American Property Casualty Insurance Association
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Testimony of

American Property Casualty Insurance Association (APCIA)

House Economic Matters Committee

HB 1199 Workers' Compensation - Occupational Disease Presumptions – COVID-19

March 2, 2021

Oppose

The American Property Casualty Insurance Association (APCIA) is a national trade organization representing nearly 60 percent of the U.S. property casualty insurance market. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers. APCIA represents the broadest cross-section of home, auto, and business insurers of any national trade association. APCIA members represent all sizes, structures, and regions, which protect families, communities, and businesses in the U.S. and across the globe. APCIA members write 86% of the workers' compensation insurance in Maryland. APCIA appreciates the opportunity to provide written comments about concerns with House Bill 1199.

APCIA understands and agrees with the need to assist our front-line workers who contracted COVID-19 as a result of exposure in the workplace. We appreciate the magnitude of the current national emergency and greatly respect all those on the front lines. APCIA and the rest of the workers' compensation industry stand ready to do our part to support both Maryland employers and employees in resolving problems arising from the current crisis. However, HB 1199 is overly broad and should be rejected.

House Bill 1199 would create a presumption of coverage of COVID-19 as an occupational disease for a broad range of workers, including certain first responders and public safety officials, child care workers, education workers, essential workers, or health care workers. In view of the drastic nature of presumptions of coverage, which are rarely enacted because they dispense with the fundamental and reasonable requirement that a worker prove that an injury or illness is work-related, we believe that this universe of workers is far too broad and would impose ruinous and unsupportable costs on Maryland's workers' compensation system. The bill also drastically misses the mark in several other important respects, including insufficient proof of disease, inadequate ability for employers to rebut a presumption, and unlimited duration of the presumption provisions.

COVID-19 Presumption and Basic Principles of Workers' Compensation

Workers' compensation is a no-fault system that guarantees injured workers prompt indemnity benefits and unlimited medical care, without any deductibles or co-payments, even in the absence of any fault by the employer. This no-fault system benefits both Maryland employers and Maryland employees. Prior to enactment of workers' compensation in 1913, an injured worker was without remedy for workplace injury or illness unless he or she successfully proved negligence on the part of the employer, and similarly, was without remedy if the employer could prove the employee's own

negligence contributed to the injury. In return for no-fault compensation, the employer was free from the threat of civil litigation. Essential to maintaining this no-fault workers' compensation system, however, *is proof that the covered injury or disease arose out of and in the course of employment.* Requiring Maryland employers to cover injuries on an absence of fault basis without proof that the injury or disease arose out of and in the course of employment violates basic core principles underlying the workers' compensation system.

House Bill 1199 provides that for purposes of adjudicating workers' compensation claims, an employee who has been diagnosed with COVID-19 shall be presumed to have contracted the virus as an occupational disease in the line of duty or in the course of employment. The presumption that anyone who contracts COVID-19 must have contracted it at the workplace, however, lacks scientific and medical proof. COVID-19 represents a global pandemic, now with over 112 million cases worldwide and almost 2.5 million deaths, precisely because it is not an occupational disease but instead is a disease of ordinary life transmitted between persons who are in close contact with an infected person. Simply put, presumptions create a fiction that all COVID-19 disease for certain categories of workers somehow arise only out of the workplace even though people are interacting with family and friends, going to restaurants, attending social events or religious meetings, etc.

Individuals Eligible for Presumption

Notwithstanding these strong public policy reasons weighing against presumptions of workers' compensation coverage, APCIA is willing to accept extending a presumption to certain limited categories of workers, guided by the principle that the only reasonable justification for granting a presumption for an "ordinary disease of life" that the general public is broadly exposed to is that those workers are at a significantly higher risk of being exposed to the disease than workers in other industries.

APCIA would accept extending a presumption of coverage to the first responders and public safety officials listed in Section 9-503(e) *as long as their duties require them to have direct contact with the public*, since the nature of many such duties makes social distancing and other safety measures impractical if not impossible.

APCIA would also accept extending a presumption to certain health care workers, though the scope of the presumption for those workers in HB 1199 is overly broad. Merely requiring that the duties of health care workers must "include direct patient care or ancillary work in areas where patients diagnosed with COVID-19 are treated" is insufficient from a true risk standpoint and would result in a massive and unjustified increase in system costs. For this presumption to be rational, it should be limited to health care workers who have both regular and direct contact with patients known or suspected to have COVID-19.

However, APCIA strongly opposes extending a presumption of coverage to any other category of workers listed in HB 1199:

<u>Individuals required to provide child care to first responders or health care workers</u> – Given the extreme nature of presumptions of coverage, which relieve an individual from the basic obligation of proving their claim, it is simply a step too far to stack a presumption on top of a presumption – and this proposal would go even farther by granting a presumption to an individual who does not even come into contact with a person entitled to a presumption (i.e., a first responder or a health care worker) but one of their relatives (i.e., a child). This is far too attenuated a causal chain to warrant a presumption.

Education workers – Unlike, e.g., front-line health care workers, education workers do not have regular or direct – and unavoidable – exposure to individuals known or suspected to have COVID-19. If there are known or suspected COVID-19 cases in a school, the school will be closed – something that cannot occur with a hospital.

Essential workers – Granting a presumption to workers in this extremely broad category would, to put it bluntly, imperil the stability of Maryland's workers' compensation system. Using the NCCI COVID-19 Hypothetical Scenario Tool[1], it is estimated that, assuming a 10% infection rate, a broad presumption of this nature would increase Maryland workers' compensation losses by more than $792 million, a 76% increase in annual losses. Applying a 20% infection rate would increase losses by nearly $1.6 billion, a 152% increase in annual losses.

Workers who occupy, clean, or repair areas occupied by patients or the children of first responders or health care workers – Since child care workers, education workers, and essential workers should not be entitled to a presumption as explained above, those who perform these ancillary duties should not qualify either. As for health care workers who perform these duties, they should only qualify for a presumption if, as with health care workers generally, they have both regular and direct contact with patients or other individuals known or suspected to have COVID-19. According to the Centers for Disease Control (CDC), spread from touching surfaces is not thought to be a common way that COVID- 19 spreads.

Proof of Disease

The standards in HB 1199 for proving that an individual has COVID-19 to the point of warranting a presumption of coverage are severely inadequate, since they call for accepting (i) a mere diagnosis without a test; (ii) a positive result on an undefined test; or (iii) a positive result on a mere antibody test. "Diagnosis" should be defined as a positive PCR test for COVID-19, an incubation period consistent with COVID-19, and symptoms and signs of COVID-19 that require medical treatment.

The most reliable laboratory test for determining whether a person has COVID-19 is a nucleic acid detection test, such as a positive polymerase chain reaction ("PCR") test. Both the Council of State and Territorial Epidemiologists (CSTE) and the Infectious Diseases Society of America (IDSA) have concluded that the most appropriate test to determine whether an individual currently has COVID-19 is the PCR test. These tests are readily available in the United States.

Unlike PCR tests, antibody tests do not tell whether a person has COVID-19 at the time of the test, but only whether an individual may have been exposed to the virus associated with COVID-19 such that the body developed antibodies. A person can test positive for COVID-19 under an antibody test without having the disease and without having any symptoms. Antibody tests have a high prevalence of false positive and false negatives, and medically are not indicated for use in patient management or medical treatment. Medically, the results of an antibody test do not impact decisions in treatment of a workplace injury or disease. Similarly, subjective diagnosis based on mere symptoms, without a PCR test, is not an accurate method of determining whether a person has COVID-19.

Reliance on inappropriate, and often inaccurate, antibody tests, or a subjective diagnosis without a PCR test, can be detrimental to a worker's health. The high proportion of false positives and false negatives could lead medical providers to prescribe dangerous toxic anti-viral therapeutics with potentially long-term side effects or could cause misdiagnosis and delay treatment of a potentially

[1] https://www.ncci.com/SecureDocuments/COVID-19-Scenarios.html

fatal disease. Toxic antiviral treatments, such as currently used to fight COVID-19, can result in side effects including eye damage, heart arrhythmia, liver toxicity, and impaired kidney function.

Ability to Rebut Presumption

The current manner in which a presumption can be rebutted – only upon showing that the employment was not a direct cause of the disease – is far too narrow. If a claim can be brought without any proof, there should not be artificial constraints placed on an employer's ability to rebut the claim. The presumption should be rebuttable by (among other things but not limited to) evidence that the employee was at least equally likely to have been exposed to COVID-19 outside the course and scope of employment.

Duration of Presumption

It is critical that there be a specific, defined end date to any presumption. As the state continues to re-open, there are more opportunities for individuals to move around and interact with others, thus making it more difficult to pinpoint where those infected by COVID-19 had contracted the virus and more unlikely to simply presume that the disease was contracted at the workplace. Accordingly, any presumption law should sunset six months after enactment or upon the expiration of the last consecutive emergency order, whichever occurs sooner.

For these reasons, APCIA urges the Committee to provide an unfavorable report on House Bill 1199.

Respectfully submitted,

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