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Economic Matters
Room 231
House Office Building
Annapolis, MD 21401

House Economic Matters Committee

HB 765 – Workers' Compensation – Occupational Disease Presumptions – Novel Coronavirus (Essential Workers' Compensation Act)

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

HB 1247 – Workers' Compensation – Occupational Disease Presumptions- COVID-19

Position: Unfavorable

February 26, 2021

Dear Chairman Davis and Vice Chair Dumais:

Maryland Defense Counsel, Inc., (MDC) urges rejection of HB 765, HB 1199, and HB 1247 which create a presumption of compensability for COVID-19 infections as an occupational disease under the Maryland Workers' Compensation Act for first responders (such as firefighters, EMTs, and police officers), correctional officers, health care workers, child care workers. In addition to these workers, HB 1199 creates a presumption of compensability for COVID-19 infections for all essential workers required to work on the premises of a business or governmental agency that has been declared essential under a state of emergency or under an executive order.

Preliminarily, the bills have been misfiled in an inappropriate section of the Act because development of COVID-19 is not properly classified as an occupational disease. Under Maryland law, occupational diseases are ordinarily slow and insidious in onset and develop over time due to repeated exposure to a hazard associated with employment. *See e.g., Baltimore City v. Quinlan*, 466 Md. 1 (2019); *Foble v. Knefely*, 176 Md. 474 (1939); *LeCompte v. UPS, Inc.*, 90 Md. App. 651 (1992). While the science surrounding COVID-19 infections is still developing, there is no evidence that the disease develops in such a manner.

To the contrary, the current evidence suggests that infection can arise from a single exposure. In light of that, workers' compensation claims for contraction of COVID-19 should be filed as claims for an accidental personal injury pursuant to § 9-101(b)(3)(defining accidental personal injury as "a disease or infection that naturally results from an accidental injury that arises out of and in the course of employment…"). Further, the existing presumptions under Md. Code Ann., Labor & Employment § 9-503 are limited to first responders and apply only to those diseases which can properly be defined as "occupational diseases" under Maryland law. For the reasons stated above, COVID-19 cannot be identified as an occupational disease because it develops from a single exposure.

MDC further opposes the above-referenced bills as they all create an open-ended presumption for COVID-19 infections with no termination date of the presumption. Of the limited states that have enacted COVID-19 presumption legislation into their existing workers' compensation statutes, the majority include sunset provisions terminating the presumption on a date certain or at the end of the applicable emergency executive order.

In addition, the proposed legislation all attempt to apply the proposed COVID-19 presumptions retroactively, and the retroactive applicability of legislation has been found to be unconstitutional under existing Maryland law. *See, e.g. Muskin v. State Dep't of Assessments & Taxation*, 422 Md. 544, 555–56, 30 A.3d 962, 968–69 (2011), *Dua v. Comcast Cable of Md. Inc.,* 370 Md. 604, 630 n. 9, 805 A.2d 1061, 1076 n. 9 (2002). Maryland law provides for the application of retroactive legislation in very limited circumstances, none of which exist under the proposed legislation referenced above. The Court of Appeals has found that "a proper retroactive application of a statute requires a two part analysis: first, a determination that the legislature clearly intended the statute to apply retroactively, and second, a determination that retroactive application does not "impair vested rights, deny due process, or violate the prohibition against *ex post facto* laws." *John Deere Const. & Forestry Co. v. Reliable Tractor, Inc.,* 406 Md. 139, 145–46, 957 A.2d 595, 598–99 (2008). The Court in *John Deere* further explained that, while there is no "bright line rule" for determining what constitutes retroactive application, impermissible retrospective statutes are those that "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." 406 Md. at 147, 957 A.2d at 599 (citing *Landgraf v. USI Film Prods.,* 511 U.S. 244, 269, 114 S.Ct. 1483, 1499, 128 L.Ed.2d 229, 254 (1994)). Here, there is no dispute that the proposed legislation would impermissibly increase the liability of employers and insurers for past potential exposure to COVID-19, which violates existing Maryland law regarding the application of retroactive legislation.

Finally, the above-referenced bills are wholly unnecessary because injured workers in Maryland already have a remedy available to them under the Workers' Compensation Act for COVID-19 infections that arise out of and in the course of employment. Like all other injury claims, injured workers have the ability to file an accidental injury claim for their COVID-19 diagnosis against their employer. Some of those claims are being accepted by the employers as compensable and benefits are being paid voluntarily. For those claims that are being contested, the Workers' Compensation Commission ("Commission") is holding hearings and issuing decisions regarding compensability. Per the most recent information provided by the Commission, there have only been 1190 COVID-19 claims filed to date, and have been timely litigated, if necessary, usually within 90 days or less from the time of filing. Accordingly, there is no practical need or reason to create a legislative COVID-19 presumption to address an issue that does not exist. Of note, those claims in which the Commission have found to be compensable have been found to be "accidental injuries" rather than "occupational diseases."

Those decisions are being made on a case-by-case basis based on the facts and circumstances of each case. Any party aggrieved by the Commission's decision is entitled to a *de novo* appeal.

Accordingly, injured workers already have a full remedy at law under the Workers' Compensation Act to litigate their COVID-19 infection. As such, the above-referenced bills are superfluous and unnecessary.

For additional information, please contact:
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Very truly yours,

Julie Murray
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The Maryland Defense Counsel

Cc:

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