



NORTH DAKOTA HOUSE OF REPRESENTATIVES

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January 27, 2021

Chairman Lefor and Members of the House Committee on Industry, Business, & Labor:

I write in **support** of HB 1433, which is a bill to protect North Dakota's essential workers and frontline heroes by allowing them to be awarded workers' compensation benefits if they contracted COVID-19 at their places of work. I urge the Committee to recommend a **DO PASS** on HB 1433.

We can all agree that 2020 was a year unlike any other. We all faced uncertainty, frustration, and even fear. Many of us experienced heartbreaking tragedy. But through it all, we relied on a small group of our fellow North Dakotans to keep us safe, to keep us healthy, to keep us fed, to keep the lights on, and to keep our state running. While the terms themselves may not be new, we came to learn that these folks are truly essential workers and frontline heroes who embody our famous North Dakota work ethic and "North Dakota tough" mentality.

It was a fitting tribute when The Forum named essential workers its persons of the year for 2020, a choice the newspaper noted had "rarely been an easier one . . . to make."¹ To quote from the article:

"Few people have put their lives more at risk during the coronavirus pandemic than essential workers, whose occupations range from assembly line laborers to teachers, doctors to firefighters, and have been working on the front lines trying to keep communities safe, fed and healthy.

Some have paid a heavy price, losing loved ones and at times their own livelihood. Others watched in horror as coworkers dropped from the workplace, wondering if and when their time would come. Despite all the uncertainty, they have kept pushing forward, at times without proper equipment and without acknowledgement, because their jobs are essential."

Like The Forum says, the benefits we all enjoyed on account of these essential workers came at considerable risk to the workers themselves. Through contact with each other and the public, these workers found themselves on the front lines of the war against COVID-19. Many contracted the disease. Some fell seriously ill. A tragic number lost their lives. As state leaders, we have an obligation to recognize those realities not only through our words of thanks and praise, but also through our actions. That's why I've introduced HB 1433.

When someone is injured on the job, he or she usually can rely on the protections and benefits of our worker's compensation system, or Workforce Safety Insurance (WSI). Generally, though, coverage for infectious diseases or other illnesses acquired at the workplace are not considered compensable injuries. And there are

¹ Hagen, C.S., "Essential workers named The Forum's Area Person of the Year," The Forum (Dec. 30, 2020), available at <https://www.inforum.com/news/6819319-Essential-workers-named-The-Forums-Area-Person-of-the-Year>.

sound policy reasons why this is usually the case, including the fact that it would be nearly impossible for a worker to prove exactly where he or she caught the disease. Subject to exceptions noted below, this general rule currently excludes compensation for COVID-related injuries. But I don't believe this accounts for our current reality in which a dangerous pandemic has swept across the entire globe and we have called upon essential workers to assume the risk of contracting that disease so that the rest of us can continue to live our daily lives with as little disruption as possible. Given these unique, unprecedented circumstances, I believe we should extend WSI coverage to North Dakota's essential workers who contracted COVID-19 on the job.

Doing so would align North Dakota with many states across the country that have already extended such workers' compensation coverage. According to the National Conference of State Legislatures, as of early December of 2020, at least 17 states have adopted some sort of COVID-related workers' compensation protections. Measures are pending consideration in at least six other states. Indeed, North Dakota itself has already recognized the need to extend WSI coverage to certain essential workers, which Governor Burgum did through Executive Orders 2020-12, 2020-12.1, and 2020-12.2. Respectively, these executive orders provide coverage to first responders, frontline healthcare workers, funeral service workers, and workers providing direct care to persons with intellectual or developmental disabilities.

HB 1433 codifies this existing emergency coverage, extends coverage to a broader swath of essential workers, and enacts a fairer system that better allows workers impacted by COVID-19 to receive WSI benefits. Starting on page 1, line 14, the bill defines which workers qualify for WSI coverage under this proposal. The list represents an attempt to encompass all those essential workers we have relied on since the start of the pandemic. It was derived from reference to definitions used in other states and from the federal government. Among other workers, the list includes healthcare workers, educators and childcare workers, food service and retail employees, laborers, ag and meat processing workers, skilled trade workers, custodial workers, law enforcement, and firefighters. I'm sure, though, that we may have inadvertently missed certain categories of workers or proposed categories that would conflict without other provisions of law. I would welcome any amendments from the Committee to address any such issues.²

The second major provision of the bill begins at page 2, line 12. It sets forth how WSI is to administer COVID-19 claims from essential workers. In short, if the worker can produce a positive lab test for COVID-19 or its antibodies, the bill creates a rebuttable presumption that the applicant's COVID-19 arose out of and in the course of his or her employment. I believe a rebuttable presumption is the best way to protect workers while balancing any concerns about over-extending coverage. As mentioned earlier, it is difficult for a worker to prove where he or she got COVID. Indeed, as of November 27, 2020, WSI advised me it had denied 782 of the 1,759 COVID claims it received pursuant to the Governor's executive orders, which do not enact a rebuttable presumption. Even with 377 additional pending claims unresolved as of that date, that already amounts to a nearly 45% denial rate. My bill tackles this problem by presuming the contraction was in the workplace.³

But such a rebuttal presumption does not mean WSI must always award benefits. Page 3, line 22 sets out how this presumption can be rebutted. There are several ways: 1) showing that the worker was working from

²To that end, I have prepared an amendment for the Committee's consideration that would strike the phrase "except a new construction builder" from page 2, line 11, as it may inappropriately restrict application to certain workers who have provided important services during the pandemic to keep the state moving forward.

³ WSI already applies a similar presumption to firefighters and law enforcement officers who have any condition or health impairment caused by lung/respiratory diseases, hypertension, heart disease, or exposure to blood borne pathogens. *See* NDCC § 65-01-15.1.

home or on leave for at least 14 days immediately before onset of the COVID-related injury, 2) showing that the employer was engaging in industry-specific safety standards like sanitation, social distancing, and use of PPE, and 3) showing that the worker was exposed somewhere besides the workplace. These factors—particularly the second factor—recognize that the most we can ask of our employers during an uncertain situation is to follow best practices for safety standards to keep their workers out of harm’s way as much as possible. If an employer did that, then the presumption is rebutted because it cannot fairly be presumed a worker contracted COVID at a workplace that was closely following the safety rules. This is an appropriate balance between protecting workers and recognizing those businesses that did their best to keep employees safe in a dangerous pandemic.⁴

I would also like to draw the Committee’s attention to page 4, line 20. In subdivision (i), the bill addresses any essential workers who received a grant under North Dakota’s Medical Expense Assistance Program (MEAP). As the Committee knows, this program used outstanding federal aid to offer \$1,000 grants to any qualifying frontline healthcare worker who contracted COVID. While that was a welcome program quickly stood up at the end of 2020, \$1,000 (and higher awards in limited instances) might not be enough to make whole all qualified workers. And according to my conversations with WSI, acceptance of a MEAP grant would foreclose the same worker from applying for WSI coverage under the existing executive orders. I do not believe that restriction was made clear to MEAP applicants, nor do I believe it is a fair restriction to apply. That’s why HB 1433 provides that acceptance of any MEAP funds should be deducted from a WSI award but not foreclose coverage altogether.

Lastly, the bill provides for retroactive application to the beginning pandemic in earnest in North Dakota. It likewise would allow an employee who had a claim denied under the existing executive orders to re-submit such claim to determine eligibility under these new provisions of law. The bill also sets a firm expiration date of July 31, 2023. As a result, the bill seeks to tackle a discrete problem in a limited way.

In sum, the bill sets forth a workable scheme for providing essential workplace protections for our essential workers. With such a complex area of law, though, I appreciate that the bill draft may require further technical revisions. I am happy to work with the Committee on any necessary amendments in that regard.

“But,” some might ask, “won’t this overwhelm the WSI system?” No. Here’s why:

First, the extended coverage only applies to a comparatively small sliver of the overall workforce, which reduces the risk of over-burdening the system. This limitation is supported in the findings of a Workers’ Compensation Research Institute a study of six states that expanded workers’ compensation to certain workers who contracted COVID-19. WCRI found that even the broadest expansion (Kentucky) “created additional claim exposure for only 4% of the state’s workers.”⁵

Second, only those of working age during the pandemic are potential direct beneficiaries of this proposal. As of January 26, 2021, approximately 20% of all confirmed COVID cases were in persons age 60 or older; over 17% of confirmed infections have been in persons aged 19 or younger. Thus, over 37% of all cases have been in persons least likely to be members of the workforce for whom WSI coverage would apply. So, too, have the

⁴ To the extent the Committee remains concerned about the potential for undue burdens on employers, I have prepared an amendment that would prohibit WSI from increasing or modifying an employer’s experience rating on account of any claims filed on the newly created provisions of this bill.

⁵ Sams, Jim, “Expansion of Workers’ Comp for COVID-19 Created Narrow Benefit in 6 States,” Insurance Journal (Dec. 21, 2020), *available at* <https://www.insurancejournal.com/magazines/mag-features/2020/12/21/594661.htm>. Three other states saw expansion covering between 3% and 4% of workers. Minnesota’s coverage extension applied to 2.8% of the workforce, and Missouri’s only to 0.8%.

highest number of deaths occurred within age groups unlikely to qualify for benefits under this proposal (nearly 93% of all deaths in ages 60+, with 82% being over age 70). These demographic realities cap the possible number of viable claims under this provision, as well as the possible number of death benefits payable under this proposal.

Third, early studies have found that the pandemic has resulted in a decline in other, more traditional injury claims, thus offsetting the impact caused by COVID-19 claims.⁶ Early data likewise shows that an average COVID claim is smaller than an average non-COVID claim.⁷ According to one report, the average COVID claim cost nationwide is \$2,366, with less than 1% of all claims exceeding \$75,000.⁸ WSI advised me that it had paid out about \$600,000 on the 600 COVID-based claims it had accepted under the Governor’s executive orders as of November 27, 2020, making the average claim award approximately \$1,000 as of that date. One factor potentially limiting claim values under this bill is the federal law mandating that many employers provide paid leave for quarantined employees. Per current WSI guidance, employees receiving this federal benefit are not eligible for WSI wage-loss benefits; I expect such limitation would likewise apply to any benefits granted under HB 1433. It bears noting, of course, that WSI is also well-positioned to absorb any added cost of new claims, as it had an available fund surplus on June 30, 2020, of over \$880 million, with the potential of reaching \$1 billion in available fund surplus by June 2021.

Fourth, North Dakota has seen a dramatic and positive downward trend in active COVID cases as the calendar turned to 2021. With North Dakota being among national leaders in per capita vaccinations, too, we can expect that trend to continue if we remain diligent. Thus, any ongoing impact on WSI should continue to decrease commensurately as COVID’s impact continues to recede in North Dakota.

Cumulatively, this data shows that we can absorb these expanded claims into our current system. But let us not lose sight that protecting the safety of our essential workers and frontline heroes is also the right thing to do. Unlike many of us, these workers did not have the luxury of working from home and avoiding high-risk situations for contracting COVID-19. Many do not enjoy the privilege of having sufficient paid leave to rely on if they got sick from COVID. And this session, we’ve already voted down whistleblower protections related to COVID, and we are considering legislation that would almost entirely prevent workers from suing their employer over any COVID-related injuries. What we risk ending up with is a system that has a clear message to essential workers: tough luck.

But through HB 1433, we have an opportunity to do better. We have an opportunity to live out our North Dakota values that honor fairness, hard work, and responsibility. We have an opportunity to show that “essential workers” is not just an empty phrase. I urge this Committee to look favorably upon the bill, to make any amendments necessary to address legitimate concerns, and to recommend a **DO PASS** on HB 1433. Thank you, and I stand ready for your questions.

⁶ *Id.* (citing research done by the Insurance Information Institute). In California, for instance, while COVID-19 claims made up 12.8% of all workers’ compensation claims in the state, the total number of all claims had dropped by 12.9% compared to the prior year.

⁷ *Id.*

⁸ Esola, Louise, “COVID-19 comp claims up in 17 states in Q4,” Business Insurance (Jan. 8, 2021), *available at* <https://www.businessinsurance.com/article/20210108/NEWS06/912338984/COVID-19-comp-claims-up-in-17-states-in-Q4>.