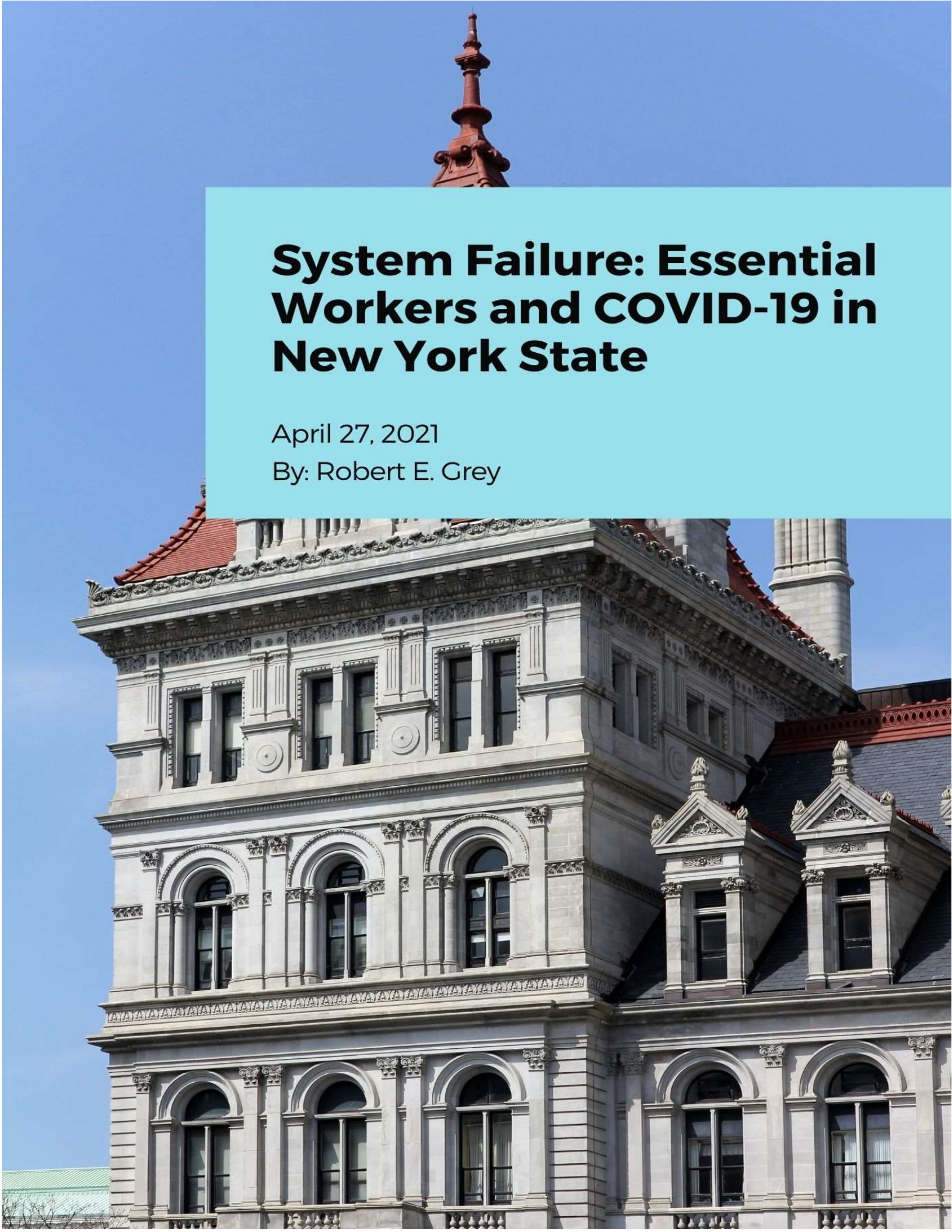
System Failure: Essential Workers and COVID-19 in New York State

April 27, 2021

By: Robert E. Grey



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SYSTEM FAILURE:
ESSENTIAL WORKERS AND COVID-19 IN NEW YORK STATE

March 23, 2021

By: Robert E. Grey[1]

Executive Summary

Exposure to COVID-19 is a hazard of employment for healthcare workers, workers designated as "essential," and many other workers required to work in pubic-facing jobs in which COVID-19 is or was prevalent.[2] The workers' compensation system is the primary resource for wage replacement benefits and medical treatment for employees who have work-related injuries or illnesses, and the Workers' Compensation Law was created and intended to protect and compensate workers from precisely such hazards as COVID-19.[3]

We estimate that as many as a quarter-million essential and healthcare workers in New York were infected with COVID-19 at work in 2020 and developed symptoms.[4] An even larger number of workers were infected but remained asymptomatic.[5] All of these workers were eligible to file for workers' compensation in order to obtain both near-term and long-term compensation for lost wages and medical treatment.[6]

The extent of the illness resulting from COVID-19 makes workers' compensation coverage especially critical for the impacted workers. There are reports that 50% to 80% of

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2 *See, e.g.*, Matter of City of Long Beach, 2021 NY Wrk. Comp. LEXIS 23, WCB G279 6329 (Jan. 4, 2021)

[3] Matter of Johannesen v. New York City Dept. of Hous. Pres. & Dev., 84 N.Y.2d 129, 134; 615 N.Y.S.2d 336, 338; 638 N.E.2d 981, 983 (1994) (*cit. omit.*)

[4] *See*, Table 2, *infra*.

[5] *Id*.

[6] *See generally*, Workers' Compensation Law §§ 13, 15.

those with symptomatic COVID continue to have symptoms for three months or longer.[7] About ten percent are classified as "long haulers," with significant, persistent and disabling symptoms.[8] In the United States, the mortality rate of COVID-19 has been 1.8%.[9]

Despite the severity and scale of work-related COVID-19 illness, we estimate that fewer than nine percent of those who are potentially eligible have filed claims for workers' compensation benefits, and only ten percent of those – less than one percent of the potentially eligible population of workers – have been awarded compensation or received formal decisions in their claims.[10] The failure to file for workers' compensation leaves workers at significant jeopardy of being unprotected against future wage loss and losing medical coverage for the long-term consequences of COVID-19-related illness.[11]

The paucity of workers' compensation claims for work-related COVID as compared to the large number of affected workers highlights significant systemic issues in the administration of the Workers' Compensation Law. Injured workers have little readily available information about the system. The system is not proactive in communicating with injured workers, and it has become far too difficult for them to obtain access to benefits or to obtain benefits even when they are able to navigate the claim-filing process. In the case of COVID-19, there is poor awareness among workers about the availability of workers' compensation as a remedy, and

[7] https://www.health.harvard.edu/blog/the-tragedy-of-the-post-covid-long-haulers-2020101521173
[8] *See*, https://jamanetwork.com/journals/jama/fullarticle/2771111; https://health.ucdavis.edu/coronavirus/covid-19-information/covid-19-long-haulers.html
[9] *See*, https://coronavirus.jhu.edu/data/mortality
[10] *See* Tables 2 and 3 and Section III, *infra*.
[11] *See generally,* Workers' Compensation Law §§ 18, 28.

other COVID-specific employer and State programs have created barriers to claim filing that may leave workers unprotected against future consequences of infection.[12]

We propose the following remedies:

1. Enact S.1241, which would create a presumption in favor of essential workers with COVID-19, ensuring that essential workers' access to workers' compensation is made explicit. While this would not necessarily create greater coverage than existing case law, it would increase public awareness and encourage eligible workers to file for benefits.

2. The Workers' Compensation Board and other state agencies should invest resources in a campaign to inform the public (specifically, healthcare and essential workers with high rates of workplace COVID exposure) that COVID-19 may be covered by the Workers' Compensation Law and the steps needed to file a claim.

3. The Workers' Compensation Board should schedule an initial hearing in every case (not limited to COVID-19) in order to ensure that injured workers receive meaningful information about their rights and benefits under the law in a suitable manner and language, as well as to ensure that the Board receives accurate information from the injured worker about the nature and extent of the claim.

4. Enact S. 1721 to expand language access with the workers' compensation system. The bill would specifically require the Workers' Compensation Board to provide for translation of documents and interpretation services and to publish a language access plan.

[12] *See*, Section IV*, infra*.

5. Expand the types of employer activity that constitute retaliation under the Workers' Compensation Law and increase the statutory penalties for retaliation and discrimination.

I. Workers' Compensation Basics.

New York's Workers' Compensation Law was created in 1914 to protect workers and their families from the economic and medical consequences of work-related injury and illness.[13] The guiding principle of the law was that a certain number of injuries and illnesses would inevitably result from work and that the associated costs would best be borne by employers, not workers.[14] Unlike workers, who had limited resources, employers could purchase insurance coverage to provide benefits, and include the cost of the insurance in the price of their goods or services.[15]

The Workers' Compensation Law gave employers near-absolute protection from being sued by their workers for occupational injury or illness.[16] In exchange, the law promised injured workers wage-replacement benefits and medical treatment, to be delivered quickly and with minimal technical or legal obstacles.[17]

Today, the amount of wage-replacement benefits awarded depends on how much the worker was earning before the injury or illness, but the current maximum weekly benefit rate is $966.78 per week.[18] Those who are permanently disabled may receive benefits for many years, and sometimes for life.[19] If a worker is killed on the job or dies as the result of a work-related

[13] *See*, Johannesen, *supra*.
[14] Ives v. South Buffalo R. Co., 201 N.Y. 271, 94 N.E. 431 (1911)
[15] *Id*.
[16] Workers' Compensation Law § 11.
[17] *Id*.
[18] Workers' Compensation Law § 15(6)
[19] Workers' Compensation Law §§ 15(1), (3).

injury, death benefits are payable to the surviving spouse (potentially for life), children, and other dependents.[20] All medical treatment is paid by the employer or insurer.[21]

Significantly, the law provides long-term protection for injured workers. Once a claim has been established, the worker may reopen the case to claim additional lost wages for up to eighteen years from the date of the accident.[22] Medical coverage for the work-related injury is provided for life.[23]

[20] Workers' Compensation Law § 16.
[21] Workers' Compensation Law § 13.
[22] Workers' Compensation Law §§ 25-a, 123.
[23] *Id*.

II. Workers' Compensation and COVID-19.

The Workers' Compensation Law recognizes both "accidents" and "occupational diseases."[24] To qualify for coverage, an "accident" must be an injury or illness that "arises out of and in the course of employment" – one that occurs in or around the workplace and is reasonably related to the work duties.[25] Under this definition, the courts have held that events like being sneezed on by a sick co-worker or being exposed to an incarcerated person with tuberculosis can qualify as "accidents" arising out of the employment.[26] The courts have also held that when the employment places the worker at increased risk of injury or illness, that may also qualify as a work-related accident.[27]

By contrast, an "occupational disease" is a condition that is associated with a "distinctive feature" of the employment – in other words, it is the type of condition that workers in that occupation often develop.[28] Applying this test, the courts have held that exposure to infectious illness or communicable disease is a distinctive feature of employment in the healthcare field, for example as a nurse or a patient care aide.[29]

The New York State Workers' Compensation Board (the agency charged with administering claims under the law) has acknowledged that each of these legal theories can be used to provide coverage for work-related COVID-19.[30] In responding to the pandemic, the

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[24] Workers' Compensation Law §§ 2(7), 38.
[25] Workers' Compensation Law § 2(7).
[26] Matter of Middleton v. Coxsackie Corr. Facility, 38 N.Y.2d 130, 132; 379 N.Y.S.2d 3, 4; 341 N.E.2d 527, 528 (1975).
[27] *See*, *e.g.*, Matter of Heidemann v. American Dist. Tel. Co., 230 N.Y. 305, 306; 130 N.E. 302, 303 (1921).
[28] *See*, *e.g.*, Matter of Bryant v. City of New York, 252 A.D.2d 777, 676 N.Y.S.2d 267 (3rd Dept. 1998).
[29] *See*, *e.g.*, Matter of Nathan v. Presbyterian Hosp. in New York, 66 A.D.933, 411 N.Y.S.2d 419 (3rd Dept. 1978).
[30] *See*, e.g., Matter of City of Glen Cove, *supra*. Early in the pandemic, the author published several articles calling for the workers' compensation system to use these legal rules in order to provide broad coverage for work-related COVID-19. *See*, https://www.nydailynews.com/opinion/ny-oped-coronavirus-victims-compensation-fund-20200417-aeg3qq6uozdvxccwarwruhjvr4-story.html (4/17/20);

Board has adopted a "prevalence standard," under which the worker "may show that an accident occurred in the course of employment by demonstrating prevalence. Prevalence is evidence of significantly elevated hazards of environmental exposure that are endemic to or in a workplace which demonstrates that the level of exposure is extraordinary. A [worker] may demonstrate prevalence through evidence of the nature and extent of work activities, which must include significant contact with the public and/or co-workers in an area where COVID-19 is prevalent. Public-facing workers and workers in a highly prevalent COVID-19 environments are the workers who can show that the exposure was at such a level of elevated risk as to constitute an extraordinary event."[31]

This standard would presumably include work during the pandemic in occupations such as healthcare services; work in congregate settings such as correctional facilities; food and retail services; hospitality; transportation; education; construction; manufacturing; and public utility or service work, among others.[32]

The Board also adopted a number of other measures in response to the pandemic, including expanded use of "virtual hearing" technology, emergency approval of tele-health, and relaxing a number of administrative requirements.[33]

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https://www.law.com/newyorklawjournal/2020/05/14/workers-compensation-coverage-for-essential-workers-with-covid-19/ (5/14/20).

[31] *Id*.

[32] *See, e.g.*, S. 1241 (2020/2021)

[33] *See*, http://www.wcb.ny.gov/covid-19/.

III. System Failure – COVID-19.

Despite the Board's initiatives, it is clear that there are systemic failures in workers' compensation that have deprived tens of thousands – and very possibly hundreds of thousands – of sick workers from seeking or obtaining benefits.

The data in Table 1 attempts to calculate the potential number of workers with COVID-19 by using two different methods.[34] In the first method, shown on lines 1- 4, we use the total number of COVID positive cases (1,648,893)[35] in New York, multiply it by the percentage of the population that is working-age[36] (73%) to arrive at a figure of 1,229,971. We then multiply the working-age population by its ratio to the total population (64%) to arrive at a figure of 774,032 workers who were potentially infected by COVID-19 while working.[37]

In the second method, shown on lines 5 through 7 of Table 1, we multiply the total working population (8,612,940)[38] by the New York COVID-19 case positivity rate of 8.4%[39], thus arriving at a figure of 724,157 workers who were potentially infected by COVID-19 while working.[40]

There is approximately a 6.5% variance between the Method 1 and Method 2 two totals (774,032 and 724,157); therefore, the mid-point between the two (749,095 workers) was used for the remaining data analysis.

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[34] All of the data discussed in this paper covers the period from March of 2020 through December of 2020.
[35] https://data.cdc.gov/
[36] Defined as ages 18 through 64.
[37] The 774,032 figure is the result of the full percentages used, rather than the abbreviated percentages shown in Table 1.
[38] https://labor.ny.gov/
[39] https://www1.nyc.gov/
[40] Again, the case positivity rate percentage shown on Table 1 is abbreviated from the actual percentage that resulted in the figure of 724,157.

In order to ensure that our analysis would not overstate the number of workers whose illness should be covered by workers' compensation and ensure the lowest possible estimate we elected to exclude consideration of asymptomatic cases. It should be noted, however, that the fact that a worker's illness was asymptomatic would not preclude him or her from filing for and receiving workers' compensation benefits for lost time and medical treatment; and indeed a worker with work-related, but asymptomatic, COVID-19 should file a claim. By applying the asymptomatic positive test rate of 45% (line 9 on Table 1) to our figure of 749,095 workers with potentially work-related COVID-19, we arrived at an estimate figure of 412,002 workers with symptomatic, potentially work-related COVID-19.[41]

TABLE 1[42]

Summary of Potential Workers Compensation Cases in the State of New York

(1) COVID Positive Cases	1,648,893	https://data.cdc.gov/
(2) % of cases in working age population	73%	https://www1.nyc.gov/
(3) % of working age population to total population	64%	https://www.health.ny.gov/
(4) Total working age positive cases	774,032	(4) = (1)x(2)x(3)
(5) Total working population	8,612,940	https://labor.ny.gov/
(6) Case Positivity rate	8.4%	https://www1.nyc.gov/
(7) Total working age positive cases	724,157	(7) = (5)x(6)
(8) Selected Positive Cases	**749,095**	(8) = Average (4,7)
(9) Asymtomatic Rate of Infected Workers	45.0%	https://www.pharmacist.com/
(10) Symptomatic Infected Workers	**412,002**	(10) = (8)x[1-(9)]

[41] Table 1, line 10.

[42] The data shown is for the period from March, 2020 through December, 2020.

Proceeding from the total number of symptomatic COVID-positive worker cases (412,002), we calculate in Table 2 how many of the workers with potentially work-related, symptomatic, COVID-19 in fact became ill as a result of their work during the pandemic.

In conducting this analysis, we assumed that any worker who was working remotely or from home could not have contracted COVID-19 as a result of their work. Unfortunately, we were unable to locate reliable data about remote-work rates in specific industries or job titles.

Table 2 therefore incorporates a set of broad assumptions about the remote-work rates in each industry. For example, we assume that there was no remote work in the "Health Care and Social Assistance" category, but 100% remote work in "Finance and Insurance." We ultimately arrived at a weighted average of a 38% of workers working remotely across all industries.[43]

In response, we reduced our figure of 412,002 workers with potentially work-related, symptomatic COVID-19 by 38%, arriving at an estimated total of 247,242 workers with symptomatic COVID-19 that was potentially acquired while working in person during the pandemic. In other words, there are approximately a quarter million essential workers in New York who developed symptomatic COVID-19 while working during the pandemic.[44]

[43] Our assumptions do take into consideration unemployment, since the employment numbers used are only for workers who were employed between March and December of 2020; unemployed workers are therefore entirely excluded from consideration in our analysis.

[44] We characterize our analysis as "conservative" because (a) we cut the number of potential cases nearly in half by excluding asymptomatic workers; (b) we believe that the weighted average of 38% for remote work likely overstates the percentage of those working remotely in certain industries; and (c) we assumed that no worker who was working remotely could have contracted work-related COVID-19. Each of these assumptions reduces the number of workers who were (a) working in-person during the pandemic and (b) contracted COVID-19.

TABLE 2[45]

Symptomatic COVID Cases Among the Working Population in 2020

Occupation	Total Employment 3/2020 - 12/2020	Work From Home (estimated)	Exposed Employees	Symptomatic Positive Employee Cases	Positive Employee Cases (Incl WFH Assumption)
Total Nonfarm	**8,612,940**	**38%**	**5,346,600**	**412,002**	**247,242**
Private Sector	**7,186,400**	**36%**	**4,633,330**	**357,038**	**214,258**
Natural Resources & Mining	4,540	0%	4,540	350	210
Construction	349,190	0%	349,190	26,908	16,148
Manufacturing Durable Goods	230,150	0%	230,150	17,735	10,643
Manufacturing Non-Durable Goods	163,070	0%	163,070	12,566	7,541
Wholesale Trade	291,740	0%	291,740	22,481	13,491
Retail Trade	797,540	0%	797,540	61,457	36,880
Transportation, Warehousing and Utilities	258,950	0%	258,950	19,954	11,975
Information	266,330	100%	0	0	0
Finance and Insurance	508,010	100%	0	0	0
Real Estate and Rental and Leasing	182,160	50%	91,080	7,019	4,212
Professional, Scientific and Technical Services	647,940	100%	0	0	0
Management of Companies and Enterprises	138,130	100%	0	0	0
Administrative and Support Services	444,550	100%	0	0	0
Educational Services	463,350	50%	231,675	17,853	10,713
Health Care and Social Assistance	1,532,300	0%	1,532,300	118,077	70,858
Arts, Entertainment and Recreation	103,170	50%	51,585	3,975	2,385
Accommodation and Food Services	457,740	0%	457,740	35,273	21,167
Other Services	347,540	50%	173,770	13,390	8,036
Government	**1,426,540**	**50%**	**713,270**	**54,964**	**32,984**
Federal Government	121,120	50%	60,560	4,667	2,800
State Government	257,680	50%	128,840	9,928	5,958
Local Government	1,047,740	50%	523,870	40,369	24,225

It is important to note that a worker could have been working in-person during the pandemic and contracted symptomatic COVID-19 without the illness being work-related. The 247,242 figure is simply the full spectrum of workers who potentially contracted work-related COVID-19 while at work between March and December of 2020. To demonstrate an

[45] A dynamic version of the spreadsheet that was used to generate Tables 1 and 2 is available at https://1drv.ms/x/s!AvIKy8JSvMTckjLI7YV6_dC1z72Y?e=N6h2kD. Readers may download their own copy of the spreadsheet, insert their own assumptions regarding any of the variables we consider and see how the new assumptions affect the outcome. For example, altering the overall work-from-home estimate from 38% to 50% would reduce the number of workers with potentially work-related symptomatic COVID-19 from 247,242 to 199,143. Conversely, reducing the work-from-home estimate from 38% to 30% would increase that number from 247,242 to 278,801.

entitlement to workers' compensation, a worker would also need to show a connection between the illness and their work.

However, given the broad legal standards discussed in Section II, above, it seems likely that a large percentage of the 247,242 workers who were working in-person during the pandemic and contracted COVID-19 would qualify for workers' compensation benefits.[46] If the figure were as low as 25% (vs our 100% assumption), then 61,810 workers should have filed for workers' compensation; at 50% it would be 121,121 workers; at 75% it would be 182,931 workers.

As shown in Table 3, the Workers' Compensation Board has received only 20,978 claims for work-related COVID – less than 8.5% of the potentially affected population.[47] Even if only half of the 247,242 workers qualified for workers' compensation, the Board only received claims from one in six workers, or 16% of those eligible. If three-quarters were eligible, the figure would be one in nine workers, or 11%.

Moreover, fewer than 10% of the workers who have filed – less than 1% of the potentially affected population - have had their claims adjudicated and benefits awarded. Out of 20,978 claims filed, nearly 19,000 have been either "cancelled" or deemed "non-comp"

[46] Studies have shown that essential workers suffered from especially high rates of COVID-19. *See*, *e.g.*, https://oem.bmj.com/content/early/2020/12/01/oemed-2020-106731; https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7499478/; https://pubmed.ncbi.nlm.nih.gov/33075539/

[47] It is important to note that Table 3 consists of claim-filing data through March of 2021, whereas Tables 1 and 2 consist of data through December of 2020. Because there were high numbers of COVID cases in January, February and March of 2021, the percentages shown are a substantial overstatement as compared to what they would be if the Tables considered coextensive time frames. This is consistent with our effort to produce a conservative estimate (*see*, footnote 42, *supra*).

(bereft of formal action by the Board), with less than 2,100 receiving a determination of any kind.[48]

This points to a systemic failure of workers' compensation to address the COVID-19 pandemic.

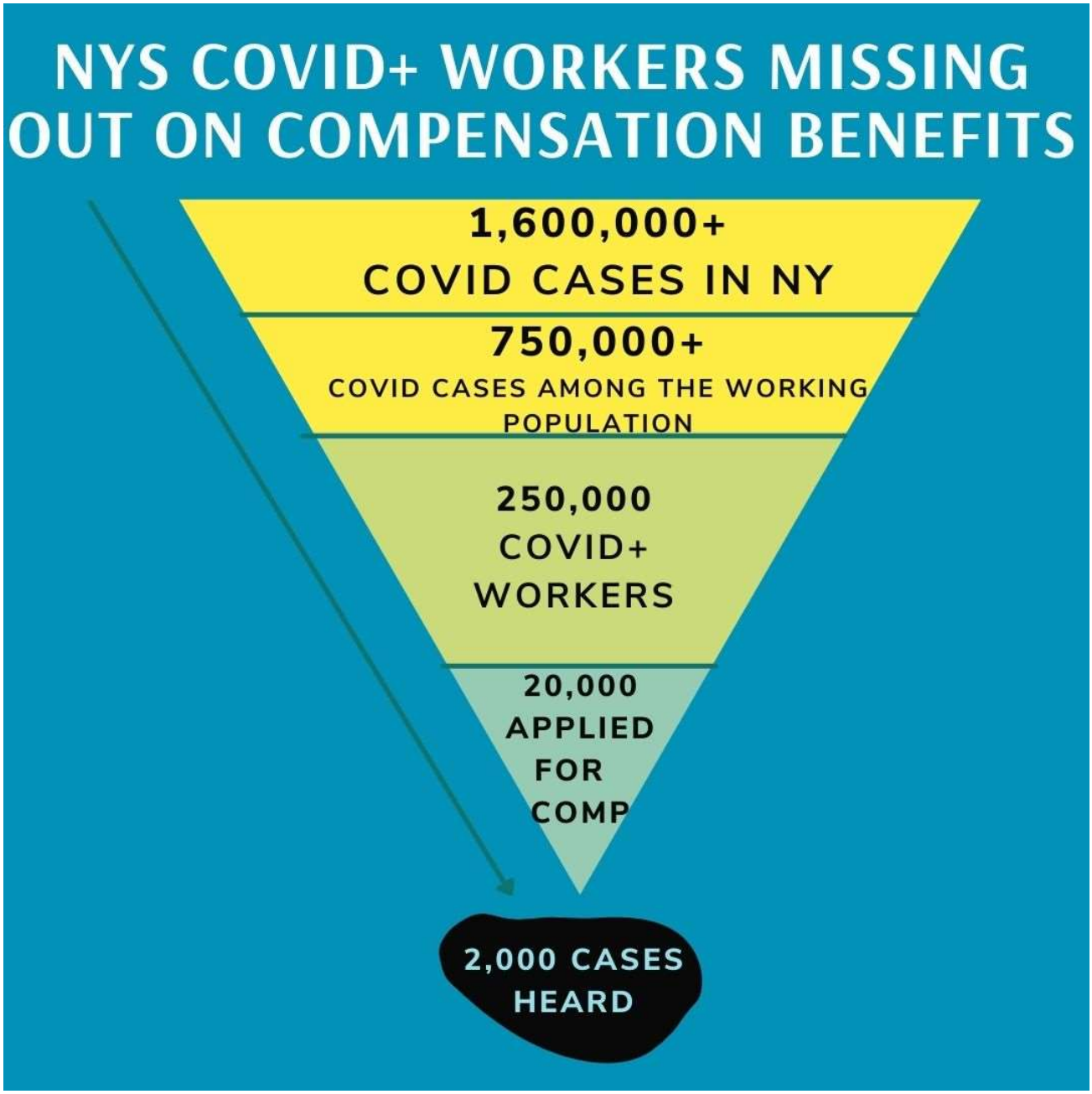
TABLE 3

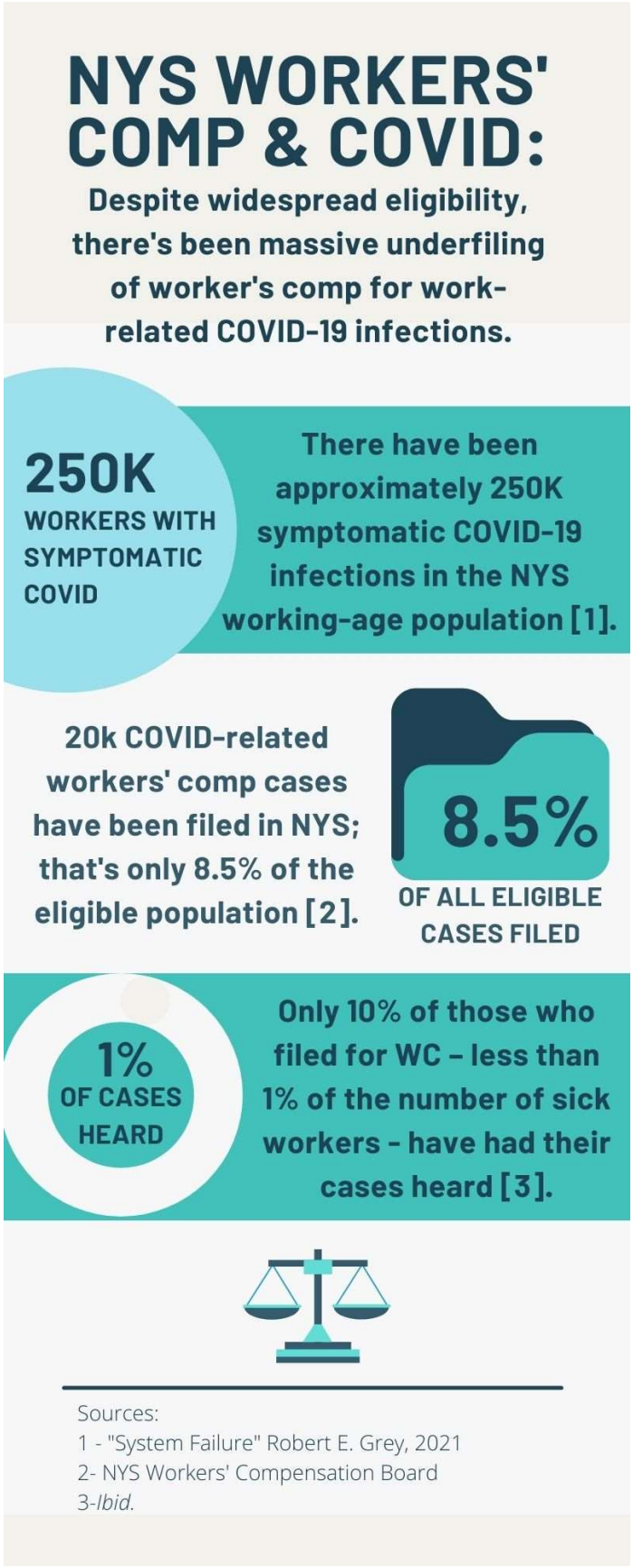
Workers' Compensation Claims for COVID-19, March 2020 – March 2021

Claim Injury Type	2020 COVID Claims
CANCELLED	204
NON-COMP	18,683
MED ONLY	831
TEMPORARY	1219
DEATH	41
Grand Total	**20,978**

- Non-Comp = Non-comp are essentially the claims that haven't been established yet (and may never be). Typically they are claims with no compensable lost time (i.e. 7 or fewer days) that don't have any issues to resolve that would have brought the case in front of a judge or conciliator. *Important to note: To date less than one-tenth of one percent of these claims have been formally disallowed.*
- Med Only = Claim that has been established for medically necessary treatment but has no compensable lost time
- Temporary = Claim that has been established for medically necessary treatment and compensable lost time
- Death = Death award (either at time of accident or years later and attributed to accident)

[48] Whether the determinations that were made are accurate cannot be determined, but it seems likely that many of the claims characterized as "medical only" in fact involved loss of time from work.


NYS COVID+ WORKERS MISSING OUT ON COMPENSATION BENEFITS
1,600,000+
COVID CASES IN NY
750,000+
COVID CASES AMONG THE WORKING POPULATION
250,000
COVID+
WORKERS
20,000
APPLIED
FOR
COMP
2,000 CASES
HEARD


NYS WORKERS' COMP & COVID:
Despite widespread eligibility, there's been massive underfiling of worker's comp for work-related COVID-19 infections.
250K
WORKERS WITH SYMPTOMATIC COVID
There have been approximately 250K symptomatic COVID-19 infections in the NYS working-age population [1].
20k COVID-related workers' comp cases have been filed in NYS; that's only 8.5% of the eligible population [2].
8.5%
OF ALL ELIGIBLE CASES FILED
1%
OF CASES HEARD
Only 10% of those who filed for WC – less than 1% of the number of sick workers - have had their cases heard [3].
Sources:
1 - "System Failure" Robert E. Grey, 2021
2- NYS Workers' Compensation Board
3-*Ibid.*

IV. Systemic Failure: Causes.

Anecdotally, the rate of claim filing in general varies with the severity of injuries.[49] Some have estimated that claims workers perceive to be medical-only claims or minor injury claims have a filing rate as low as 25%.[50] By contrast, the filing rate for serious injuries may exceed 90%.[51]

Occupational disease claims have the lowest filing rate of all, with some estimates falling in the low single digits – similar to the COVID-19 filing rates discussed above.[52]

There are many reasons why workers don't file workers' compensation claims for occupational injury and illness. In the case of medical-only and minor injury cases, a significant factor is a reluctance to do what they perceive as "suing the employer" and potentially creating friction in their employment situation or losing their job (fear of retaliation).[53] This may account for a large part of the variance between the filing rates for minor and major injuries – the worker with a major injury is more likely to seek access to a remedy, and the employer in that situation is less likely to engage in workers' compensation-avoidant behavior.

In the case of occupational disease, however, an additional factor is poor recognition of the relationship between work and the illness, as well as the system's poor track record in recognizing and compensating occupational diseases.[54]

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[49] *See, e.g.*, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3912896/; https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2018/01/18/the-critical-need-to-reform-workers-compensation

[50] *Id.* We use "perceive" because, in a number of those claims, the worker is entitled to some form of indemnity benefits but does not pursue those benefits for a variety of reasons.

[51] *Id.*

[52] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2690178/

[53] *See, e.g.*, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3912896/; https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2018/01/18/the-critical-need-to-reform-workers-compensation; https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2690178/

[54] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2690178/

Underlying all of this is a significant information gap on the part of workers about the availability of workers' compensation as a remedy and the benefits that the system provides. This lack of information is a key contributor to workers not filing claims – people who are unaware that a system exists or what benefits it provides have little ability or incentive to pursue claims.

The behavior of the workers' compensation system over the past 25 years has significantly exacerbated this problem. Prior to the mid-1990s, whenever a worker was injured, the Workers' Compensation Board would schedule a hearing. The injured worker's appearance at the hearing would enable the Law Judge to interact with the worker, determine whether there was a language or other barrier, obtain accurate information from the worker about their injury, wage, work status, and medical treatment, and give the worker accurate information about the benefits the law provides.

This in-person interaction has been replaced with a system in which the Board does not schedule hearings unless the case is contested by the employer or a specific request is made.[55] Instead, workers generally have their cases closed without any interaction with the Board, or with the issuance of an English language-only decision notice making legal findings that are mostly unintelligible to the worker – and which provide little or no information about the availability of benefits.

The law also fails to provide workers with adequate protection against employer retaliation. The statute currently prohibits only "discharge" or "discrimination" against workers

[55] *See, e.g.*, 12 NYCRR §300.37; WCB Subject No. 046-777, http://www.wcb.ny.gov/content/main/SubjectNos/sn046_777.jsp

who file a claim or testify, but says nothing about employers who threaten, penalize, or retaliate against workers who it believes may do so.[56] This creates an environment in which workers are often reluctant to seek out information about claim filing. Moreover, the worker's burden of proof under the statute is excessive, and the penalties for violation are inadequate.[57]

In short, the system has shifted from one that delivers information and benefits to the injured worker into one that places the burden entirely on the worker to seek benefits – notwithstanding the almost-universal lack of the necessary information on the part of injured workers. The consequences of this systemic failure are evident in the low COVID claim filing rate.

[56] Workers' Compensation Law § 120.

[57] The statute essentially requires the worker to prove that there was no reason other than the workers' compensation claim for the employer's action, and the maximum penalty is one thousand dollars (in addition to reinstatement, which is often an unsatisfactory remedy).

Conclusion and Proposed Remedies

The number of claims the Workers' Compensation Board has received represents a tiny fraction of the number of workers with work-related COVID-19. This points to a systemic failure to provide workers with basic information about the workers' compensation system and the benefits it provides, as well as raising significant concerns about the role of the agency in this systemic failure.

We propose the following remedies:

Enact S.1241, which would create a presumption in favor of essential workers with COVID-19, ensuring that essential workers' access to workers' compensation is made explicit. While this would not necessarily create greater coverage than existing case law, it would increase public awareness, encourage eligible workers to file for benefits, and encourage insurers to honor their obligation to quickly and timely pay benefits that are due.

2. The Workers' Compensation Board and other state agencies should invest resources in a campaign to inform the public (specifically, healthcare and essential workers with high rates of workplace COVID exposure) that COVID-19 may be covered by the Workers' Compensation Law and the steps needed to file a claim.

3. The Workers' Compensation Board should schedule an initial hearing in every case (not limited to COVID-19) in order to ensure that injured workers receive meaningful information about their rights and benefits under the law in a suitable manner and language, as well as to ensure that the Board receives accurate information from the injured worker about the nature and extent of the claim.

4. Enact S. 1721 to expand language access with the workers' compensation system. The bill would specifically require the workers' compensation board to provide for translation of documents and interpretation services and to publish a language-access plan.

5. Expand the types of employer activity that constitute retaliation under the Workers' Compensation Law and increase the statutory penalties for retaliation and discrimination.

Taken together, these proposals would help restore the nature of the workers' compensation system to its intended form: a means of providing compensation and medical benefits to workers who suffer from occupational injury and illness, interpreted broadly for their protection. This would respond not only to the specific challenge presented by the COVID-19 pandemic, but also to the broader challenge of ensuring that the system functions properly.