March 15, 2022

The Honorable Senator Cortese
Chair, Senate Labor, Public Employment & Retirement
State Capitol, Room 6640
Sacramento, CA 95814

Subject: SB 1127 (Atkins) – Workers' Compensation Investigations and Penalties - **OPPOSE**

Dear Senator Cortese,

The undersigned organizations are **OPPOSED** to **SB 1127 (Atkins)**, which fundamentally alters longstanding rules and timeframes for determining eligibility for workers' compensation claims and as drafted, would dramatically increase systemic friction and litigation. SB 1127 reduces the timeline for employers to make a decision about covering a claimed injury, but it does not harmonize any of the other statutes and regulations that prevent employers from complying with the new timeline. The bill changes the rules for all claims – including public and private sector employers – but the provisions as they apply to public employers are especially challenging.

SB 1127 has three main provisions, all of which are problematic:

- Reduces the timeframe allotted to employers to investigate claims: SB 1127 proposes to shorten the time provided for employers to investigate claims from 90 to 30 days for any claim covered by a presumption statute, and 60 days for all other claims. The bill does not, however, address the statutory and regulatory provisions that protect the due process rights of injured workers and ensure an objective, fair investigation.

- Imposes massive new penalties on employers: SB 1127 proposes new and unprecedented penalties all claims covered by presumption statutes, including the COVID-19 presumption that applies to every employer in the state. The penalty would apply in situations where "liability has been unreasonably rejected for claims of injury" and would be five times the amount of benefits unreasonably delayed, up to $100,000. These claims – most of which are for public sector public safety employees and are funded by taxpayers – would, as proposed, now have a higher standard of evidence because of the presumption, an objectively inadequate timeline to investigate claims, and now massive penalties for getting that process wrong.

- More than doubles duration of temporary disability for cancer presumption claims: SB 1127 would extend the duration of temporary disability benefits from 104 to 240 weeks for claims covered by cancer presumption statutes. Covered employees currently have full and tax-free wage replacement benefits for one full year, and have access to disability retirement benefits that can, in some cases, be received at the same time as temporary disability benefits. SB 1127 does not necessarily, as described by proponents, create a guarantee that an injured worker will have wage loss benefits available if they face a recurrence of their cancer. As drafted, that employee could use all five years of the disability during the initial treatment period and would then still not have benefits available if there is a recurrence.

The laws of the State of California already provide for a fair and equitable system for all workers. Our workers' compensation system is "no fault", meaning that employers pay for benefits even if there was no specific negligence. Additionally, state law requires the workers' compensation appeals board judges to "liberally construe" the laws of the state toward the provision of benefits. These two statutory requirements make our workers' compensation system extremely accessible for injured workers. A recent analysis from the California Workers' Compensation Institute found that while California represents only 12% of the nation's jobs and 14.4% of national payroll, California employers provide 19.7% of all cash and medical benefits provided to injured workers.

We provide more detailed explanations along with substantial data, analysis, and examples below.

SB 1127 DOES NOT PROVIDE SUFFICIENT TIME TO INVESTIGATE CLAIMS

Our coalition is opposed to shortening the investigation period from 90 to 60 days for claims generally, and we also oppose the additional shortening of this period to 30 days for claims covered by special legal presumptions. We strongly oppose this provision because it undermines the due process rights of both the injured worker and the employer. As will be discussed below, ensuring a fair, impartial investigation that protects the rights of both parties equally and fairly takes time, and, in some cases, it just takes longer than 30 or even 60 days.

When an employee claims a work-related injury or illness their employer must decide whether to accept liability, which happens within the first month in most cases, or investigate further. Not every claimed injury is valid and a portion of them are, in fact, fraudulent. Wisely, rather than permitting an employer to assert that a claim in fraudulent and walk away, California has created a comprehensive investigatory process with strict standards. This process takes time, but it also protects the due process rights of both the employers and injured workers, maintaining the delicate balance that allows the California workers' compensation system to function.

This is particularly important for public employers who have injured workers with presumptive occupational injuries. Presumption statutes apply to injuries and illnesses such as heart, cancer, and PTSD that are complex in causation and sometimes difficult for workers to connect to employment. That is, in fact, why the legislature has historically chosen to impose a presumption that shifts the legal burden of proof away from employees and instead requires an employer to prove that the claimed injury was not caused by employment. Presumptions might be rebuttable in name, but they already impose a near-impossible task by requiring employers to "prove a negative" (e.g., that a cancer is not caused by employment). This requires a more thorough investigation that, as will be discussed below, cannot be completed in 90 days, let alone 30.

The Investigation Process

California law requires employers to "conduct a reasonable and timely investigation upon receiving notice or knowledge of an injury or claim". The regulations expressly prohibit an employer from restricting an investigation to "preparing objections or defenses to a claim". Instead, employers must "fully and fairly gather the pertinent information, whether that information requires, or excuses benefit payment." Finally, the employer is required to document the investigatory acts undertaken and the information obtained as a result. Taken together, the law requires employers to conduct a thorough investigation of all relevant facts, which both protects their due process rights and the injured worker's due process rights by creating a full, impartial record of the events.

During the investigation period an employer or their insurer needs to interview the supervisor, employee, witnesses, and medical providers to get a baseline understanding of the situation. Employers must obtain relevant medical records, documents related to prior claims, schedule a medical evaluation, receive a complete written report from the doctor, and potentially identify and recover additional records that might be relevant to the claimed injury. Simply put, this process takes longer than the 30 or 60 days provided under SB 1127.

Specifically, Labor Code Section 4060 requires a medical evaluation by a panel of qualified medical evaluators (QMEs) if a medical evaluation is needed to determine liability. This process breaks down as follows for an employee that is not represented by counsel (the rules for represented employees have only minor differences that do not materially reduce the timeframe for completion):

- For claims where the employee is not represented by counsel, an employer must wait **10 days** after the filing of a claim form to request a Panel QME from the state *[Labor Code Section 31.3(a)]*.

- Once a Panel QME is requested, the state has **10 days** to provide the panel to the parties so they can select a medical evaluator from the list provided.

- Once the Panel is issued, the employee has **10 days** to select a medical evaluator from the list, set the appointment, and notify the employer. If the employee does not select an evaluator after ten days, then the employer can select an evaluator and set the appointment *[Labor Code Section 31.3]*.

-30-day investigation clock in SB 1127 runs out here-

- The party scheduling the appointment must secure an appointment within **60 days**, or **90 days** if an evaluation can't be scheduled within 60 days *[Labor Code Section 31.3]*.

-60-day investigation clock in SB 1127 runs out here-

- Once the evaluation has been completed the medical evaluator has an additional **30 days** to complete and submit the comprehensive medical report that will determine liability.

In addition, the California State Auditor has conducted a review of the state-run Panel QME process and found that it is slower-than-intended because there are not enough medical evaluators available to meet the increasing

demand. In fact, while demand for Panel QME reports increased by 37% the number of QME doctors available decreased by 12%. The system for providing the medical evaluations and reports needed to determine liability isn't functioning correctly. If employers are expected to secure needed medical reports faster than the medical-legal process will need to be substantially reformed.

During this investigative period, the injured worker receives up to $10,0000 of medically necessary treatment, free of charge, ensuring that the injured worker is not adversely impacted by this investigative period. Even if the employer is found later to not be liable, the injured worker does not need to pay a cent back. This balances the rights and responsibilities of employers and injured workers, maintaining a fair and equitable system.

However, under the timelines SB 1127, this due process is impossible. Rather than ensuring a fair and impartial investigation, SB 1127 forces employers to make decisions on liability on an artificially short timeline and without all the necessary information. As SB 1127 prohibits employers from denying claims after 30 or 60 days unless new information becomes available, this bill will push employers to deny claims before a full investigation is completed, as an employer can always accept a denied claim after 30 or 60 days, but an employer cannot deny an acceptable claim as easily. This news species of denied claims, which will be solely due to an artificially short timeline, rather than the investigative process, will result in higher costs for employers and delayed medical treatment for injured workers.

NEW PENALTIES MAKE TAXPAYER FUNDED PRESUMPTION CLAIMS DANGEROUS TO INVESTIGATE

Additionally, SB 1127 established harsh new penalties for employers who "unreasonably" reject liability for clams covered by presumption statutes. SB 1127 mandates a penalty of five times the amount of benefits delayed or denied, with a maximum penalty of $100,000.

> *Example: An employer is found to have unreasonably denied a claim and the employee has $10,000 worth of temporary disability benefits and $10,000 worth of medical care delayed or denied as a result. Under SB 1127 the employer would be penalized $100,000. Under these provisions the penalty cap will be reached in *most claims* that are found to have been "unreasonably denied".*

This impacts both public and private employers because these penalty provisions apply not only to the severe injuries and illnesses found in the public safety presumption statutes, but also to the COVID-19 presumption which applies to every employer in the state. Similarly, all these claims will be held to the 30-day investigation period, which all but guarantees that a legally sufficient investigation cannot be conducted within the allotted timeframe.

As noted above, SB 1127 hamstrings employer investigations of workers' compensation claims and then penalizes employers for denying a claim due to an incomplete investigation. This kind of penalty structure is a punitive Catch-22, and it moves California's workers' compensation system away from a balanced system that respects the due process rights of both employers and injured workers.

MORE THAN DOUBLES TEMPORARY DISABILITY BENEFITS

SB 1127 more than doubles the period of temporary disability that is available to firefighters and police officers covered by the cancer presumption. The peace officers and firefighters covered by the cancer presumption are also eligible for one year of complete wage replacement benefits instead of temporary disability, not to mention disability retirement benefits that are unavailable to other workers. We oppose the vast expansion of temporary disability benefits as proposed by AB 1127 because we're unaware of any data that would suggest this is necessary or desirable.

Signed,

American Property Casualty Insurance Association
Association of California Healthcare Districts

Association of California School Administrators
Association of Claims Professionals
Auto Care Association
BETA Healthcare Group
California Assisted Living Association
California Association of Joint Powers Authorities
California Association of Winegrape Growers
California Attractions and Parks Association
California Chamber of Commerce
California Coalition on Workers' Compensation
California Farm Bureau Federation
California Farm Labor Contractor Association
California Grocers Association
California Hospital Association
California Joint Powers Insurance Authority
California Manufacturers & Technology Association
California Pool and Spa Association
California Schools JPA
California Special Districts Association
California State Association of Counties
California Trucking Association
CAWA - Representing the Automotive Parts Industry
Civil Justice Association of California
County of Monterey
Housing Contractors of California
Independent Insurance Agents and Brokers of California
League of California Cities
National Association of Mutual Insurance Companies
National Federation of Independent Business
Protected Insurance Program for Schools and Community Colleges
Public Risk Innovation Solutions and Management (PRISM)
Rural County Representatives of California (RCRC)
Special District Risk Management Authority
The Family Business Association of California
Urban Counties of California
Western Electrical Contractors Association (WECA)
Western Growers Association