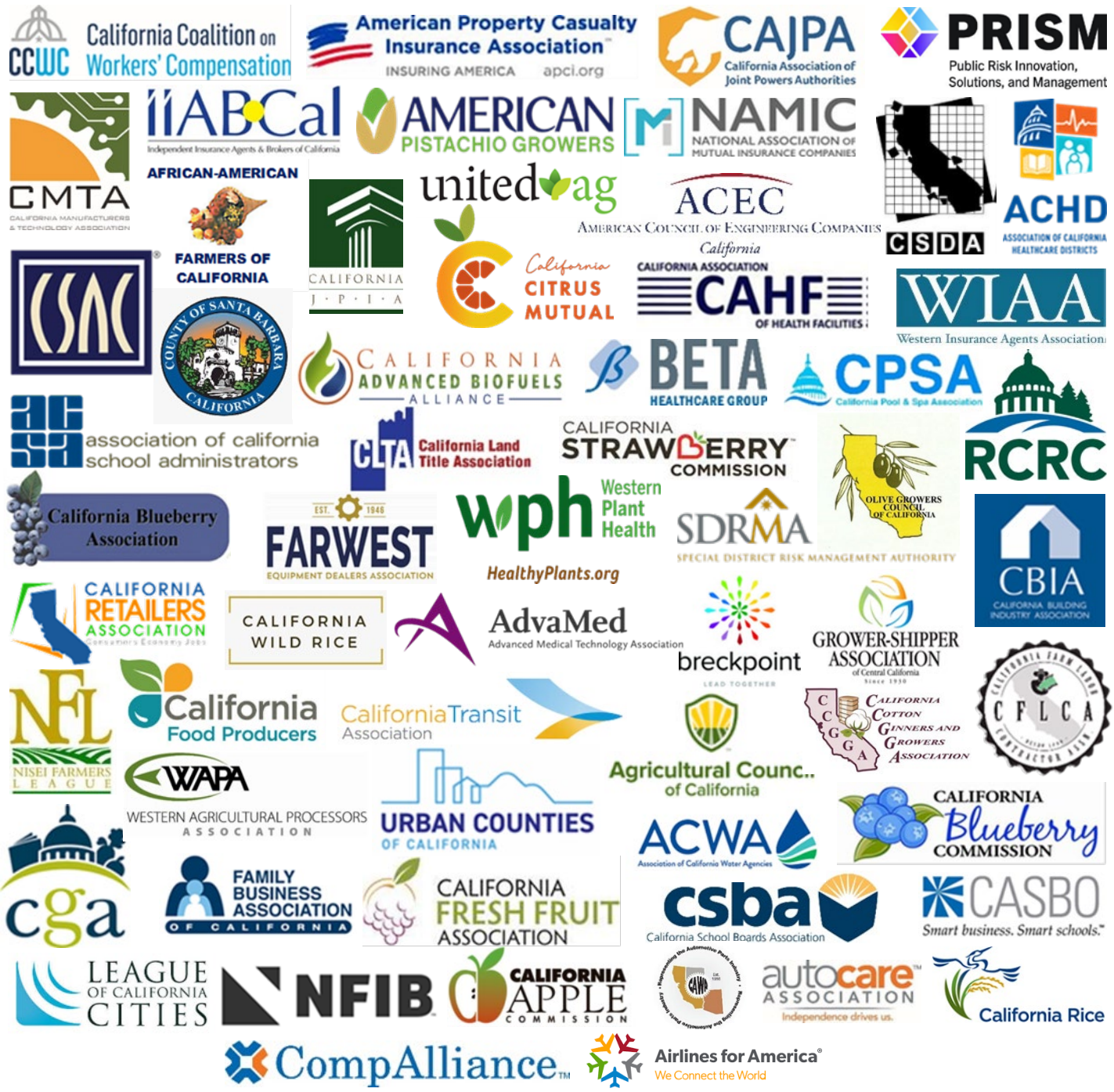

DATE: August 30, 2020

TO: Members, California State Senate
Members, California State Assembly

SUBJECT: COVID-19 Workers' Compensation Legislation
AB 196 (Gonzalez) – Oppose
AB 664 (Cooper) – Oppose
SB 1159 (Hill) – Oppose

The undersigned organizations are respectfully **OPPOSED to AB 196 (Gonzalez), AB 664 (Cooper), and SB 1159 (Hill)**. Each of these bills establishes some variety of legal presumption that COVID-19 infections are caused by work for purposes of accessing medical treatment and cash benefits in California's employer-funded workers' compensation system.

Our coalition of employer and insurer organizations has proactively engaged with both the legislature and Newsom administration since March. We have provided data and analysis on system performance, worked to identify and address any concerns about system performance, and have repeatedly and with great specificity offered both suggestions and specific amendments to aid in the development of a workers' compensation presumption to help protect California workers. This is despite every indication that our workers' compensation system is functioning as designed even during the COVID-19 pandemic. We took this extraordinary step because we understand that workers are reasonably fearful about working during a pandemic, just as they are nervous about the other errands and tasks of daily life that bring them into contact with the public. We also recognized that legislators might want, in this unusual time, to further put their finger on the scale and ensure that workplace infections are appropriately covered. Despite our best efforts and an unprecedented willingness to "give" by California employers, none of these bills represents a workable policy for employers who are already stretched thin.

California's Workers' Compensation System Broadly Extends Benefits

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 or positive test 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 a reasonable 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%.

California's workers' compensation system had a cost of $23.5 Billion in 2018. California's employers 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.

AB 196 (Gonzalez) – Broad Presumption for "Essential Critical Infrastructure Workers"

We are most concerned with the potential passage of AB 196 by Assemblymember Lorena Gonzalez (D – San Diego), which would establish an overly-broad legal presumption that employers are liable for the COVID-19 infection of every "Essential Critical Infrastructure Worker" in California. There is simply no rational basis for this legislation, and it is poorly crafted:

- Overly Broad & Unrelated to Risk: AB 196 extends a presumption for "Essential Critical Infrastructure Workers", a nebulous term that doesn't have any real meaning for purposes of employer and insurer compliance. Because of this, it will be incredibly confusing for employers and insurers to confidently identify which employees fit into this definition. There is also no objective indication that a legal presumption is necessary on a broad basis to provide access to the workers' compensation system for California workers. The operative term hasn't had real meaning since the state's shelter-in-place order was lifted.

- Opens the Door no Non-work Infections: California's worker's compensation system is designed to provide treatment and monetary disability benefits for work-related injuries and infections. Cost estimates are wide-ranging but very concerning for struggling employers, and AB 196 would open the floodgates for non-work COVID-19 infections. We have

communicated repeatedly that rational filters needed to be applied to any policy because. AB 196 utilizes a broad and confusing term for purposes of establishing scope, which will create confusion and lead to more non-work infections being covered by employers.

- No Sunset: AB 196 is the only proposal that does not contain a sunset date, a key provision requested by employers to protect against having a poorly operating policy in perpetuity without an opportunity for recalibration. This is a simple protection that could be provided. Sunsets are easy to extend if actually needed.

- Furthest from Acceptable to Employers: Despite our extensive engagement on these issues and communications to the legislature, AB 196 contains fewer protections for employers and virtually none of the protections offered by Governor Newsom's Executive Order and requested by employers on an ongoing basis.

AB 664 (Cooper) – Targeted Presumption: Police, Fire, and Healthcare Workers

While we maintain opposition to this measure, we want to be clear that we offered a clear path to neutrality on a temporary rebuttable presumption for appropriate classifications of police, fire, and healthcare workers. In both our letters to legislative leadership and the Governor, as well as our letters to Assemblymember Cooper on AB 664 specifically, we offered constructive feedback on how to build a workable policy. While AB 664 misses the mark in our estimation, it does so only slightly.

- Doesn't Include Protections from the EO: While AB 664 does contain some of the provisions from the spring executive order, it doesn't contain some of the most important protections. Specifically, it does not require the use of COVID-19 specific leave benefits before temporary disability or full wage replacement benefits are due nor does it require recertification of temporary disability every 15 days for the first 45 days. Because police and fire have special and more expensive wage replacement benefits these protections are critical.

- Poorly Crafted PPE and Workplace Protection Provisions: We strongly prefer that workers' compensation policy and health and safety policy stay separate. AB 664 contains a requirement to provide PPE for employees, and a peculiar and legally concerning requirement to "do every other thing reasonably necessary to protect the life, safety, and health of employees". Employers already have detailed workplace safety requirements, CalOSHA and CDPH guidance specific to COVID-19, and plenty of financial incentives to keep workplaces as safe as possible. We don't understand the need for such broad requirements inside of a workers' compensation bill.

- Codified Intent Language is Confusing: AB 664 contains codified intent language that calls for the provision of housing and living expenses for covered employees that are directed to quarantine because of a possible exposure. This section of the bill serves no purpose because it doesn't actually require anything. We think it will ultimately serve to be confusing for employers and misleading for employees.

SB 1159 (Hill) – Presumption Covering Police, Fire, Healthcare, and "Outbreaks" for All Others

We would be remiss if we didn't start this section of our letter by complimenting the authors and their staff for the hours of conversation and discussion that they undertook with our coalition since April. While we could not have asked for more of their time and consideration, a decision was made to specifically exclude the items necessary for employers to remove opposition to SB 1159. We provided a very clear pathway to our neutrality on SB 1159 – in fact, we needed only a handful of meaningful but reasonable changes to the bill. These changes were quite important to terms of both fairness to employers and functionality of the outbreak-based presumption trigger contained in the bill. Unfortunately, those changes were rejected, and we are therefore still opposed. We would make the following observations about SB 1159:

- No Objection to Sections 1-3: Our coalition is not opposed to the contents of Sections 1-3 of SB1159 and this was clearly communicated to the authors office. This includes research on COVID claims through the Commission on Health and Safety and Workers' Compensation, a codification of the policy contained in Governor Newsom's Executive Order, and a temporary and rebuttable COVID-19 presumption for police, firefighters, healthcare workers, IHSS workers, and home health workers that contains necessary protections and a reasonable sunset date.

- Section 4's Cluster Approach Unworkable: While we fundamentally do not agree that a presumption is necessary for workers who are not in Section 3 of SB 1159, we tried to find a pathway to neutrality on a risk-based approach to a presumption "trigger" for all employees. The idea behind this policy is that workplaces that pose a significantly higher risk of infection for COVID-19, through the application of some objective measurement, should have a presumption applied to claimed workplace infections. Unfortunately, the bill in its final form is administratively burdensome, unrelated to actual risk in the workplace, and unworkable for employers. Again, we want to be clear that we offered a handful of meaningful but reasonable amendments that made this section more workable for employers while leaving the underlying policy unchanged. *Those amendments were rejected despite our offer of neutrality*. We would offer the following additional observations:

    - No Objective Relation to Risk: If the purpose of the outbreak-triggered presumption is to identify workplaces with an objectively higher risk of infection than the general population, then there should be some explanation for the 4/4% in the bill. There isn't – the number is arbitrary and falls apart upon the slightest examination.

    - Includes Non-Work Infections in the Outbreak Calculation: Again, If the purpose of an outbreak-triggered presumption is to measure and act upon "risk" in the workplace, then the calculation should only consider work-related infections. To do otherwise would – by definition – include non-occupational risk in the occupational risk calculation. SB 1159 includes in an "outbreak" for any "specific place of employment" all positive tests for employees – even employees who contracted COVID-19 outside of the workplace. We asked for this detail to be changed, and that request was rejected.

    - Doesn't Control for Late Reported Claims: Common in the workers' compensation system is the late reporting of claims, both by workers and employers. While we did not request any accommodation for late reporting by employers, we did ask that claims reported late by employees (sometimes months or even years late) would not impact previously determined outbreak calculations. Under SB 1159 coverage decisions could be legally made based on the information available but claims reported months or years later would force employers to open the books and re-evaluate already-made decisions. This would be extraordinarily disruptive, and we asked that this be resolved. Our request was rejected.

    - Does not Contain a Standard for Rebuttal: Presumptions are either rebuttable (meaning that evidence can overcome the legal presumption) or conclusive (meaning that no amount of evidence is enough to overcome the presumption). However, even rebuttable presumptions need a reasonable standard of evidence to be included for purposes of overcoming the presumption. If not, they are functionally conclusive like most existing presumptions in California. Our coalition asked specifically for a clear standard by which we could overcome the legal presumption that COVID-19 infections are caused by work, and our request was rejected.

    - Definition of "Specific Place of Employment" is Unworkable: The entire premise of SB 1159 is that an outbreak at a "specific place of employment" can be used to measure heightened risk and trigger a policy intended to ease the evidentiary burden on sick employees. However, the definition of "specific place of employment" contained in the bill is such that an attorney representing an injured worker can argue virtually any definition for purposes of establishing a cluster. Is a "specific place of employment" a work unit, entire office, entire office building, collection of related buildings, office park, or maybe an entire company? Under the definitions in SB 1159 an attorney can argue for any of these possibilities, and to pretend like they won't in California's uniquely litigious workers compensation system is ignore reality. Again, we asked for resolution to this very real problem to no avail.

    - Reporting Requirement and Penalties are Overly Punitive: Not only do employers have to track positive tests of employees that didn't get infected at work, but they must track these infections on a "known or should have known" basis. Remember, these are not necessarily work-related infections and our employees are under no obligation to disclose their specific medical conditions to their employers. On top of this, SB 1159 establishes a maximum

$10,000 penalty for incorrectly or unreported information. We asked that these penalties be halved and only applied to data errors that were relevant to an actual coverage decision for an employee, and that request was rejected.

The policy contained in SB 1159 is unique and presents a significant administrative burden for employers if it is to be functional in the actual workers' compensation system. Our amendments, as you can see above, did not fundamentally alter the public policy direction of this bill. They made it fair and workable for employers. In its final form SB 1159 does not meet that standard, and we are therefore opposed.

Conclusion

California employers and insurers offered real and viable pathways for a COVID-19 presumption for front line workers, and an outbreak-based approach for other employees. The decision was made – despite early, frequent, and substantive offers by our coalition – to proceed in a direction that we cannot support. The result is a collection of bills that miss the mark because they functionally shift significant pandemic-related costs only employers. For these reasons and more, our coalition is regrettably opposed to AB 196, AB 664, and SB 1159.

Signed,

Advanced Medical Technology Association
African American Farmers of California
Agricultural Council of California
American Council of Engineering Companies, California
American Pistachio Growers
American Property Casualty Insurance Association
Association of California Health Care Districts
Association of California School Administrators
Association of California Water Agencies
Auto Care Association
BETA Healthcare Group
Breckpoint
California Advanced Biofuels Alliance
California Apple Commission
California Association of Health Facilities
California Association of Joint Powers Authorities
California Association of School Business Officials
California Blueberry Association
California Blueberry Commission
California Building Industry Association
California Citrus Mutual
California Coalition on Workers' Compensation
California Cotton Ginners and Growers Association
California Farm Labor Contractors Association
California Fresh Fruit Association
California Grocers Association
California Joint Powers Insurance Authority
California Land Title Association
California League of Food Producers
California Manufacturers & Technology Association
California Pool & Spa Association
California Retailers Association
California Rice Commission
California School Boards Association
California Special Districts Association
California State Association of Counties
California Strawberry Commission
California Transit Association
California Wild Rice Advisory Board
CAWA – Representing the Automotive Parts Industry
County of Santa Barbara
Family Business Association of California
Far West Equipment Dealers Association
Grower-Shipper Association of Central California
Independent Insurance Agents & Brokers of California
League of California Cities
National Association of Mutual Insurance Companies
National Federation of Independent Business
Nisei Farmers League
Olive Growers Council of California
Public Risk Innovation, Solutions, and Management
Rural County Representatives of California
Special District Risk Management Authority
United Ag
Urban Counties of California
Western Agricultural Processors Association
Western Insurance Agents Association
Western Plant Health Association