April 26, 2020

The Honorable Gavin Newsom
Governor of California
State Capitol
Sacramento, CA 95814

The Honorable Toni Atkins
President Pro Tempore, California State Senate
State Capitol, Room 205
Sacramento, CA 95814

The Honorable Shannon Grove
Republican Leader, California State Senate
State Capitol, Room 305
Sacramento, CA 95814

The Honorable Anthony Rendon
Speaker, California State Assembly
State Capitol, Room 219
Sacramento, CA 95814

The Honorable Marie Waldron
Republican Leader, California State Assembly
State Capitol, Room 3104
Sacramento, CA95814

Subject: Workers' Compensation and COVID-19

Dear Governor and Legislative Leaders,

The undersigned organizations would like to thank all of you, the members of the legislature, and of course your staff, for the hard work and leadership that you have displayed in responding to the COVID-19 pandemic. We write to you today to contribute to the broader conversation about how California's workers' compensation system should appropriately intersect with COVID-19.

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 if they, as prescribed by law, delay a determination of liability, 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.

We understand that there are proposals under consideration in various venues, and we will respond to each of those separately after they have been fully evaluated. For now, we would like to share some core principles as you consider various public policy options.

Method of Enactment

We do not presume to tell you how to enact important public policy, and we understand the extraordinary nature of these times. We would, however, suggest that any policy in this area should be enacted through a stable mechanism that will provide clarity and predictability for both injured workers and employers. It is important that the administration of our workers' compensation system and the flow of benefits to injured workers not be destabilized by shifting rules and requirements.

Conclusive v. Rebuttable Presumption

One concept under consideration is the establishment of a workers' compensation "presumption". The function of a 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.
>
> Similar to a conclusive presumption would be the idea that employers could simply skip the process of determining workplace causation for certain workers. While this may not be called a "conclusive presumption," this concept would have the same impact. 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.

Of note, although there are examples of rebuttable presumptions in California's workers' compensation statues, there are no conclusive presumptions. The undersigned organizations would respectfully urge you not to establish a conclusive presumption. This type of action would transform California's important workers' compensation system into a safety net system for non-industrial COVID-19 claims.

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. The evidence would suggest that community spread is and will continue be a probable source of COVID-19 infections.

While it might make sense to err on the side of caution with a limited presumption policy applicable during the statewide shelter-in-place order, we would oppose the continuation of any presumption policy when that period ends, and all Californians face a renewed, shared risk for exposure.

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.

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. This is simply a provision that should not be considered.

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.

Cost Estimates & Concerns

The undersigned organizations both appreciate and share your concern for our employees, and we agree that workers' compensation benefits should be extended as appropriate for COVID-19 infections that are work-related. However, our comments above establish that the proposals under consideration are very likely to force significant numbers of non-industrial COVID-19 infections into an already-strained workers' compensation system.

The Workers' Compensation Insurance Rating Bureau has issued their "Cost Evaluation of Potential Conclusive COVID-19 Presumption in California," which estimated the cost of similar proposals to be somewhere between $2.2 and $33.6 billion per year depending on details of any eventual proposal. The WCIRB cites an approximate mid-range cost estimate of $11.2 billion, or a 61% increase in the cost of California's worker's compensation system (already the second most expensive in the country).

We would cite this as evidence that the decisions above matter, and respectfully urge you to approach this issue with great caution so that the workers' compensation system is functional and affordable as California attempts to climb out of the economic malaise that follows in the wake of COVID-19. Public agencies and private entities are facing unprecedented financial strain. Inappropriately adding burdensome costs will certainly further strain or even crush their ability to recover from this pandemic, leading to wide-spread insolvency and bankruptcy.

Probable Number of Claims

It has been suggested that California might not experience very many claims if the proposals under consideration are enacted, and that maybe the cost estimates might be overblown. We would suggest that the broad range in the cost estimate is an indicator of the potential volatility that could result from these proposals. We would also offer several factors that we believe will drive up the number of claims as we've described in this letter:

- Under California law any employers with notice of an occupational injury or illness are required to provide the employee with a claim form and information on how to file a workers' compensation claim. If the law says that all COVID-19 infections are conclusively work related for certain populations, that means that an employer will have an affirmative obligation to lead employees toward a claim.

- Most group health payers currently filter out occupational versus non-occupational injuries and illnesses and consciously work to move work-related injuries into the workers' compensation system where they belong. If California has a conclusive presumption as described above, all other health care payers (health plans, union health care benefit trusts, and even the state and federal governments) will have a significant fiscal incentive to actively move infections into the workers' compensation system.

- The first of Governor Newsom's six critical indicators for modifying the stay-at-home order includes our collective ability to monitor and protect our communities through testing and contact tracing. There will be widespread testing, workplace screenings, and some amount of antibody testing.

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. We look forward to further discussion on individual proposals, and we are prepared to evaluate and discuss the performance of California's workers' compensation system. However, we think it is important that the discussion be focused on extending benefits for *work-related* injuries and illnesses. California

employers have been significantly impacted by this crisis and simply cannot be the safety net for this pandemic by providing workers' compensation benefits for all employees, even when they are not injured at work. Thank you for your time and thoughtful consideration.

Sincerely,

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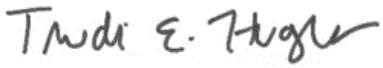

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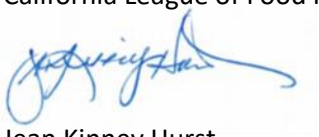

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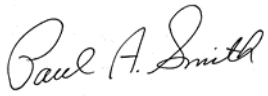

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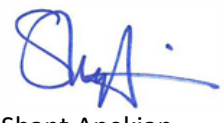

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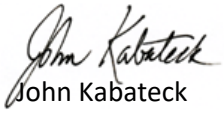

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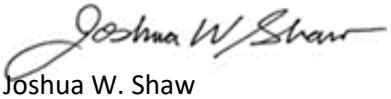

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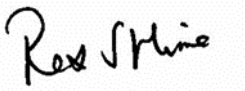

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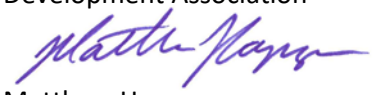

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cc. Senator Jerry Hill, Chair of the Senate Committee on Labor, Public Employment and Retirement
Assemblymember Tom Daly, Chair of the Assembly Insurance Committee
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