Oregon
Kate Brown, Governor

Department of Consumer and Business Services
MLAC | Management-Labor Advisory Committee
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January 15, 2021

Governor Kate Brown
President Peter Courtney
Speaker Tina Kotek

Dear Governor Brown, President Courtney, and Speaker Kotek:

At your request, in July 2020 the Management-Labor Advisory Committee (MLAC) sent you a report on the current workers' compensation system and the impact of the COVID-19 pandemic. The committee made a number of consensus recommendations, but management and labor had separate proposals for administrative or legislative changes relating to COVID-19.

In September 2020, the committee reconvened discussions. This letter provides an update on the implementation of our earlier recommendations, a summary of recent discussions, and the current status of the committee's discussions.

Implementation of July 2020 recommendations
MLAC recommended six action items to address COVID-19 in the workers' compensation system. The following is an update on the implementation of those recommendations.

Remove the Social Security number on the Form 801 Report of Job Injury or Illness. MLAC heard concerns that the use of a Social Security number on injury reporting forms has a chilling effect on workers filing claims. The Department of Consumer and Business Services (DCBS), Workers' Compensation Division, convened a stakeholder group to review the use of the Social Security number on claim reporting forms. Based on that discussion, the division removed the Social Security number from the two main claim reporting forms and adopted an administrative rule to implement this change, effective January 1, 2021.

DCBS should develop COVID-19 specific educational materials for employers and workers. Public input suggested there is a lack of understanding about a

worker's ability to file a claim for COVID-19 and that employers may be discouraging claim filing. MLAC recommended DCBS provide a notice for employers to alert workers to their rights. The agency developed an informational flier in multiple languages and a web page to provide this information, and distributed it widely by a notice to industry, GovDelivery lists, and stakeholder outreach.

*Support the rulemaking discussions conducted by Oregon OSHA relating to communicable disease standards as well as ongoing enforcement of personal protective equipment and face covering requirements***.** The committee supported the workplace safety efforts of Oregon OSHA and their administrative rulemaking process. OSHA adopted temporary rules effective November 16, 2020.

*Express concern about COVID-19 claim denial rates of some carriers***.** The committee was concerned about some insurers with apparent high denial rates for COVID-19 claims based on data reported to DCBS. Further committee discussion, noted below, resulted in an administrative rule establishing a focused audit to determine the reasonableness of COVID-19 claim denials. The final audit results are pending.

Convey support to the Division of Financial Regulation (DCBS) for the proposed rule to remove the impact of COVID-19 claims on employer experience ratings. The National Council on Compensation Insurance (NCCI) proposed to not hold COVID-19 claims against an employer when determining future costs for workers' compensation insurance premiums. The Division of Financial Regulation adopted the rule effective October 24, 2020.

Forward issues raised regarding public health, paid leave, contact tracing, and enforcement of retaliation laws to the responsible enforcement entities. Many issues were raised outside the scope of MLAC review, but they were nonetheless important concerns. We had recommended those issues be forwarded to the appropriate entities for their consideration. We will continue to share new issues if they are raised to us. We also would note that the Oregon OSHA temporary rules include specific worker protections for discrimination or retaliation under the Oregon Safe Employment Act.

MLAC discussions - Fall 2020

At the request of legislative leadership, MLAC continued discussions on COVID-19 issues. MLAC established a subcommittee in September 2020 to continue evaluating reported claim data and revisit discussions on the management and labor proposals identified earlier in the year.

Workers' compensation claim data

The subcommittee closely monitored reported COVID-19 claim data, published by DCBS in weekly (detailed) and monthly (summary) formats. The COVID-19 pandemic is a highly

unusual situation, so it will take time to identify trends in the data. The subcommittee identified one gap in data, which is the lack of information about accepted nondisabling claims (medical services only). These claims are not required to be reported to DCBS, and thus the available data does not show total COVID-19 claims in Oregon. In July, MLAC asked DCBS to conduct a data call of insurers to get accepted nondisabling claim information. In October, the subcommittee asked DCBS to do another data call to get updated information. This information will be available in early 2021 and will help the committee better identify the total volume of COVID-19 workers' compensation claims.

Administrative rules for COVID-19 claim processing

The subcommittee discussed an administrative rule proposal to give insurers guidelines on investigating COVID-19 claims and establish an audit of denied claims to determine if they were reasonably investigated. At MLAC's request, DCBS undertook a temporary rulemaking process, starting from the original management rule proposal and adjusting it to reflect DCBS' statutory authority.

Based on input from the MLAC subcommittee and the public, DCBS adopted a temporary rule (OAR 436-060-0141) effective October 1, 2020, that:

- Defines commonly used terms relating to COVID-19.
- Establishes what constitutes a reasonable investigation for COVID-19 exposure or illness claims.
- Establishes an audit of denied claims as of October 1 to determine if the claims were reasonably investigated under the prior claim processing rules, and setting criteria for audits of reasonable investigations of claims after October 1.

After the temporary rule was adopted, the department immediately entered the permanent rulemaking process to replace the temporary rule. It held a stakeholder advisory committee meeting and is taking public comment until January 8, 2021. They expect to file a final rule effective February 1, 2021.

Presumption for COVID-19 claims

The subcommittee also continued discussions relating to the labor proposal for a statutory presumption for COVID-19 claims. The committee discussion and stakeholder input focused on Legislative Concept 293 (7/27/20) which provided a presumption for COVID-19 for specified groups of workers. The subcommittee held three meetings on this topic but was unable to reach agreement on a proposal.

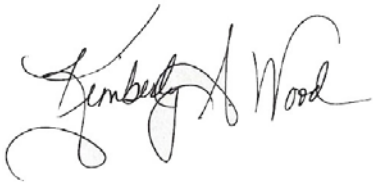
Current status

Management and labor members agree that COVID-19 presents difficult and serious issues for both workers and employers. However, based on the information received by the committee to-date, management and labor continue to have differing opinions about how to address those issues within the workers' compensation system. Each caucus' position is noted in the attachments to this letter.

At this time the full committee is unable to recommend a specific policy proposal that addresses COVID-19 in the workers' compensation system. MLAC will continue to monitor COVID-19 claim data and other issues. If the 2021 legislature develops specific policy proposals impacting the workers' compensation system, we are prepared to review them in light of the information we continue to gather.

We thank you for the opportunity to be of continued service as you consider addressing these serious issues.

Sincerely,



Diana Winther
Labor Co-Chair

Kimberly Wood
Management Co-Chair

Attachments

- Management member letter
- Labor member letter

Management Position on a COVID-19 Presumption

Over the past six months, the labor and management members of MLAC have approached the novel issues presented by COVID-19 with a seriousness of purpose and in a spirit of collaboration. As the co-chairs' letter outlines, we agreed on a number of recommendations to address the issues we heard from workers and their representatives, and are pleased to see the implementation of those recommendations.

The one issue on which we were unable to agree is the need for legislative action creating a presumption – specifically expressed in Legislative Concept 293 - that the workplace is the source of a worker's COVID-19 infection. *The management members of MLAC do not believe the available data supports the need for a presumption, particularly one with the broad scope and irrebuttability of LC 293*.

The Data

MLAC is charged with ensuring that a balance between management and labor is maintained in Oregon's workers' compensation system. For MLAC to make a recommendation that the Legislature enact a statutory presumption, it must conclude that there is an imbalance in the system that the presumption will correct. From our perspective, the data does not show that such an imbalance exists.

The latest COVID-19 claims data from the Workers' Compensation Division (WCD) through January 4, 2021[1] does not suggest a system-wide problem that should be addressed through a presumption.

The data shows a total of 1,750 disabling COVID-19 claims among Oregon's workforce. Those disabling claims are divided among 130 industry groups. Of the 130, 111 industries have fewer than 10 claims, making it impossible to recognize any trends for the vast majority of industries.

[1] It is important to recognize, as indicated in the co-chairs' letter, that the data includes only accepted and denied disabling claims — those which resulted in time-loss, permanent disability, or death. It does not include accepted non-disabling claims – those which required only medical services. As WCD points out in the notes to the latest data, the available information does not reflect the total number of workers' compensation claims filed, and thus should not be used to calculate the overall rate of acceptance or denial. Although WCD does not require reporting of accepted non-disabling claims, it recently issued a data call to insurers and self-insured employers that had more than five COVID-19 claims; that data has just become available and will be discussed by MLAC at January 8 meeting.

As might be expected, 65% of the claims are associated with four industry groups: hospitals, physicians' offices, and facilities for skilled nursing and assisted living for the elderly. Among that group, 82.1% of those disabling claims were accepted.

About 40% of the denials in these groups were due to the finding that the worker did not actually have COVID-19. The high accepted claims rate for these high-risk groups limits any perception that the system is imbalanced.

Sources of COVID-19 infection

Another important question relevant to presumption is whether the workplace was actually the source of a worker's COVID-19 infection. In an October 2, 2020 town hall meeting in Clatsop County, Dr. Emilio DeBess of the Oregon Health Authority addressed a cluster of cases among workers at Pacific Seafood in Warrenton that were largely associated with a Labor Day gathering. The presentation included the statements: "COVID-19 is a community acquired infection" and "Household transmission plays a significant role." He also noted that the Labor Day gathering in question was not associated with Pacific Seafood.

MLAC invited Dr. DeBess to attend a meeting to delve into those remarks, and members prepared a number of questions to help clarify how "workplace cases" are determined. However, the increase in cases throughout Oregon that began in late October and continues to date caused Dr. DeBess to cancel planned attendance at one meeting and has made him unavailable since then. Thus, MLAC has been unable to develop any further data better understand workplace vs. community transmission of COVID-19.

Additional data not yet available

One of MLAC's accomplishments is its support of a temporary rule, effective October 1, setting standards for COVID-19 claims processing. As a result of the rule, WCD is now auditing certain insurers' claim denials, ensuring that those denials result from a fair process. While we do not yet know what those audits show and whether they suggest additional action is needed, these enhanced audit standards provide additional assurance that the COVID-19 claims procedures are objective and fair, further reducing the need for a presumption.

We also do not know the outcome of COVID-19 denials that are being litigated. MLAC was informed during its Dec. 11 meeting that the Workers' Compensation Board has not yet decided any COVID-related cases.

To summarize:

- High acceptance rates of confirmed COVID-19 infections indicate that the current worker's compensation system is working as designed.

- Information provided by the Oregon Health Authority suggests that COVID infections are in large part community-based, with household transmission playing a large role. Given this information, a presumption that all COVID-19 infections arise in the workplace unfairly places the burdens of community infections on employers.
- Temporary rules adopted Oct. 1 that provide for WCD to audit denied COVID-19 claims create a framework for fair adjudication of claims, but we do not yet know the outcome of audits WCD has conducted.

Presumption Legislation: LC 293

As noted, the data that we have received to date does not change the management members' concerns about a presumption generally, and about LC 293 in particular. In fact, the lack of data supporting a presumption makes us even more doubtful about the breadth of the conditions and members of the workforce that would be covered.

To restate our concerns about LC 293:

- The proposed presumption says that "death, disability, impairment of health, loss of work time or expenses of medical treatment or services, including diagnostic or preventative medical treatment or services, is presumed to be compensable as an occupational injury or disease" if the worker meets two criteria: (1) he/she works in a job subject to the presumption and (2) meets one of five COVID-related conditions, only two of which involve workplace exposure. *There is no requirement that COVID be contracted in the workplace to be compensable.*

- The lack of language which relates "death, disability, impairment of health" etc. to COVID-19 means that if a worker covered by the presumption is diagnosed with or tests positive for COVID, regardless of where the exposure occurred, all of that employee's medical expenses and time loss would be compensable not only for COVID-19, but potentially for any illness or disability – diabetes, pregnancy, heart condition, cancer – the worker may suffer from.

- The workers to which it would apply are largely determined by their industry and direct exposure to the public. Yet, the data does not establish a clear link between a number of the industries listed in the proposal and the COVID-19 claims in those industries. An example is supermarket/grocery workers, where there are four claims reported statewide through January 4.

- By removing the key consideration that injuries or illnesses must occur on the job to be covered, the presumption tips the system's balance toward the worker to an unprecedented degree.

- The presumption is irrebuttable by the employer for all practical purposes:

- A suspected COVID source is sufficient to trigger the presumption but a known source is required to produce the "clear and convincing evidence" required to rebut it. This is the highest possible standard and, due to the nature of COVID-19, sets an impractically high bar for rebuttal.
  Employers are not allowed to investigate the medical history of the worker's off-work contacts to prove a confirmed source. Without the ability to investigate outside sources of contagion it is not possible to identify possible non-workplace sources of a worker's infection.

- Increased workers' compensation costs are likely to follow an enacted presumption system-wide, to be borne by employers that are already struggling and who have already made significant and unexpected investments to protect their workers and the public.

- Insurers and excess insurers may decide to leave Oregon's workers' compensation market, to not cover certain classes of workers, or to limit coverage available, as was the case following adoption of the firefighter cancer presumption.

While opposing a presumption at this point, we remain committed to reviewing the data as it is developed, and to use that data in considering all specific policy proposals impacting the workers' compensation system that are referred to MLAC.

Members of MLAC Representing Management

Kimberly Wood, MLAC Co-Chair
Tammy Bowers
Alan Hartley
Lynn McNamara
Kathy Nishimoto

Labor Letter

January 15, 2021

Governor Kate Brown
President Peter Courtney
Speaker Tina Kotek

Dear Governor Brown, President Courtney, and Speaker Kotek,

The Labor representatives of the Management-Labor Advisory Committee (MLAC or Committee) write this separate letter to you to express our sincere apologies for not being able to resolve the issue of a presumption for Oregon's frontline workers in light of the COVID-19 pandemic. We believe that both the Management and the Labor members worked hard to address this issue, but had obstacles outside of MLAC's control that contributed to our lack of success. We have much respect for the Management representatives on the Committee, but feel strongly enough about the need for a presumption to take the time and explain why we remain unable to sign onto their position.

MLAC has repeatedly proven itself to be a successful forum for addressing complex subjects affecting Workers' Compensation by generating compromise, thus helping to ensure the system remains balanced, fair, and effective. All Committee members are committed to balance and fairness as part of our stated set of shared values, along with adequacy of benefits, affordability, efficiency, and the need to maintain the appropriate combination of stability and flexibility.

MLAC has traditionally performed these functions under very different conditions than those we face during the COVID-19 pandemic. In the past we have relied on substantial quantities of data, calculable predictions of effects, and controllable timelines when making recommendations to the Legislature. These are either wholly absent, such as any degree of certainty about when there will be a definitive end to this pandemic, or at least significantly reduced, which is true in the case of both the predictable effects and concrete, quantifiable information. The Committee, through the Workers' Compensation Division, made multiple data calls to insurers related to COVID-19 claims, and spent hours reviewing what was received. Unfortunately, there remain inherent gaps in that information which are difficult to fill without a case-by-case review of each claim, such as the facts that prompted an acceptance or denial. In order to conduct a proper analysis to see if the current system is unfairly burdening workers, we would need to be able to review information that is not required to be reported, such as medical costs on denied claims and if those with denied claims received other forms of employer-provided aid. Frankly, MLAC is not designed for this type of evaluation, especially given the unique time pressures and rapid escalation of this pandemic.

In the past MLAC has benefited from broad stakeholder engagement when trying to find balanced solutions to issues within the Workers' Compensation system. The PTSD presumption for first responders is a great example of how a wide range of affected parties were able to come together to carefully craft an equitable path forward. However, in the case of a COVID-19 presumption for frontline workers, business stakeholders provided testimony in full and unwavering opposition. Their position focused mainly on their belief that the system is working according to the limited data available, and that the pandemic is primarily a social issue, so a

presumption would unfairly shift costs to employers. This made developing legislation that had the potential to gain unanimous MLAC support and any chance of successfully passing into law nonexistent.

With this combination of limited access to the information the Committee typically relies on to make informed decisions, and the clear indication that necessary stakeholders would not be at the table, it became clear that MLAC was not the forum best able to address this issue. At the end of the day, a presumption for frontline workers is really a policy decision that is more appropriately placed directly in the hands of our elected officials. The standard MLAC process is not possible and will likely not be possible until it is too late to be meaningful. So much time has passed at this point that we likely have already left many workers feeling abandoned by the system, even though they maintained their posts on the front lines.

It is unfortunate that MLAC as a whole was unable to come to a definitive conclusion on a presumption, although we believe that many other important achievements were made. Those include the removal of Social Security numbers from the 801 and 827 forms, the education of employers and workers on the right to file a claim related to COVID-19, and the audit of insurers that appear to have an excessive number of COVID-19 claim denials. The Labor members of MLAC felt it necessary to join together in this letter to express our continued support of a COVID-19 presumption for frontline workers, although we do not claim to be best equipped to propose which Oregonians fit into that definition. Below is a summary of why we believe a presumption is necessary to preserve the proper function and purpose of the Workers' Compensation system in Oregon.

<u>The Labor members of MLAC have reservations around the need for a medical or expert opinion in the Administrative Rule, and are also concerned that it does not provide a fix for individual workers, nor does it seem to be successfully codifying the good practices of one insurer across the whole industry.</u>

One of the functions of the Administrative Rule (Rule) drafted to address COVID-19 and which is still in the finalization process, is to specify what constitutes a reasonable investigation. According to the current language, obtaining a medical or expert opinion may be a part of a reasonable investigation if the source of the exposure is unclear. As Labor MLAC members and worker advocates expressed repeatedly during discussions on the Rule, it may be difficult to find a medical provider or other expert willing to say that it was more likely than not the worker contracted COVID-19 in the workplace because of the current near-omnipresence of the virus. This seems like it has the potential to be especially problematic when dealing with a worker's general practitioner provider, who is not likely an expert on novel infectious diseases and workplace epidemiology. This may be further exacerbated as we continue to face new strains that are even more contagious. Additionally, it is anticipated that an Independent Medical Exam (IME) requested by an insurer will often be just a record review, even if an in-person examination (or a tele-medicine appointment) would have given the worker a chance to better explain the circumstances around their contraction of the disease. Due to that record review opinion, the worker does not have a right to seek a Worker Requested Medical Exam (WRME) if

the IME does not support the worker's claim, leaving the worker further disadvantaged and the system unbalanced.

Another purpose of the Rule is to set criteria for audits regarding the reasonable investigations of claims. The Labor representatives of the Committee appreciate what this Administrative Rule (Rule) proposes to do, which is to prevent insurers from denying workers' claims without any basis. However, the Rule does not help the individual worker whose COVID-19 claim has been denied. This is because the Workers' Compensation Division is only able to audit claims that are completed. If, during the audit, it becomes apparent that the insurer did not obtain a medical or expert opinion prior to denying the claim, ignored an opinion that supported a worker's claim, and/or otherwise failed to fairly process a claim, the only action the Workers' Compensation Division can take is to fine the insurer. It cannot overturn the worker's denial and provide benefits, and is therefore not a fair solution, nor one that provides adequate and predictable benefits for injured workers.

The last major purpose of the Rule was to codify the benefit of the doubt that SAIF Corporation was giving workers when processing COVID-19 claims. Based on the data from the January 11, 2021 report from the Workers' Compensation Division, the Labor side of MLAC is incredibly concerned with the disproportionate denials for COVID-19 claims found among the self-insured and private insurers. This data shows that SAIF has only denied 12% of claims, whereas self-insured employers have denied 54.3% of COVID-19 claims, and private insurers have denied 64.1% of COVID-19 claims.[1] We believe that there are workers among these denials whose claims likely should have been processed, and that a presumption would balance what is clearly a large discrepancy in half of the market.

The Labor members hope that the clarity the Rule provides will assist in the proper processing of COVID-19 claims, and the threat of financial penalties will motivate insurers to follow the law and all related administrative rules. However, it would be foolish to believe the Rule will guarantee full compliance. There are likely some insurers that will hope not to be caught or will factor in a certain amount of fines as a cost of doing business. Those of us representing Labor appreciate the Rule and worked collaboratively as a Committee to shape it to be as useful as possible. We just do not feel that it does enough on its own to make the Workers' Compensation system function as it should in this pandemic.

<u>The data MLAC has reviewed is likely incomplete, and therefore unable to provide a true picture of what workers are experiencing under COVID-19 due to the lack of knowledge around the right to file a claim, reluctance to file a claim based on the burden of proof, and the alternatives available to workers regarding financial support.</u>

[1] These percentages were extrapolated from the data available on the Workers' Compensation Division website under "Oregon Workers' Compensation COVID-19 claims data": https://wcd.oregon.gov/Pages/COVID-19-updates.aspx.

As mentioned above, the information that MLAC has traditionally utilized in order to make recommendations on changes to Oregon's Workers' Compensation system has not been available when considering a COVID-19-related presumption. Although the Workers' Compensation Division has done an excellent job of gathering and providing data to the Committee, the data that is available is incomplete and often counterintuitive. True clarity around the reason for denials is not readily apparent without reviewing each individual claim. Additionally, what data we have seen shows that there are industries that have a surprisingly small number of claims, such as agriculture (the majority of claims are from supportive activities for forestry and not farming, even though there have been a number of reported outbreaks among farmworkers in the state). The same is true for manufacturing, warehousing, and retail workers. This is in addition to the concerning high rate of denials amongst self-insured employers and private insurers when compared to SAIF's denial rate mentioned above. In considering the outbreaks reported by the Oregon Health Authority, the evidence shows that there are workers who contracted the virus in their place of work, even if the initial case was brought in from an outside non-work-related source. Pointing out that someone attended a family barbeque and contracted COVID-19 does not negate the fact that this individual then carried the virus into the workplace and infected others while at work. Where the initial carrier may have been infected at a social event, all subsequent infections of coworkers while working is workplace exposure and illness and subject to the Workers' Compensation system. Comparing this analysis to the available claim data strongly suggests that the system is not working as intended, as the system's goal is to provide stability and certainty for workers who develop a health condition in connection with work.

We also cannot calculate how many workers have not filed a claim because they were unaware that that was even an option. The Labor members of MLAC appreciate the information that is being disseminated now, but the flyers took a number of months to create and distribute to workplaces. Again, the data we considered as a Committee likely does not reflect the number of claims that might be in the system, including the number of denials, if all workers knew at the onset of the pandemic that filing a claim was an option.

The data also cannot tell us how many workers did not file a Workers' Compensation claim because they did not want to fight what appeared to be an impossible battle, and/or they feared retaliation from their employer. Retaliation was a concern before COVID-19 and will unfortunately remain one once the virus is under control. We understand a presumption does not fully address the problem of retaliation. However, the issue likely has affected the data that MLAC has been evaluating when trying to determine the necessity of a presumption, skewing and obscuring that information in a problematic way that frustrates our ability to fully understand the scope of the issues. If frontline workers had the benefit of a presumption, they would have a better chance of a valid claim being accepted. Reassured of a predictable and fair outcome, they would likely be more willing to go through what is still a very challenging process and to risk potential repercussions from a bad-acting employer.

As it stands now, when a worker learns that they alone bear the burden of proving where they contracted the disease, many choose not to file a claim. Not because they do not sincerely believe they contracted the disease at work, but because they perceive filing a claim as an inefficient and

unpredictable fight through an optional system when better alternatives exist. Every Labor member of MLAC has had conversations with the workers they represent to this effect. It must be acknowledged that these are workers who have the additional support and protection of a collective bargaining agreement and union representation. It is easy then to imagine that an unrepresented worker would feel even less confident in taking the chance of filing and risking potential retaliation when they realize that the current lack of scientific understanding of the virus creates a nearly insurmountable burden of proof for workers under the current system. The fact that the law prohibits such retaliation is small comfort to workers who live paycheck-to-paycheck during a pandemic, are perhaps struggling with food insecurity, lack of childcare, home schooling pressures, or are dealing with any of the normal life challenges that have been intensified during this pandemic. Even if the employer is found guilty of retaliation, making ends meet while trying to prevail through the appeal process and related cases is most likely unmanageable for a worker already living on the edge, and so many more workers are living on that edge now.

Last, the data cannot tell us how many workers opted not to file a Workers' Compensation claim because there were other easier alternatives available to them, whether it was paid sick leave, unemployment benefits, or other forms of support. The fact that workers took easier paths is not to suggest that having these substitutes should be eliminated. We are certain that these alternatives have been a huge benefit to Oregonians during this crisis. However, ready access to them likely affected the data that the Committee studied in order to assess whether or not the system is functioning properly, making that assessment incomplete and flawed. A system in which workers who contract this terrible disease at work but choose not to file a Workers' Compensation claim because they need quick financial support without a legal battle is not a system that is functioning as it should, or as the statutory policy states.

<u>We are only beginning to understand the health ramifications of COVID-19, and where the virus was more likely than not contracted at work, it is fair that the system and not the individual worker bear the costs of future medical care.</u>

Perhaps the most frightening part of this pandemic are the unknowns. When will we have the virus under control? What will our communities look like when we can finally return to normal? What businesses will survive? Will our jobs be forever changed? Will there be enough vaccine available? Will it be able to protect people from new COVID-19 strains? How long will immunity last? Perhaps most importantly, and one that we may be unable to fully answer for a substantial period of time: what are the long-term effects of contracting COVID-19?

Tragically many Oregonians, as well as our fellow Americans and people across the globe, have lost their lives. Many more will perish before we put this pandemic behind us. Some individuals had little to no symptoms and are living life as they did before contracting the virus. We are also seeing "long haulers" – those for whom COVID-19's effects continue long after the normal course of recovery. These long-term symptoms can include memory problems, shortness of

breath, racing heart, and digestive upset. Lung scarring, abnormal heart rhythms, and inflammation of the heart are also potential complications.[2]

Knowing this, it is increasingly more concerning that workers may not be filing claims for all the reasons listed above, or may be unsuccessful with a claim that should be accepted but for the unequitable burden of proof currently facing workers. Those of us representing Labor on MLAC understand the concern of Management, employers, and other stakeholders – why should this burden be placed on them?

It is in the very core of the workers' compensation system that we find the answer. At its heart, Workers' Compensation is an insurance plan, and all insurance is based on the allocation and management of risk. The concerns expressed by both Management and Labor relate to the uncertainty of the costs, caused by the pandemic's effects on the workplace, which are incurred by employers and workers. Management has expressed concern about various potential increases in costs that could result from the adoption of a presumption, where Labor has expressed concern about the possibility of costs being shifted unfairly to workers through a potential lack of claim initiation and potential increases in denials. Both of these concerns relate to the allocation of risk, as the costs in question have not yet been accrued. In the short term, the question becomes which group must bear the risk until costs can be properly attributed in the long term, once better understood and actually accrued.

To punt on the issue of a presumption until there is more information shifts the entire risk to workers and does not keep with the "grand bargain" of our Workers' Compensation system. Similarly, to grant a broad presumption covering all workers would shift risk completely to employers, and again not be a "bargain." The only approach that represents a sharing of risk between both groups would be a presumption that covers frontline workers. Without such a compromise, frontline workers, who are often least likely to be able to manage risk, are shouldered with the entire risk of how the pandemic could unfold.

In addition to the allocation of risk explained above, there is an additional reason that the burden is better suited for employers and the Workers' Compensation system, rather than the individual worker. There is a growing movement within Oregon's business community of employers that are choosing to defy openly the health and safety laws regarding COVID-19, putting their workers in the vulnerable situation of having to choose between their jobs and their safety during a pandemic. Perhaps some workers can afford to simply refuse to go to work, but to believe that all workers are positioned to do this is simply divorced from reality. The chance that these workers will contract COVID-19 in the workplace is therefore directly increased by the very nature of their employment situation.

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[2] Barber, Carolyn. "The Problem of 'Long Haul' COVID." *Scientific American*, Springer Nature America, Inc. 29 December 2020, scientificamerican.com/article/the-problem-of-long-haul-covid/.

Even more frightening is the possibility that some workers may be swayed by these rogue employers to believe in any number of the various conspiracy theories and pseudo-scientific arguments that COVID-19 is not anything to worry about, or that developing herd immunity through exposure is better, or that COVID-19 is a hoax and wearing a face covering and social distancing is a violation of their constitutional rights. We have all heard these statements and more, even from individuals we thought knew better. Unfortunately, the problem is compounded by the fact that many of the employers pushing for open defiance of safety laws are coordinating with community leaders who were looked up to by the affected workers and their communities. Although we would like to believe that even under the current burden of proof this sort of information would be considered in evaluating a claim, at the end of the day if an infected worker cannot find a way to prove the existence of other COVID-19 cases in the workplace (somehow miraculously overcoming various confidentiality and privacy laws), they will still have an unacceptable probability of being denied. We are not saying that all employers are like this, or even share these sentiments, but there have been widely publicized cases of this occurring, and this movement appears to be growing.

In addition to select employers willfully violating safety laws, there continue to be other frequent and very problematic issues in the workplace – managers that do not wear face coverings properly, coworkers that do not social distance, a lack of appropriate cleaning in shared spaces, etc. These are all conditions that employers, not workers, have the most control over. Our frontline workers, those that have continual contact with the public and co-workers as part of the essential services they provide, deserve better than the current burden of proof with its associated pitfalls, especially since they are not in a position to ensure the safety of their workplace in the same way their employer is.

<u>This is the right thing to do for the frontline workers that risk their well-being to keep our state functioning, as the policy of the Workers' Compensation laws set forth.</u>

This letter contains a laundry list of reasons why the Labor members of MLAC support a presumption for Oregon's frontline workers. Perhaps the most foundational reason is simply that it is the right thing to do. It is the right thing to do for those that serve the public as first responders, as health care workers, as laborers ensuring that the shelves of our pantries and stores remain stocked with food. We need this work to continue and want the workers to know that when they risk their health to show up and keep our economy and communities functioning, they will be taken care of if they are harmed at work – in this case, harmed by COVID-19. Whether that harm is a few weeks of fevers and painful coughing, the frightening and unknown symptoms of long haul COVID, months on a ventilator in the ICU, or even death, the fact is that the very nature of their jobs puts them in harm's way. Sadly, for this pandemic to end, we need them to continue to put themselves in harm's way. As MLAC members whose regular jobs are to represent workers, including those on the frontlines, we know how they feel. We know they are worried. That going to work gives them anxiety and nightmares. That everything takes so much more time and thought in order to be careful and that this fact makes work mentally and emotionally exhausting. That their ears and faces hurt from their masks pulling and pushing on them. They've told us.

Publicly we call them heroes. We put signs in our yards to thank them and memes on our social media pages to show our appreciation. However, we have not yet given them the peace of mind that a presumption would. They deserve that, for all they have done, are doing, and will continue to do for us. We trust that after a careful examination of what evidence we do have, you will make the policy determination to create a presumption – it is the right thing to do.

Members of MLAC Labor:

Diana Winther, Co-chair
Kevin Billman
Jill Fullerton
Ateusa Salemi
Scott Strickland