June 5, 2020

The Honorable Jim Cooper
California State Assembly
State Capitol, Room 6025
Sacramento, CA 95814

The Honorable Rob Bonta
California State Assembly
State Capitol, Room 2148
Sacramento, CA 95814

The Honorable Lorena Gonzalez
California State Assembly
State Capitol, Room 2114
Sacramento, CA 95814

Subject: AB 664 (Cooper, Bonta, Gonzalez) – Conclusive WC Presumption for COVID-19
OPPOSE

Dear Assembly Members Cooper, Bonta and Gonzalez,

The organizations listed below are respectfully **OPPOSED** to your **AB 664,** which would create a time-limited but indisputable legal presumption that all COVID-19 infections suffered by police, fire, and some hospital workers are work related for purposes of workers' compensation benefit eligibility. This proposal violates any reasonable standard of fairness that could possibly be expected by employers across our state, and it would divert vital resources away from hospitals and state and local budgets. We respectfully urge you to abandon this legislation.

Many of the undersigned organizations delivered a letter dated 4/26/2020 to Governor Gavin Newsom and the legislative leaders in both the Senate and Assembly. The purpose of that letter was to provide a common voice to the concerns from all corners of California's public and private sectors about the possibility of shifting the medical and social costs of this pandemic onto California's workers' compensation system through the enactment of a workers' compensation presumption. We believe that the existing workers' compensation system is certainly

capable of effectively and efficiently meeting the needs of workers who are indeed infected while in the course and scope of their employment. In fact, there hasn't even been a clearly established "problem" with the operation of the current system relative to COVID-19.

Notwithstanding employer concerns or a demonstrated problem with acceptance of claims, Governor Newsom issued Executive Order N-62-20 on May 6 to establish a rebuttable presumption for confirmed positive cases of COVID-19 among any California worker who reported to work outside of their home between March 19 and July 5. With such a broad presumption now in place for workers during the period in which the greatest number of Californians were ordered to stay home, we urge the legislature to thoughtfully consider the problems that need to be addressed beyond the broad scope of the Executive Order. Expansion of such extraordinary measures take California's workers' compensation system further away from its intended design and purpose and shift greater liability for the pandemic onto California employers.

AB 664 proposes to establish an indisputable presumption for COVID-19 for police, fire, and some hospital workers. AB 664 would also blur the lines between workplace safety requirements and the workers' compensation requirements, trigger benefits without an actual illness, and broaden the scope of workers' compensation benefits to include housing and living expenses. Below we have provided additional detail on why we oppose such an expansion of the workers' compensation system.

Basics of California Workers' Compensation

California's workers' compensation system is a no-fault, employer-funded system that must be liberally-construed by the courts with the purpose of extending benefits to workers who claim an injury or illness is work-related. This means that California's system has been designed and consistently operates in a manner that broadly extends benefits for injuries and illnesses that occur on the job. Under existing rules, there needs to be some medical evidence that the illness was related to work. Therefore, employers are currently accepting COVID-19 claims, but some claims are likely to be denied because they are simply not work related or even lack any diagnosis of COVID 19. California law also requires employers to pay for health care services up to $10,000 while the claim is reviewed, even if it is ultimately denied.

California's system is specifically designed to address workplace injury and illness and is limited to that sole purpose. To meet that important threshold, workers need to establish some reasonable factual basis for asserting workplace causation of an injury or illness. With a no-fault standard that awards benefits without consideration of negligence, and a statutory directive that the courts must construe the state's laws in favor of providing benefits, California workers' compensation claims are accepted by employers are a rate of roughly 90%.

Employers in California's workers' compensation system, which had a cost of $23.5 Billion in 2018, are approximately 67% insured and 30.2% self-insured (the State of California makes up 2.8%). It is important to note that for many large employers and nearly all public entities, the cost of workers' compensation is largely self-funded and come directly out of those organizations' annual budgets.

Conclusive v. Rebuttable Presumption

The function of a legal presumption in workers' compensation law is to shift the burden of proof from the employee to the employer. Currently a worker claiming work-related COVID-19 would need to offer some reasonable basis to support their claim that they contracted COVID-19 at work, or that their work put them at a special risk for contracting COVID-19, and their claim would be evaluated as described above. A presumption, whether rebuttable or conclusive, would shift the burden onto the employer and require them to *prove that the employee did not get sick at work*.

When the burden of proof is shifted to the employer through a presumption the law also needs to establish what standard overcomes the presumption. In other words, what legal standard must an employer meet in order to

demonstrate under the law that an infection is not work related and therefore not eligible for workers' compensation benefits?

A **"conclusive presumption"** would clearly declare, as a matter of law, that employers must provide workers' compensation benefits for eligible employees even if the evidence clearly indicates that the infection did not occur at work.

The California Department of Public Health (CDPH) noted in their April 8, 2020 Press Release that, "Since COVID-19 is moving rapidly within the community, health care workers now appear just as likely, if not more so, to become infected by COVID-19 outside the workplace." Nearly every day since that press release CDPH has noted in their daily update that hospital workers continue to contract COVID-19 both through the workplace and community exposure. A conclusive presumption, or anything that operates like a conclusive presumption, would unquestionably push these non-industrial infections into the workers' compensation system.

A **"rebuttable presumption"** would shift the burden of proof onto employers as described above but wouldn't allow benefits for infections that could be proven to be unrelated to work. This would be accomplished by establishing a standard of evidence for the employer to meet – typically in a rebuttable presumption the burden can be overcome by establishing non-industrial causation through a preponderance of the evidence. Even under a rebuttable standard we expect that employers would still ultimately provide workers' compensation benefits for a substantial number of COVID-19 infections that are not work related.

AB 664 establishes a conclusive presumption that would inarguably shift nonoccupational COVID-19 infections into California's workers' compensation system. This is violative of 100 years of common understanding of the purpose of the workers' compensation system, and quite possibly unconstitutional.

Time Limited

Any policy proposal that fundamentally alters how our workers' compensation system works relative to COVID-19 should be considered a temporary and extraordinary measure with a clearly defined end date. Even under the statewide shelter-in-place order it would seem, again based on the CDPH press release linked above, that even employees with an elevated occupational risk are prone to contract COVID-19 through community spread. As California re-opens in stages and people across the state return to their lives the evidence would suggest that community spread is and will continue be a probable source of COVID-19 infections.

AB 664 seems to have incompatible policies contained within the bill. On the one hand, 3212.18(b) seems to indicate that the presumption is only in effect during a state or local COVID-19 emergency declaration, but 3212.18(d) reads as though the presumption is permanent and continues for up to 90 days post-termination.

Scope of Workers

Many workers are doing heroic work at this time to care for the sick, produce food and other essentials, and make deliveries so most Californians can stay at home. At the same time, continuation of work during the shelter-in-place directive, by itself, should not be used as a proxy for exposure risk. Workers face a wide range of risk, from front-line, public-facing workers, to those who work in relative isolation and adequate social distancing.

Therefore, any suspension of existing causation standards should be targeted to workers who face a demonstrably higher risk of exposure. We oppose proposals that would apply a presumption for COVID-19 to every worker that has reported to work outside of the home during the statewide shelter-in-place order, because such a policy would significantly increase the number of non-work claims shifted into the workers' compensation system.

Presumption policy typically applies to small subsets of workers and injuries / illnesses and we believe that a narrow scope is appropriate here, as well. SB 664 does a good job of isolating the bill's presumption policy, however flawed, to a limited group of employees who arguably have a demonstrably higher risk of exposure in the workplace.

What Should Generate a Claim

Workers' compensation benefits are extended to "cure and relieve" the effects of an industrial injury or illness. If an employee tests positive for COVID-19 but is asymptomatic, then there is nothing to "cure or relieve" and access to the workers' compensation system should not be allowed. California's workers' compensation system is vulnerable to gaming via litigation, and allowing access to the system for exposures, suspected exposures, physician-directed quarantines, and asymptomatic positive tests would serve little, if any, good for sick workers and their employers, but it would give enterprising attorneys an avenue to exploit our system's known litigation weaknesses.

AB 664 provides for access to the workers' compensation system for purposes of quarantine and requires employers to pay for housing and living expenses in those circumstances. This is unsustainable for the workers' compensation system.

Housing and Living Expenses

We would oppose any effort to include housing and living expenses as any part of the workers' compensation system. Our system is designed to provide medical treatment, temporary disability payments to the sick and injured who cannot work, longer-term permanent disability benefits, and funds for workers who cannot return to their place of employment following their injury. Including housing costs and living expenses as a benefit of the workers' compensation system during a pandemic and then opening the system to non-industrial infections would be disastrous. AB 664 creates new housing and living expense benefits that would have to be provided even in cases where the COVID-19 infection has not been established or is known to be unrelated to work.

Looking Ahead

These are important issues and we commend your attention to these matters as you, your colleagues, and your staff work diligently to keep California on track. However, any legislative proposal needs to focus on extending benefits for *work-related* injuries and illnesses. We believe AB 664 fundamentally violates this premise and we oppose the bill for that reason.

Sincerely,

Acclamation Insurance Management Services, Inc
Advanced Medical Technology Association
Allied Manager Care, Inc.
American Property Casualty Insurance Association
Association of California Healthcare Districts
Association of California Life & Health Insurance Companies
Association of Claims Professionals
Auto Care Association
Breckpoint
California Alliance of Self Insured Groups
California Association of Joint Powers Authorities
California Association of Sheet Metal and Air Conditioning Contractors National Association
California Chamber of Commerce
California Coalition on Workers' Compensation
California Farm Labor Contractor Association
California Forestry Association
California Fuels and Convenience Alliance
California Hospital Association
California League of Food Producers
California Schools Joint Powers Authority
California Special Districts Association
California State Association of Counties ®
CAWA – Representing the Automotive Parts Industry
CompAlliance
County of Monterey
CSAC Excess Insurance Authority
Gilroy Chamber of Commerce
National Association of Insurance & Financial Advisors - California
National Association of Mutual Insurance Companies
National Federation of Independent Business
Official Police Garages Association of Los Angeles
Personal Insurance Federation of California
Special District Risk Management Authority
Urban Counties of California
Western Insurance Agents Association

CC. Office of Assembly Speaker Anthony Rendon