May 8, 2020

TO: Members, Senate Committee on Labor, Public Employees and Retirement

FROM: Ben Ebbink
California Chamber of Commerce

Acclamation Insurance Management Services
Allied Managed Care
American Property Casualty Insurance Association
California Association of Joint Powers Authorities
California Coalition on Workers' Compensation
Chambers of Commerce Alliance of Ventura and Santa Barbara Counties
CSAC Excess Insurance Authority
Fountain Valley Chamber of Commerce
Fresno Chamber of Commerce
Gilroy Chamber of Commerce
Greater Coachella Valley Chamber of Commerce
North Orange County Chamber
Oceanside Chamber of Commerce
Pleasanton Chamber of Commerce
San Gabriel Valley Economic Partnership
Santa Maria Valley Chamber of Commerce
Southwest California Legislative Council

SUBJECT: SB 893 (CABALLERO/SKINNER) WORKERS' COMPENSATION: HOSPITAL EMPLOYEES
OPPOSE – AS AMENDED APRIL 29, 2020

The California Chamber of Commerce and the organizations listed above respectfully **OPPOSE SB 893 (Caballero/Skinner),** as amended on April 29, 2020. **SB 893** will impose a significant financial burden on employers in the healthcare industry and create a troubling precedent for the workers' compensation

system in general by creating a legal presumption that blood-borne infectious diseases, tuberculosis, meningitis, methicillin-resistant Staphylococcus aureus (MRSA), other infectious diseases caused by novel pathogens, such as novel coronavirus (COVID-19), respiratory disease and musculoskeletal injury are presumptively workplace injuries for ***all*** hospital employees that provide direct care.

Injuries occurring within the course and scope of employment are automatically covered by workers' compensation insurance, regardless of fault. **SB 893** would require that hospital employees do not need to demonstrate work causation for specified injuries or illnesses in any circumstance. Instead, these injuries and illnesses would be presumed under the law to be work related. Presumptions of industrial causation for specific employees and injury types are simply unnecessary and create a tiered system of benefits that treats employees differently based on occupation and undermines the credibility and consistency of our workers' compensation system.

<u>This Legislation is Unnecessary in Light of the Governor's Recent Executive Order and Federal Legislation</u>

As a preliminary matter, on May 6, 2020, Governor Newsom issued an Executive Order establishing a rebuttable presumption for COVID-19 for any worker who reported to work outside of the home at the direction of their employer and who tests positive for COVID-19. This presumption applies from March 19, 2020 until July 5, 2020.

This development dramatically changes California's workers' compensation issues related to COVID-19, and creates significant cost pressures and procedural challenges for California's workers' compensation system. California employers, workers' compensation carriers, and other stakeholders are already struggling to deal with the implementation and effects of that Executive Order. To the extent this legislation addresses COVID-19 issues, it is therefore unnecessary and will further complicate an already fluid situation involving workers' compensation.

Moreover, the federal government is already paying to compensate workers who have gotten ill from Covid-19. As a part of the federal Coronavirus Relief Act (CARES Act) passed on March 27, 2020, the federal government approved a fund called Pandemic Unemployment Assistance (PUA). The purpose of this fund was to provide equivalent benefits to individuals not entitled to unemployment insurance, like independent contractors or business owners who have suffered a pandemic-related loss of revenue. But what has not been widely known or reported is that the PUA also provides benefits for ***employees*** who still have a job yet have been affected by Covid-19.

Specifically, Section 2102 of the CARES Act provides wage replacement benefits to five categories of employees: (1) employees who are diagnosed with Covid-19; (2) employees who are experiencing symptoms of Covid-19; (3) an employee who has a family member who has been diagnosed with Covid-19 and is the caregiver; (4) an employee who is the primary caregiver for a child who cannot attend school or a child care provider because of Covid-19; or (5) an employee who cannot get to the physical location of work because of a quarantine imposed due to Covid-19.

In addition, the federal Families First Coronavirus Response Act (FFCRA) provides emergency paid sick leave for covered employees who are diagnosed with COVID-19 or experiencing symptoms and seeking a diagnosis.

As we have stated previously, the private sector cannot be the safety net for this crisis. That is the role for government and, as explained above, the federal government has already stepped in to fulfill this function.

<u>Presumptions and the Workers' Compensation System</u>:

SB 893 creates a presumption of industrial causation for ***all*** hospital employees that provide direct patient care who manifest a blood-borne infectious disease, tuberculosis, meningitis, MRSA, COVID-19,

respiratory disease and musculoskeletal injury, during their employment, as well as for a time period *after* the end of employment. The practical impact of creating a presumption of industrial causation is that hospitals will have a nearly impossible burden of proof when attempting to contest a claim that they believe is non-industrial.

Workers' compensation insurance is a "no fault" system that is intentionally constructed in a way that leads to the vast majority of claims being accepted. In fact, when determining compensability, a Workers' Compensation Appeals Board administrative law judge is required to interpret the facts liberally in favor of injured workers.

> *Labor Code Section 3202 provides: "This division and Division 5 (commencing with Section 6300) shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment."*

COVID-19 Claims and California's Workers' Compensation System

As discussed above, California's no-fault system of workers' compensation insurance that must be "liberally construed" with the purpose of extending benefits to injured workers.

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 at 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.

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 rebuttable presumption would unquestionably push these non-industrial infections into the workers' compensation system.

The creation of a presumption for employees, absent any justification, serves only to make it nearly impossible for an employer to contest any claim for benefits, which will unnecessarily increase costs for employers.

SB 893 Would Dramatically Increase Costs on an Already-Strained Workers' Compensation System

The Workers' Compensation Insurance Rating Bureau recently issued a "Cost Evaluation of Potential Conclusive COVID-19 Presumption in California," which estimated the cost of requiring workers' compensation benefits for all essential employees to be somewhere between $2.2 and $33.6 billion per year. 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).

California employers are facing unprecedented financial strain as a result of the COVID-19 crisis and resulting shutdown in operations and new obligations imposed at the federal, state and local levels. 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.

The Presumption Is Extended to Up to 10 Years Beyond Termination of Employment:

Generally, there is a 1-year statute of limitations for workers' compensation claims. By requiring claims to be filed within one year from the date of injury, existing law ensures claims will be resolved while evidence and witnesses are still available. Stale claims, faded memories, and unavailable witnesses not only impede an employer's ability to defend against a claim, but also impede the ability of the workers' compensation system to properly evaluate a claim.
Per **SB 893**, a former employee could come back and file a claim based on this presumption for up to ***10 years*** for certain claims (and up to 5 years for other claims) after employment had ended and the employer would be virtually powerless to question the compensability of the claim. This presents a number of problems, not the least of which is that there is no rationale for basing the duration of an employee's post-employment presumption on the length of their service with a specific employer.

Even if the Legislature were inclined to revise the worker's compensation system for COVID-19, despite the cost referenced above, any revision should have a clearly defined end date.

SB 893 Creates a Troubling Precedent:

Although there is a long history of legal presumptions being applied to public safety employees in the workers' compensation system, there has never been a presumption applied to private sector employees. **SB 893** would be the first such presumption applied to private sector employees. Workers' compensation is designed to apply a consistent, objective set of rules to determine eligibility, medical needs and disability payments for all injured workers in California. We do not believe that the Legislature should take on the role of trying to identify likely injuries for every occupation in the state with the goal of creating special rules for those employees. This is an unrealistic expectation in an insurance system that covers thousands of types of employees and employers.

There Is No Evidence Supporting the Presumption Proposed by SB 893:

Supporters of **SB 893** have argued that healthcare workers are more likely to contract blood-borne infectious disease, tuberculosis, meningitis, MRSA, COVID-19, respiratory disease and musculoskeletal injury. All employees, in every type of occupation, face risks inherent to their employment. This is anticipated by current labor law, which requires every employer to evaluate the specific risks faced by their employees and develop an "Injury and Illness Prevention Plan" that mitigates those risks.

There has been no statistical evidence presented that would indicate, in any way, that workers' compensation claims by hospital employees for exposure to blood-borne infectious disease, tuberculosis, meningitis, MRSA, COVID-19, respiratory disease and musculoskeletal injury are being inappropriately delayed or denied by employers or insurers. In fact, it is our understanding that health care providers are widely accepting claims of COVID-19 for workers who provide direct patient care. In addition, there has not been any demonstration that hospital employees are uniquely impacted in a negative way by the current legal standard for determining compensability of industrial injuries.

Narrower Versions of this Presumption Have All Failed:

A similar bill, SB 567 (Caballero) was introduced in 2019, but that bill did not receive enough votes to pass out of the Senate Labor and Industrial Relations Committee. The bill was then amended in January of 2020 and is nearly identical to **SB 893**; however, the amended version of SB 567 was not set for hearing and **SB 893** was introduced instead.

Much narrower versions of this bill have all failed passage with many of them not making it out of committee or failing on the Assembly or Senate Floors. In 2014, AB 2616 (Skinner), the only version to make it to the Governor's desk, was vetoed by Governor Edmund G. Brown, Jr. In his veto message he stated, "This bill would create a first of its kind private employer workers' compensation presumption for a specific staph infection – MRSA -- for certain hospital employees. California's no-fault system of worker's compensation insurance requires that claims must be 'liberally construed' to extend benefits to injured workers whenever possible. The determination that an illness is work-related should be decided by the rules of that system and on the specific facts of each employee's situation. While I am aware that statutory presumptions have steadily expanded for certain public employees, I am not inclined to further this trend or to introduce it into the private sector."

Notably, AB 2616 was limited to only MRSA and the post-employment presumption only extended for 60 days, yet the bill was still vetoed. Here, **SB 893** extends the presumption to a laundry list of illnesses and injuries where the post-employment presumption is up to ***10 years*** for certain claims.

Such a drastic shift in the law will create an astronomical financial burden on healthcare employers and the workers' compensation system, creating an appreciable impact on the cost of healthcare at a time when we are trying to make healthcare more affordable as well as rebuild our economy from this pandemic.

For these reasons, we respectfully **OPPOSE SB 893.**

cc: Stuart Thompson, Office of the Governor
Gideon Baum, Senate Committee on Labor, Public Employment and Retirement
Peter Ansel, Office of Senator Caballero
Marvin Deon, Office of Senator Skinner
Cory Botts, Senate Republican Caucus
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