	15.30
	40%	4.08	8.16	12.24	16.32	20.40
	50%	5.10	10.20	15.30	20.40	25.50
	60%	6.12	12.24	18.36	24.48	30.60
	70%	7.14	14.28	21.42	28.56	35.70
	80%	8.16	16.32	24.48	32.64	40.80
	90%	9.18	18.36	27.54	36.72	45.90
	100%	10.20	20.40	30.60	40.80	51.00

(Shaded region represents Governor Cuomo's predicted infection rate in New York State)

**B. Hospitalization Costs**

The Rating Board's estimate of short-term hospitalization costs are predicated on the following reported statistics: (i) Governor Cuomo stated that approximately 15% of those infected will require hospitalization; (ii) the average hospital stay cost for pneumonia with major complications is approximately \$23,000 whereas the average non-ICU hospital stay cost is approximately \$11,000; and (iii) 25% of COVID-19 hospitalizations involve ICU stays. Accordingly, the estimated average hospitalization cost for COVID-19 patients is \$14,000 ( $=25\% \times \$23,000 + 75\% \times \$11,000$ ). Under these assumptions, the estimated total cost of hospitalizations is \$10.0B ( $=60\% \times 7.9M \times 15\% \times \$14,000$ ). It bears mention that other medical costs, such as primary care physician visits, have not been included in this analysis.

**C. Fatalities**

The Rating Board's cost estimate of fatality claims related to the COVID-19 virus is predicated on the following assumptions: (i) the average indemnity cost for a fatality claim in New York State is approximately \$575,000; and (ii) a mortality rate of .5% for workers identified with the virus, which is less than New York State's current mortality rate of 1% because mortalities have been driven by older individuals. Applying these assumptions together with Governor Cuomo's estimate that 40% to 80% of the State's residents will be infected with the virus, the Rating Board estimates that the cost of fatalities could exceed \$13.6B ( $=60\% \times 7.9M \times .005 \times \$575,000$ ).

*D. Total Impact*

Combining the estimated costs for temporary indemnity benefits, hospitalizations, and fatalities, the potential cost impact of this proposal could exceed \$31B (=\$7.4B + \$10.0B + \$13.6B + other unknown costs, such as the long-term health impact). By way of comparison, current annual losses in the State's workers' compensation system, including both the insured market and self-insureds, is approximately \$8.7B.

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# EXHIBIT 2

# Cost Evaluation of Potential Conclusive COVID-19 Presumption in California Workers' Compensation

By the WCIRB Actuarial and Research Teams

## Summary

The COVID-19 pandemic and resultant stay-at-home orders are significantly impacting California's economic, health care and workers' compensation systems. Some COVID-19 workers' compensation claims have already been filed. However, at this time, it is unclear what proportion of the illnesses and deaths directly resulting from the virus will ultimately be determined to be work-related. Some states have enacted presumptions of COVID-19 claims being work-related for certain front line workers and similar proposals are under discussion in California.

On April 8, 2020, Assemblyman Tom Daly, Chair of the Assembly Insurance Committee, requested the WCIRB to provide an estimate of the potential cost impact of presumptions provided to front line workers in California. Specifically, the WCIRB was requested to provide the cost impact of a conclusive presumption for health care workers, firefighters, EMS and rescue employees, front line law enforcement officers and other essential critical infrastructure (ECI) employees. In response and to provide insight on the potential cost impact of COVID-19 claims on the California workers' compensation system, the WCIRB has completed an initial analysis of these costs.

For purposes of this analysis, the WCIRB assumed that the ECI workers were those identified as "Essential Critical Infrastructure Workers" in Governor Newsom's March 19, 2020 Executive Order N-33-20. The WCIRB segregated these workers into ECI Group 1, which includes health care workers, firefighters, EMS and rescue employees, and front line law enforcement officers and ECI Group 2, which includes all other workers on the Governor's ECI list. In evaluating the impact of a conclusive presumption, we assumed all symptomatic ECI workers with COVID-19 would file a compensable workers' compensation claim. While some ECI workers would file a compensable workers' compensation claim in the absence of a conclusive presumption, we had no basis to estimate this proportion and, as a result, made no estimate of the incremental impact of a conclusive presumption. Also, while it is likely that some non-ECI workers will file compensable workers' compensation claims, estimating the cost impact of such claims was outside the scope of this analysis. Finally, our cost estimates exclude any potential costs for workers who are being quarantined but have not been diagnosed with COVID-19.

The cost estimates in this report are based on WCIRB data including unit statistical reports, aggregate financial data calls and medical transaction data. We also relied upon external data from the American Community Survey<sup>1</sup> (ACS), the Division of Workers' Compensation (DWC) Official Medical Fee Schedule, and a number of published studies on COVID-19 incidence rates and medical treatment patterns and costs. At times, we relied upon judgmental assumptions based on published research or feedback from workers' compensation experts that may or may not materialize. In general, the cost impact of COVID-19 claims will vary significantly based on the number of workers covered by a presumption, the proportion of these workers that have COVID-19 and the number of workers' compensation claims that are filed as a result. Given the current level of uncertainty surrounding these factors, the cost estimates in this Research Brief are presented as a range of potential impacts based on varying assumptions of the number of COVID-19 claims filed. **On this basis, the WCIRB estimates that the annual cost of COVID-19 claims on ECI workers under a conclusive presumption ranges from \$2.2 billion to \$33.6 billion with an approximate mid-range estimate of \$11.2 billion, or 61% of the annual estimated cost of the total workers' compensation system prior to the impact of the pandemic.**

<sup>1</sup> The WCIRB sourced the ACS data from IPUMS-USA, University of Minnesota, [www.ipums.org](http://www.ipums.org).

## COVID-19

### Key Findings

Table 1 summarizes the overall potential annual total cost of medical and indemnity benefits and loss adjustment expenses (LAE) on COVID-19 claims arising during 2020 segregated between the WCIRB's two categories of ECI workers. In evaluating the impact of a conclusive presumption, estimates shown in Table 1 reflect the assumption that all ECI workers in the state<sup>2</sup> who have the novel coronavirus and are symptomatic will file a compensable workers' compensation claim for COVID-19.

The total cost estimates shown in Table 1 reflect a high-end illness/claim rate<sup>3</sup> for health care workers and first responders of 60% based on the illness rate of health care workers from Wuhan, China, the initial epicenter of the outbreak.<sup>4</sup> The low-end estimates are based on an illness/claim rate for health care workers and first responders of 4%, which is approximately based on estimates of COVID-19 cases for the first year for the population with commercial health insurance<sup>5</sup> and estimates of infection rates for the working age population in China.<sup>6</sup> Given the greater concentration of exposure to the novel coronavirus for health care workers and first responders and published data on the relative rate of health care workers in China contracting the novel coronavirus,<sup>7</sup> the WCIRB assumed that the rate of COVID-19 claims for ECI Group 1 workers is five times as high as those for ECI Group 2 workers. The estimates in Table 1 range from \$1.2 to \$18.1 billion in total annualized costs for ECI Group 1 workers and \$1.0 to \$15.6 billion for ECI Group 2 workers. The approximate mid-range cost estimate for the total system is \$11.2 billion (\$6.0 billion for ECI Group 1 workers and \$5.2 billion for ECI Group 2 workers). This is based on an illness/claim rate of 20% of ECI Group 1 workers and 4% of ECI Group 2 workers.

<b>Table 1: Estimated System Cost of COVID-19 Claims</b>				
<b>Health Care Workers and First Responders – ECI Group 1</b>		<b>Other ECI Workers – ECI Group 2</b>		<b>Total System Cost in Billions</b>
<b>Percent of Workers with COVID-19 Claims</b>	<b>Cost in Billions</b>	<b>Percent of Workers with COVID-19 Claims</b>	<b>Cost in Billions</b>	
4%	\$1.2	0.8%	\$1.0	\$2.2
5%	\$1.5	1%	\$1.3	\$2.8
10%	\$3.0	2%	\$2.6	\$5.6
15%	\$4.5	3%	\$3.9	\$8.4
20%	\$6.0	4%	\$5.2	\$11.2
30%	\$9.0	6%	\$7.8	\$16.8
40%	\$12.0	8%	\$10.4	\$22.4
50%	\$15.1	10%	\$13.0	\$28.0
60%	\$18.1	12%	\$15.6	\$33.6

Table 2 summarizes the distribution of the approximate mid-range estimate of \$11.2 billion into temporary disability benefits, permanent disability benefits, death benefits, medical costs and loss adjustment expenses. Comparatively, the WCIRB estimates that the total cost of losses and LAE in the California workers' compensation system in 2020, prior to the impact of COVID-19 claims, is \$18.3 billion.<sup>8</sup>

<sup>2</sup> This includes all workers in the state including those who are employed by insured, legally self-insured or legally non-insured employers, but excludes those employed by the Federal Government or those who are self-employed. In California, the insured system is approximately two-thirds of the size of the total system.

<sup>3</sup> The high-end estimate is not intended as a "worst case" scenario. Nor is the low-end estimate intended to reflect the "best case" scenario. Instead they reflect the high and low ends of a range of reasonable assumptions based on available published research.

<sup>4</sup> "Characteristics of and Important Lessons From the Coronavirus Disease 2019 (COVID-19) Outbreak in China—Summary of a Report of 72 314 Cases From the Chinese Center for Disease Control and Prevention." JAMA. 2020;323(13):1239-1242.

<sup>5</sup> "The Potential National Health Cost Impacts to Consumers, Employers and Insurers Due to the Coronavirus (COVID-19)." Covered California, March 2020.

<sup>6</sup> "Estimates of the severity of coronavirus disease 2019: a model-based analysis." The Lancet Infectious Diseases (2020).

<sup>7</sup> "Characteristics of and Important Lessons From the Coronavirus Disease 2019 (COVID-19) Outbreak in China—Summary of a Report of 72 314 Cases From the Chinese Center for Disease Control and Prevention." JAMA. 2020;323(13):1239-1242.

<sup>8</sup> This includes \$6.1 billion in indemnity benefits, \$7.3 billion in medical benefits and \$4.9 billion in LAE.



Table 2: WCIRB Mid-Range Estimate <sup>9</sup> by Cost (in Billions) and Claim Type							
Type of COVID-19 Claim	Number of Claims	Temporary Disability	Permanent Disability	Death	Medical	LAE	Total Cost
Mild (No Hospitalization)	378,300	\$0.4	N/A	N/A	\$0.1	\$0.2	\$0.7
Severe (Hospitalization w/o ICU)	70,900	\$0.2	N/A	N/A	\$3.6	\$1.4	\$5.2
Critical (Hospitalization w/ ICU, no Death)	20,300	\$0.1	\$0.1	N/A	\$2.6	\$1.0	\$3.8
Death	3,300	\$0.0	N/A	\$0.7	\$0.4	\$0.4	\$1.5
All Claim Types	472,900	\$0.7	\$0.1	\$0.7	\$6.7	\$3.0	\$11.2

## Methodology and Assumptions

### ECI Workers

The WCIRB mapped the occupations and industries exempted in Governor Newsom's March 19, 2020 Executive Order N-33-20 to WCIRB classifications as well as to employment, wage and age of worker information obtained from ACS data. Table 3 summarizes the industries and estimated number of workers included.

Table 3: ECI Worker Estimates		
Worker Type	Category	Affected Workers (in Thousands)
Health Care Workers	ECI Group 1	1,071
Firefighters	ECI Group 1	38
EMS and Rescue Employees	ECI Group 1	22
Law Enforcement Officers	ECI Group 1	132
ECI Group 1 Total		1,262
Other ECI Employees – ECI Group 2		5,510
Total Estimated ECI Workers		6,772

The ACS data suggests approximately 18.8 million workers were employed in California sometime within the last year.<sup>10</sup> Unemployment has increased dramatically during the COVID-19 crisis. For purposes of this study, the WCIRB has not tried to adjust employment counts for this sharp drop in employment, which most likely is greatest in non-ECI industries. The WCIRB estimates that ECI Group 1 consists of approximately 1.3 million workers, or 7% of statewide employment. The WCIRB also estimates that ECI Group 2 consists of approximately 5.5 million workers, or 29% of statewide employment.

The likelihood of hospitalization or death as a result of COVID-19 significantly depends on the age of the individual and their prior health history. The estimates included in this analysis are based on a combined rate of illness and claim filing with the assumption that, in valuing the cost impact of a conclusive presumption for ECI workers, all symptomatic employees with COVID-19 will file a compensable workers' compensation claim. Given the greater concentration of exposure to the novel coronavirus for health care workers and first responders and published data on the relative rate of health care workers in China contracting COVID-19, the WCIRB assumed that the rate of COVID-19 claims for these workers (ECI Group 1) is approximately five times as high as those for other ECI workers (ECI Group 2). Conversely, while some workers' compensation claims will be filed by workers who are not ECI workers, any estimate of this impact was outside the scope of this study. Finally, the WCIRB has based these estimates on an annualized period rather than the Governor's stay-at-home period, which assumes that exposure to the novel coronavirus for the ECI workers and a presumption of compensability will be in effect for the entire year.

<sup>9</sup> The mid-range estimate assumes an illness/claim rate of 20% for ECI Group 1 workers and 4% for ECI Group 2 workers.

<sup>10</sup> Based on 2017 ACS data trended to 2020 using employment growth from the March 2020 UCLA Anderson Forecast for the Nation and California.

<sup>11</sup> "Characteristics of and Important Lessons From the Coronavirus Disease 2019 (COVID-19) Outbreak in China—Summary of a Report of 72 314 Cases From the Chinese Center for Disease Control and Prevention." JAMA. 2020;323(13):1239-1242.

## COVID-19

### Proportion of Illness/Claim Types

Studies of the virus show that a significant proportion of individuals with COVID-19 are completely asymptomatic (ranging from 5% to 80%).<sup>12</sup> Although the asymptomatic cases would be carriers of the virus, the WCIRB assumed that they would not have a workers' compensation claim.

Of those having mild or more severe COVID-19, data from a number of published studies of COVID-19 suggests that the vast majority (approximately 80%) will have mild COVID-19 and fully recover at home without any significant medical treatment.<sup>13</sup> These studies also suggest that approximately 15% of COVID-19 cases are severe and result in some hospitalization but do not require a stay in an intensive care unit (ICU), while 5% are critical and require advanced care including an ICU stay. Of the critical cases of COVID-19, the Chinese CDC estimated approximately 50% result in death, suggesting a death rate of approximately 2.5% of all cases.<sup>14</sup> This figure is generally consistent with the midpoint of death rate estimates from the United States CDC (1.8% to 3.4%).

The information described above is based on the general population. The likelihood of having severe or critical COVID-19 depends heavily on the age and prior health of the individual. The vast majority of people with severe or critical COVID-19 are over the age of 50 and/or have underlying health conditions including hypertension, obesity, chronic lung disease, diabetes and cardiovascular disease.<sup>15</sup> The California worker population is generally younger and likely with fewer underlying health conditions compared to the general population. The proportion of California workers with underlying health conditions is not clear. However, the WCIRB used the distribution of worker ages in the categories of ECI workers based on ACS data to adjust the rates of severe and critical cases of COVID-19 for the worker population.

Table 4 shows the proportion of COVID-19 severity categories and average cost of medical and indemnity benefits estimated by the WCIRB for the ECI workers. The percentage estimates for ECI workers are based on the distribution of ages of these workers from ACS data and the midpoint of hospitalization, ICU and death rate estimates by age interval from the United States CDC.<sup>16</sup> Other than the proportion of death claims, which is significantly lower for affected workers, the age-weighted proportions are generally consistent with those published in other studies. The average loss shown in Table 4 by type of claim is based on the assumptions and estimates discussed below.

<b>Table 4: Estimated Proportion of COVID-19 Claims by Type</b>		
<b>Type of COVID-19 Claim</b>	<b>Percent of Claims</b>	<b>Cost of Indemnity and Medical Benefits</b>
Mild (No Hospitalization)	80%	\$1,400
Severe (Hospitalization w/o ICU)	15%	\$53,400
Critical (Hospitalization w/ ICU, no Death)	4.3%	\$137,800
Death	0.7%	\$333,300
All Claims	100%	\$17,400

<sup>12</sup> The Centre for Evidence-Based Medicine published a list of studies that showed asymptomatic individuals testing positive for COVID-19 ranged from 5% to 80% with the most credible estimates around 20%.

<sup>13</sup> "Characteristics of and Important Lessons From the Coronavirus Disease 2019 (COVID-19) Outbreak in China—Summary of a Report of 72 314 Cases From the Chinese Center for Disease Control and Prevention." JAMA. 2020;323(13):1239-1242. As well as estimates from the United States CDC on COVID-19 cases in March.

<sup>14</sup> "Characteristics of and Important Lessons From the Coronavirus Disease 2019 (COVID-19) Outbreak in China—Summary of a Report of 72 314 Cases From the Chinese Center for Disease Control and Prevention." JAMA. 2020;323(13):1239-1242.

<sup>15</sup> "Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19) — United States, February 12–March 16, 2020." CDC Mortality and Morbidity Weekly Report. March 27, 2020 / 69(12):343-346

<sup>16</sup> "Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19) — United States, February 12–March 16, 2020." CDC Mortality and Morbidity Weekly Report. March 27, 2020 / 69(12):343-346

## COVID-19

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### Mild COVID-19 Claims

As shown in Table 4, the WCIRB estimates that 80% of all ECI workers with COVID-19 will not require hospitalization or significant medical treatment. It is unclear whether these workers will file workers' compensation claims to receive temporary disability (TD) benefits or whether they will utilize other benefits for paid sick leave made available by their employer or the Federal Government. However, for purposes of this study, the WCIRB assumed all ECI workers with mild COVID-19 will file a compensable claim for worker's compensation benefits. The CDC recommends that people with mild illnesses who do not require hospitalization stay home for 2 weeks after exposure.<sup>17</sup> Based on the estimated distribution of weekly wages of ECI workers, the WCIRB estimates the average TD benefit to be \$620 per week for ECI Group 1 workers and \$540 per week for ECI Group 2 workers. This results in an average TD cost for mild COVID-19 claims of \$1,200 for ECI Group 1 workers and \$1,100 for ECI Group 2 workers.

Although the WCIRB believes the overall medical cost of mild COVID-19 claims to be small, there may be some medical costs related to a test of COVID-19, physician costs (telemedicine) and some medication. In total, the WCIRB estimates an average medical cost of approximately \$300 for mild COVID-19 claims based on the DWC Official Medical Fee Schedule and average payments in WCIRB medical transaction data for these types of services.

### Severe COVID-19 Claims

As shown in Table 4, the WCIRB estimates that 15% of all ECI workers with COVID-19 will be severe and require some hospitalization but not a stay in an ICU. The diagnosis related groups (DRGs) for treating respiratory infections and inflammations (similar to severe COVID-19) suggest an average hospital stay of approximately 1 week.<sup>18</sup> The WCIRB assumes an average of 1 week from onset of the symptoms to hospital admission. Based on feedback from a number of workers' compensation medical experts, the WCIRB assumed an additional 2-week period for recovery after hospitalization, including approximately 1 week of follow-up medical care. In total, the WCIRB estimates these workers will receive TD benefits for 4 weeks on average. As discussed above, the WCIRB estimates the average TD benefit for the types of workers affected to be \$620 per week for ECI Group 1 workers and \$540 per week for ECI Group 2 workers. This results in an average TD cost for severe COVID-19 illness claims of \$2,500 for ECI Group 1 workers and \$2,200 for ECI Group 2 workers.

The WCIRB medical transaction data and the DWC's medical fee schedule for the DRGs for respiratory infections and inflammations suggest approximately \$300 for initial physician services, \$47,400 for inpatient care and \$3,500 for follow-up care. This results in an average \$51,200 of medical costs for a severe COVID-19 claim.

### Critical COVID-19 Claims

As shown in Table 4, the WCIRB estimates that 4.3% of the ECI workers who have COVID-19 will have critical illnesses that require an ICU stay. The WCIRB assumed the majority of the ICU patients will need ventilator support. The DWC's medical fee schedule for the DRGs for hospitalization that includes ventilator support suggest an average hospital stay of approximately 2 weeks.<sup>19</sup> The WCIRB assumes an average of 1 week from the time symptoms first appear to a hospital admission. Based on feedback from a number of workers' compensation medical experts who suggested that recovery from critical COVID-19 will be significantly longer for critical cases compared to mild or severe cases, the WCIRB assumed an average of an 8-week period for recovery after ICU care, during which these workers are likely to receive 4 to 6 weeks of rehabilitation and follow-up medical care. In total, the WCIRB estimates these workers will receive TD benefits for 11 weeks on average. As discussed above, the WCIRB estimates the average TD benefit for ECI workers to be \$620 per week for ECI Group 1 workers and \$540 per week for ECI Group 2 workers. This results in an average TD cost for severe COVID-19 claims of \$6,800 for ECI Group 1 workers and \$5,900 for ECI Group 2 workers.

<sup>17</sup> See CDC guidelines for COVID-19 patients.

<sup>18</sup> DRGs 177, 178 and 179. See CMS's guidance on the DRGs.

<sup>19</sup> DRGs 207 and 208.

## COVID-19

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The WCIRB consulted a number of workers' compensation claims experts to assess the potential for COVID-19 claims leading to permanent disability (PD) in California's workers' compensation system. Although there was a general consensus among experts that there is potential for PD arising from COVID-19, the likelihood and extent of PD was not clear. In any case, the number of COVID-19 claims with PD are expected to be small. To reflect the potential for PD and the level of uncertainty, based in part on information on PD from similar claims, the WCIRB assumed that 20% of the critical COVID-19 claims will have some form of PD. Based on WCIRB medical transaction data, unit statistical data and anecdotal information from workers' compensation claims experts, the average PD rating for a claim with respiratory issues similar to COVID-19 is estimated to be approximately 20%. Based on this projected rating, the WCIRB estimates an average PD benefit of \$22,000 for the critical COVID-19 claims that involve PD.

Similar to the methodology used for estimating the medical cost of a severe COVID-19 claim, the WCIRB used the WCIRB medical transaction data and the DWC's medical fee schedule for severe respiratory infections and inflammations and ventilator support (DRGs 177, 207 and 208) and estimated approximately \$300 of initial physician costs, \$92,000 of inpatient costs, and \$35,000 for rehabilitation and follow-up care for critical cases of COVID-19. This results in an estimated average of \$127,300 in medical costs for a critical COVID-19 claim.

### Death Claims Arising from COVID-19

As shown in Table 4, the WCIRB assumed a death rate of 0.7% of COVID-19 claims for ECI workers. Based on the historical average cost of death claims in California, the WCIRB estimates the average death benefit in 2020 to be approximately \$220,000. The WCIRB assumed an average of 3 weeks of TD benefits on death claims based on the average length of hospitalization for critical COVID-19 claims (approximately 2 weeks) and an average of 1 week from onset of the symptoms to hospitalization. This results in an average TD cost for COVID-19 death claims of \$1,900 for ECI Group 1 workers and \$1,600 for ECI Group 2 workers. The WCIRB also estimated medical costs for COVID-19 death claims to be \$111,600, which is based on the DRGs for ventilator support assumed for the critical COVID-19 claims but using the higher case severity estimate given the advanced stage of these cases.

### Loss Adjustment Expenses

Claims arising from COVID-19 will incur claim handling and defense costs as do other workers' compensation claims. At this time, there is no data available to suggest that COVID-19 claims will incur more or less claims administrative costs (unallocated loss adjustment expenses or ULAE) than the typical workers' compensation claim. Similarly, the WCIRB believes that COVID-19 claims will incur medical cost containment program (MCCP) costs similar to the typical workers' compensation claim. The WCIRB's projected ratio of these costs to losses based on insurer experience as of December 31, 2019 is 15.0% for ULAE and 4.3% for MCCP costs.

The WCIRB consulted several workers' compensation claims experts to assess the potential litigation costs for COVID-19 claims. There was a general consensus among experts that there would be some litigation arising from COVID-19 claims, particularly as to whether there was any PD. However, it was not clear whether allocated loss adjustment expense (ALAE) costs related to litigation on COVID-19 claims would be higher or lower on average than the typical workers' compensation claim. As a result, the WCIRB assumed ALAE on COVID-19 claims to be similar to the typical workers' compensation claim. The WCIRB's projected ratio of ALAE to losses based on insurer experience as of December 31, 2019 is 16.8%.

## Conditions and Limitations

1. The WCIRB's system cost estimate presumed that all of the ECI workers with symptomatic COVID-19 will file compensable workers' compensation claims. We did not project what proportion of those workers would have filed compensable workers' compensation claims without a legal presumption of compensability. Nor did we try to estimate what proportion of non-ECI workers will file a compensable COVID-19 workers' compensation claim as that estimate was beyond the scope of this evaluation.
2. Some of the data used in the analysis was based on the experience of insured employers only. When needed to estimate the impact for the California workers' compensation system as a whole, the WCIRB assumed the patterns evident in the insured employer experience data were applicable to the entire state.
3. The high-end estimate reflected in this study is not intended as a "worst case" scenario. Nor is the low-end estimate intended to reflect the "best case" scenario. Instead, these estimates reflect the high and low ends of a range of reasonable assumptions based on available published research.
4. The COVID-19 pandemic is a rapidly evolving crisis. WCIRB estimates were based on information available at the time of this study. If subsequent information becomes available that changes the basis of our assumptions, these estimates would of course be affected.
5. This analysis is based on a broad-based presumption of COVID-19 claims being work-related for ECI workers. No specific presumption bill is currently before the California Legislature. If and when a presumption bill is under consideration by the Legislature, the WCIRB will update the estimates in the analysis based on the specific language contained in the bill.
6. Whenever possible, the WCIRB based its system cost estimates on WCIRB and other publicly available data as well as COVID-19 impact estimates by credible research and public health institutes. At times, judgmental assumptions were needed. Actual system cost results could differ significantly from those projected.
7. As discussed in this report, the WCIRB relied upon many publicly available sources of information to determine our assumptions. While we deemed the sources credible for the purposes we used the information, we did not independently validate the underlying information.

*This Research Brief – Cost Evaluation of Potential Conclusive COVID-19 Presumption in California Workers' Compensation* was developed by the Workers' Compensation Insurance Rating Bureau of California (WCIRB) and contains information for a specific period of time and may not reflect long-term trends before or after the specific period addressed in the Research Brief. This Research Brief contains data from a variety of sources, both public and private. The WCIRB has made reasonable efforts to ensure the accuracy of this Research Brief but cannot guarantee the accuracy of all the data or data sources. You must make an independent assessment regarding the use of this Research Brief based upon your particular needs and circumstances

**IN THE CIRCUIT COURT  
FOR THE SEVENTH JUDICIAL CIRCUIT OF ILLINOIS  
SANGAMON COUNTY, ILLINOIS**

ILLINOIS MANUFACTURERS'  
ASSOCIATION and ILLINOIS RETAIL  
MERCHANTS ASSOCIATION,

Plaintiffs,

vs.

ILLINOIS WORKERS' COMPENSATION  
COMMISSION and MICHAEL J. BRENNAN,  
COMMISSIONER, IN HIS OFFICIAL  
CAPACITY,

Defendants.

Case No.: 2020CH000098

The Honorable John M. Madonia

**ORDER**

The Court GRANTS certain parties' Motion for leave to file their Amici Curiae brief.

**IT IS SO ORDERED.**

Date: \_\_\_\_\_

\_\_\_\_\_

IN THE CIRCUIT COURT  
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ILLINOIS MANUFACTURERS'  
ASSOCIATION and ILLINOIS RETAIL  
MERCHANTS ASSOCIATION,

Plaintiffs,

v.

ILLINOIS WORKERS' COMPENSATION  
COMMISSION and MICHAEL J. BRENNAN,  
COMMISSIONER, IN HIS OFFICIAL  
CAPACITY,

Defendants.

Case No. 2020 CH 00098

**CERTIFICATE OF SERVICE**

I, Scott Cruz, a licensed attorney, do hereby certify that I caused a true and correct copy of the following:

- *Verified Complaint for Injunctive and Other Relief;*
- *Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction;*
- *Plaintiffs' Memorandum in Support of Temporary Restraining Order;*
- *Summons issued against Illinois Workers Compensation Commission; and*
- *Summons issued against Michael Brennan,*

to be served on April 22, 2020, before 1:30 pm, upon all Defendants, as shown below, via electronic mail:

ILLINOIS WORKERS' COMPENSATION  
COMMISSION

c/o Cole D. Garrett, Deputy General  
Counsel, Illinois Workers' Compensation  
Commission,

Ronald Rascia, General Counsel, Illinois  
Workers' Compensation Commission  
100 W. Randolph Street, Suite 8-200,  
Chicago, IL 60601

[Cole.Garrett@illinois.gov](mailto:Cole.Garrett@illinois.gov)

[Michael.Brennan@Illinois.gov](mailto:Michael.Brennan@Illinois.gov)

[Ronald.Rascia@Illinois.gov](mailto:Ronald.Rascia@Illinois.gov)

MICHAEL J. BRENNAN

c/o Cole D. Garrett, Deputy General  
Counsel, Illinois Workers' Compensation  
Commission,

Ronald Rascia, General Counsel, Illinois  
Workers' Compensation Commission  
100 W. Randolph Street, Suite 8-200,  
Chicago, IL 60601

[Cole.Garrett@illinois.gov](mailto:Cole.Garrett@illinois.gov)

[Michael.Brennan@Illinois.gov](mailto:Michael.Brennan@Illinois.gov)

[Ronald.Rascia@Illinois.gov](mailto:Ronald.Rascia@Illinois.gov)

Respectfully submitted,

ILLINOIS MANUFACTURER'S ASSOCIATION  
and ILLINOIS RETAIL MERCHANTS  
ASSOCIATION

By: /s/ Scott Cruz  
One of Their Attorneys

Scott Cruz – ARDC No. 6277314  
[scruz@greensfelder.com](mailto:scruz@greensfelder.com)  
Thadford A. Felton – ARDC No. 6224896  
[taf@greensfelder.com](mailto:taf@greensfelder.com)  
Kevin F. Hormuth – ARDC No. 6278862  
[kfh@greensfelder.com](mailto:kfh@greensfelder.com)  
Greensfelder, Hemker & Gale, P.C.  
200 West Madison Street, #3300  
Chicago, IL 60606  
(312) 419-9090