



## School Board Employees and Coverage Under the Essential Employees Law

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In light of Governor Phil Murphy's passage of the Essential Employees law last month, one of the hot topics in workers' compensation is whether teachers are covered under the law as "essential employees." Before answering this question, it is important to understand what this law hopes to achieve. It is the first law ever in New Jersey workers' compensation that applies to just one type of virus: only COVID-19. The law shifts the burden of proof to the employer to disprove a COVID-19 workers' compensation claim when the covered worker is an "essential worker." Normally it is the injured worker's burden to prove a work-related claim, but under this law it is the employer's burden to disprove the claim for any essential employee. That subtle burden shift can make a big difference at trial.

### Essential Employees are defined as:

1. A public safety worker or first responder, including any fire, police or other emergency responders;
2. Those involved in providing medical and other healthcare services, emergency transportation, social services, and other care services, including services provided in health care facilities, residential facilities or homes;
3. Those who perform functions which involve physical proximity to members of the public and are essential to the public's health, safety, and welfare, including transportation services, hotel and other residential services, financial services, and the production, preparation, storage, sale and distribution of essential goods such as food, beverages, medicine, fuel, and supplies for conducting essential business and work at home, or;
4. Anyone deemed an essential employee by the public authority declaring the state of emergency

As one can plainly see, there is no mention of teachers being covered as essential workers in any of the foregoing categories. Some have questioned what is meant by section 4. This practitioner believes Section 4 means anyone that the State or the Governor deems to be an essential worker. There has been no designation by the Governor stating that teachers are essential workers. Indeed, teachers did not work in schools during most of the pandemic. In September some teachers returned to teaching in school as opposed to remotely teaching. Clearly a teacher also does not meet the definition set forth in sections 1, 2 and 3. This does not mean that a teacher cannot win a COVID-19 claim in workers' compensation. Not at all: it means that just like any other employee, the teacher bears the burden of proving that he or she contracted the coronavirus at work and not through some other means.

Having considered this law with respect to teachers, what about other school board employees? It seems likely that some bus drivers, aides and food service personnel who served free lunches at a school site or delivered such lunches to homes during the pandemic and who contracted COVID-19 would be covered under the law as essential employees. The reason for this conclusion is that section 3 covers those who *"perform functions which involve physical proximity to members of the public and are essential to the public's health, safety*

*and welfare, including transportation services... and distribution of essential goods such as food, beverages...*” Assuming a school board employee contracted COVID-19 during the time period that they came into contact with members of the public while distributing lunches to students, such a worker would likely be successful in arguing entitlement to the presumption of compensability.

So what does it mean when a judge has to make a presumption that someone’s COVID-19 condition is compensable? It means that the employee with the presumption does not have to play offense or prove anything at all. The law considers the worker to have made out a strong case by virtue of being an “essential employee.” He or she wins unless the Board can disprove the case. The Board of Education has to prove to the judge that there was no exposure at work or that there was significant exposure outside work, such as from a family member who had already tested positive with COVID-19 before the employee became ill. Close cases are likely to be found in favor of the employee because of the presumption of compensability. Bear in mind that it is always hard to prove a negative for any employer: namely, that someone was NOT exposed to COVID-19 at work.

How much evidence is needed in a COVID-19 case? The burden of disproving the case is only by a “preponderance of the evidence.” That’s a fancy way of saying by more than 50%. If you think of a football field, when there is a presumption of compensability the employer has to drive the ball just past the 50 yard line to win.

It is critical to understand the next point: just because a worker meets the test of an essential employee does not mean the employee will get a monetary award for his or her COVID-19 illness. There is no presumption under this new COVID-19 law that an employee has an impairment. That is an entirely different issue. The burden remains on the employee to prove that he or she has an impairment of a bodily organ related to COVID-19. The employee could allege a respiratory impairment, a cardiac impairment or some other impairment of the body system, including a psychiatric condition. But the employee has to prove that there is truly a permanent impairment to get an award of monetary compensation.

Very little is known right now about the long-term effects of COVID-19 on someone’s health. Yet COVID-19 compensation claims are being filed in recent months at a very fast clip. There are hundreds of claim petitions in the Division already. It is hard to know how someone who recovered from COVID-19, treated only at home and then returned to work will prove a permanent impairment. The more science and medicine learn, the better our understanding will be of what kind of permanent impairment COVID-19 can cause.

In some cases, there may be no impairment at all. It is not enough to prove that someone may have problems in the future. In order to get an award, the employee must prove a *present impairment*. *Lawyers for workers and employers are busy now trying to find experts who understand and can assess the damage COVID-19 may cause to the body’s organs. In the end, judges of compensation will make the ultimate decisions on whether a worker has proven a present impairment related to exposure to COVID-19.*

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