American Property Casualty Insurance Association
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Testimony of

American Property Casualty Insurance Association (APCIA)

Senate Finance Committee

SB 860 Workers' Compensation - COVID-19 Occupational Disease Presumptions – Public School Employees

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 860.

APCIA 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 860 would create a presumption of coverage of COVID-19 as an occupational disease for public school employees. 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 unsupportable costs on Maryland's workers' compensation system. The bill also misses the mark in several other important respects, including insufficient proof of disease, and the 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.

Senate Bill 860 provides that for purposes of adjudicating workers' compensation claims, a paid public-school employee who has been diagnosed with COVID-19 shall be presumed to have a compensable occupational disease. 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. For instance, APCIA would accept extending a presumption of coverage to the first responders and public safety officials whose 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 who have both regular and direct contact with patients known or suspected to have COVID-19. However, APCIA does not support extending these presumptions to public school employees. Unlike 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.

Proof of Disease

The standards in SB 860 for proving that an individual has COVID-19 to the point of warranting a presumption of coverage are severely inadequate, since they call for an employee testing positive or diagnosed with COVID-19 and the test was performed or diagnosed by a licensed health care practitioner. "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.

Ability to Rebut Presumption

SB 860 currently provides that a presumption of coverage is rebuttable with "substantial evidence to the contrary that demonstrates that the employee tested positive for or was diagnosed with COVID–19 for reasons not arising out of and in the course of employment." While this language is an improvement from similar pending bills that provide more limited (or even no) ability to rebut a claim, we believe it is still 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.

Retroactive Application

SB 860 would be retroactive to claims filed on or after March 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 860 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 860.

Respectfully submitted,

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