

Testimony of

American Property Casualty Insurance Association (APCIA)

Senate Finance Committee

SB 812 Workers' Compensation - Occupational Disease Presumptions – COVID-19

March 9, 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 Senate Bill 812.

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.

Senate Bill 812 would create a presumption of coverage of COVID-19 as an occupational disease for a broad range of workers including certain firefighters, rescue squad members, advance life support unit members, police officers, sheriffs, deputy sheriffs, correctional officers, and certain 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 certain amendments are necessary. The categories of workers covered need to be refined, meaningful proof of disease needs to be added, an employer's ability to rebut the presumption needs to be expanded and the presumption should expire when the state of emergency ceases.

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.

Senate Bill 812 states "COVID-19 is an occupational disease" and 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 "that was suffered in the line of duty and is compensable." 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 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 significantly higher risk of being exposed to the disease than workers in other industries.

APCIA would accept extending a presumption of coverage to the listed first responders whose duties require them to have direct contact with the public, since the nature of many of their 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 this presumption must be refined. Merely requiring that an individual be employed in a facility where patients are diagnosed or treated with COVID-19 is clearly insufficient from a true risk standpoint and would result in a massive and unjustified increase in system costs, so the presumption should be limited to health care workers who have both regular and direct contact with patients 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 current standards in SB 812 for proving that an individual has COVID-19 to the point of warranting a presumption of coverage need significant improvement, since they call for accepting (i) a mere diagnosis without a test or tests positive for COVID-19 or a positive result on a mere antibody test. Accordingly, "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 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

SB 812 does not provide employers any opportunity to rebut a presumption that a proven case of COVID-19 arose in the line of duty and is therefore compensable. If a claim can be brought without any proof, fundamental due process demands that an employer should be able to rebut the presumption 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 line of duty.

Retroactive Application

SB 812 would be retroactive to claims filed on or after January 1, 2020. Retroactive application of any legislation – much less a bill that fundamentally changes the nature of coverage for workers' compensation claims – is fundamentally unfair. Neither employers nor insurers ever calculated that an ordinary disease of life would be presumed to be covered workers' compensation claims absent any proof that it was contracted in the course and scope of employment. Furthermore, issues of proof and rebuttal, which present challenges even on prospective claims due to the fact that COVID-19 can be contracted anywhere outside of the workplace and has symptoms that resemble other illnesses, would be unfairly and unreasonably exacerbated by making any presumption retroactive.

Duration of Presumption

While it is critical that there be a specific, defined end date to any presumption of coverage, SB 812 is completely lacking in this regard. 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 illogical and unfair 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 Senate Bill 812.

Respectfully submitted,

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