August 1, 2020

The Honorable Jerry Hill
California State Senate
State Capitol, Room 5035
Sacramento, CA 95814

The Honorable Tom Daly
California State Assembly
State Capitol, Room 3120
Sacramento, CA 95814

Subject: **SB 1159 (Hill & Daly): COVID-19 Workers' Compensation Presumption**
OPPOSE – As Amended 8/3/2020

Dear Senator Hill and Assemblymember Daly,

The undersigned organizations write to respectfully **OPPOSE 1159 (Hill & Daly)**, which would codify Governor Newsom's Executive Order N-62-20 and establish two distinct types of workers' compensation presumptions for COVID-19 infections that would be effective only after the expiration date of Executive Order N-62-20.

While we very much appreciate your efforts to work toward a rational public policy on the question of how workers' compensation will treat COVID-19 infections. Prior to the amendments of 8/3/2020 our coalition had a position of "concerns" and had sent a substantive letter explaining what would likely trigger our opposition. We appreciate the spirit of collaboration to date and hope to reach agreement at some point, but the severity of our concerns with the broad presumption created by Section 3 of the bill requires us to oppose.

Structure of the Bill

SB 1159 can be broken down into three separate pieces that combine for a complete policy. Our coalition has concerns with some of these pieces and not others, so we want to describe them briefly so we can be more precise with our concerns.

- SECTION 1 codifies the policy contained in Executive Order N-62-20, which was issued by Governor Newsom on May 6, 2020. This Executive Order and this section of the bill are only effective from March 19, 2020 through July 5, 2020.

- SECTION 2 establishes a rebuttable presumption for COVID-19 for some classifications of police, fire, and health care workers. The presumption maintains many of the provisions that were included in the executive order, including a 30-day decision-making window, a requirement to test positive, and more. Section 2 is effective July 6, 2020 and sunsets on 7/1/2024.

- SECTION 3 establishes a rebuttable presumption for COVID-19 for all employees and places of employment that are not covered by Section 2 of the bill. The presumption would not always be applicable. Instead, the law would trigger a presumption when there was a cluster of positive tests at any "specific place of employment". The size of the cluster needed to trigger the presumption is different based on the size of the specific place of employment. For employers with fewer than five employees no presumption is applicable. For employers with 6-100 employees a presumption is triggered when five employees test positive for COVID-19 at the specific place of employment within any 14-day period. For employers with over 100 employees the presumption turns on when 5% of the employees test positive for COVID-19 at the specific place of employment within any 14-day period. Section 3 is effective July 6, 2020 and sunsets on 7/1/2024.

Our coalition does not oppose the codification of the Governor Newsom's Executive Order in Section 1 of the bill. We oppose the 30-day decision making window and the proposed sunset date of July 1, 2024 for Section 2, but we don't oppose any other provisions of that section. We oppose Section 3 entirely and believe it should be removed from the bill.

Conditions Don't Warrant a Broad Presumption

When the Executive Order was issued by Governor Newsom the entire state was subject to a shelter-in-place order; except essential workers. Those workers were clearly subject to a higher risk for contracting COVID-19 because they were, for purposes of their employment, the only Californians not actively sheltering in place. California is no longer subject to that order, and business of all varieties are opening and will be open for the life of the presumption established by Section 3 of SB 1159. Californians are getting back to their lives the best they know how, and the

law should not make California employers financially responsible for the actions of employees outside of the workplace.

The current CDPH and CalOSHA guidance and requirements on re-opening various workplaces means that employers have been and continue to invest massively in procedures, training, equipment, and facility modifications to protect their employees. A person's place of employment is most likely the place where they are most compliant with masking, social distancing, and other protections.

There is no data suggesting that workers with a workplace exposure or infection are having a difficult time accessing the workers' compensation system. 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 (Labor Code Section 3202). 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.

The presumption policy proposed by SB 1159 would cause the workers' compensation system to absorb an unknown number of COVID-19 infections that were not work related. With no demonstrable problem we simply don't believe this is necessary.

5/5% Presumption Trigger Extraordinarily Problematic

Section 3 of SB 1159 adopts a completely new model of establishing a presumption and our coalition is strongly opposed to this portion of the bill in large part because we don't believe it's functional. SB 1159 would create a location-based presumption that turns on and off based on the number of infections at a specific place of employment over a rolling 14-day period. The idea behind the proposal is to use the development of COVID-19 clusters at a specific place of employment as a proxy for risk. While we don't believe this is a bad approach on paper, we are very concerned that the actual implementation would be disastrous.

The amount of tracking, record-keeping, analysis, and the number of moving parts to this policy make it administratively burdensome and complicated at a time where employers are already overwhelmed by keeping their doors open and their facilities serving the public. In order to properly administer benefits an employer will have to track an incredible amount of information just to establish which law is applicable when a claim for COVID-19 arises.

The complexity of this presumption mechanism makes it difficult to ensure consistent and fair coverage decisions. There are a lot of moving parts that depend on specific data inputs and analysis. California's workers' compensation system is known for being complex and litigious, with a high cost of benefit delivery. There is no question that this proposal would compound both of those problems, even if some of the rough edges were smoothed out through amendments.

We'd like to offer a few specific concerns:

> *Number of Positive Tests* – The SB 1159 is unclear on how employers should count the number of positive COVID-19 tests for purposes of establishing a cluster to trigger the presumption. The bill is not clear on whether employers are to count positive tests for work-related infections, or for all infections. If the number of positive tests at a location is meant to be an indicator of the workplace risk, then why would a presumption be triggered by an infection that occurred outside of the workplace? In fact, under the current proposal an employee infected outside of the workplace would have to be included in the calculation even if they hadn't been at work since their infection. Also unclear is whether the employee has any duty to inform their employer of non-industrial COVID-19 infections, and how that might hinder our administration of the law.

Specific Place of Employment – The definition of "specific place of employment" is imprecise and indicates that it "can refer to a single location or a group of contiguous locations". This is extraordinarily unclear. Consider large and complex operations like schools and universities, amusement parks, industrial operations, or logistics facilities. Some facilities might have multiple addresses, buildings, and other specifics that might fit neatly into this analysis. If employers don't have clear guidance on how to define a "specific place of employment" for the purposes of this law, then there will be serious problems and increased litigation is the likely outcome.

Counting Employees at a Specific Location – In order to appropriately apply a presumption based on the 5/5% calculation, and employer will need to determine how many employees are at a "specific place of employment" for the 14-day period being examined. Again, the bill is unclear on this point and we are concerned this will be another point of contention in litigation. Do we count employees who were travelling, on vacation, working remotely, or out sick? The bill attempts to address "employees with no fixed specific place of employment" but this portion of the bill is still quite unclear when applied to any number of scenarios.

Shortened Time Period for Decisions – Compounding the problems identified above is the requirement that employers make their decision to approve claims under the presumption in one-third the normal time period. With significant complexity added to the decision-making process the 30-day window to approve claims is insufficient. This will likely lead to some early decisions being reversed based on new information (the bill specifically allows this), which could change the 5/5% calculation for other claims retroactively and increase litigation due to premature denials.

Different Standards for Similar Employees – The 5/5% trigger will require employers to apply different standards to infections claimed by similar employees. An employer could get two claims a month apart for workers performing the exact same function but be required to treat them differently under the law. Some employers, such as counties and hospitals, will also have one group of employees covered under Section 2, and another group covered under Section 3. Applying two separate rules for various groups of employees at multiple locations unreasonably increases the burden at a time when counties and hospitals are laser focused on the health and safety of their communities.

Presumptions Should Simplify the Claims Process

The purpose of any workers' compensation presumption is to simplify the process of determining which claims are work-related. Because the California workers' compensation laws already lean heavily in the direction of providing benefits, a presumption should only be implemented where there is a demonstrated problem with the normal process. There is no data to suggest that workers with workplace acquired COVID-19 are even experiencing problems accessing workers' compensation benefits.

Section 3 of SB 1159 violates the underlying premise of a presumption by significantly complicating the process of determining whether a COVID-19 infection should be covered by workers' compensation. There is little question that the data tracking, analysis, and trigger system will lead to significant litigation.

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.

The Workers' Compensation Insurance Rating Bureau has issued their "Cost Evaluation of Potential Conclusive COVID-19 Presumption in California," which estimated the cost of other 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). This doesn't apply to this specific proposal, but we include the information to show the massive range in the cost analysis.

We believe that the WCIRB is working on a new cost estimate for SB 1159, and we think the legislature should consider that estimate before proceeding. 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.

Sincerely,

Acclamation Insurance Management Services
Advanced Medical Technology Association
African American Farmers of California
Agricultural Council of California
Allied Managed Care Incorporated
American Pistachio Growers
American Property Casualty Insurance Association
American Staffing Association
Association of California Healthcare Districts
Association of California School Administrators
Association of California Water Agencies
Association of Claims Professionals
Auto Care Association
BETA Healthcare Group
Breckpoint
California Alliance of Self-Insured Groups, Inc.
California Association of Health Facilities
California Association of Joint Powers Authorities
California Association of School Business Officials
California Association of Winegrape Growers
California Beer & Beverage Distributors
California Building Industry Association
California Cattlemen's Association
California Chamber of Commerce
California Citrus Mutual
California Coalition on Workers' Compensation
California Construction and Industrial Materials Association
California Cotton Ginners and Growers Association
California Farm Bureau Federation
California Farm Labor Contractors Association
California Forestry Association
California Fresh Fruit Association
California Grocers Association
California Hospital Association
California Land Title Association
California League of Food Producers
California Manufacturers & Technology Association
California Municipal Utilities Association
California Pool and Spa Association
California Restaurant Association
California Retailers Association
California Rice Commission
California Schools JPA
California Self Storage Association
California Special Districts Association
California Staffing Professionals
California State Association of Counties
California Strawberry Commission
California Travel Association
CAWA – Representing the Automotive Parts Industry
CompAlliance
Exclusive Risk Management Authority of California
Family Business Association of California
Far West Equipment Dealers Association
Grower Shipper Association of Central California
Independent Insurance Agents & Brokers of California
Lake Elsinore Unified School District
League of California Cities
Los Angeles Area Chamber of Commerce
Michael Sullivan & Associates, LLC.
Milk Producers Council
Monterey County
National Association of Mutual Insurance Companies
National Federation of Independent Business
Nisei Farmers League
Personal Insurance Federation of California
Public Risk Innovation, Solutions, and Management
Rural County Representatives of California
Self-Insurance Risk Management Authority I
Special District Risk Management Authority
The Council of Insurance Agents and Brokers
United Ag
United Hospital Association
Urban Counties of California
Western Agricultural Processors Association
Western Insurance Agents Association
Western Growers Association
Western Plant Health
Western United Dairies
West San Gabriel JPA