



Oregon

Kate Brown, Governor

Department of Consumer and Business Services

MLAC | Management-Labor Advisory Committee

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July 20, 2020

Governor Kate Brown
254 State Capitol
Salem, Oregon 97301-4047

Dear Governor Brown:

On June 22, you asked the Management-Labor Advisory Committee to review the current workers' compensation system and the impact of the COVID-19 pandemic. The committee met six times to review current data and information about COVID-19 workers' compensation claims, get public testimony on issues, and discuss recommendations for specific workers' compensation system changes.

The committee heard about many issues that affect employers and workers trying to navigate the workers' compensation system and COVID-19 claims. Issues identified included how workers file claims, inconsistencies among insurers and self-insured employers when processing these claims following current statute, and how to evaluate claims based on existing law. A full list of issues grouped by category is in Appendix A.

We heard many issues about general workplace safety concerns leading to workplace exposures, such as adequate personal protective equipment and Oregon OSHA enforcement of social distancing and mask wearing requirements. There were concerns that workers may be retaliated against if they file a workers' compensation claims. We also heard about many challenges with the public health system, particularly contact tracing and the sharing of information gathered in that process.

Consensus Recommendations from MLAC

The committee agreed on the following six recommendations.

1. **The Department of Consumer and Business Services (DCBS) should convene a stakeholder group to discuss the use of the Social Security number on the Form 801 Report of Job Injury or Illness (issue 1).** The committee heard concerns that the use of a Social Security number on the

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most common injury reporting form has a chilling effect on workers filing claims. Because the reporting form is used by many entities for a variety of purposes, the committee supports further discussion before the agency makes any change to this requirement. The agency should start meetings as soon as possible.

2. **DCBS should develop COVID-19 specific educational materials for employers and workers** (issues 2 – 4, 15). The 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. The committee recommends DCBS consider a separate posting notice for employers to alert workers to their rights. The committee also recommends working with the Bureau of Labor and Industries to inform workers and employers that there can be no retaliation for filing a COVID-19 worker’s compensation claim.
3. **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** (issues 5, 14, 22 – 27). Workplace safety efforts by Oregon OSHA and employers are key to protecting workers from getting COVID-19 while at work. The committee acknowledges their work will ultimately prevent transmission of COVID-19 in the workplace.
4. **Express concern about COVID-19 claim denials rates of some carriers** (issue 9). The committee was concerned about some insurers with apparent high denial rates for COVID-19 claims based on data reported to DCBS. However, the committee did not have enough information or time to make a specific recommendation on this topic. Both Management and Labor believe their solutions would address this issue, and have discussed it further in their summaries below.
5. **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** (issue 21). The National Council on Compensation Insurance (NCCI) has proposed to not hold COVID-19 claims against an employer when determining future costs for workers’ compensation insurance premiums. This will impact about one third of Oregon employers.
6. **Forward issues raised regarding public health, paid leave, contact tracing, and enforcement of retaliation laws to the responsible enforcement entities** (issues 4, 28-31). Though many issues were raised outside the scope of MLAC review, they are nonetheless important concerns about workplace safety and the workers’ compensation process. We ask you to forward the relevant issues to the Oregon Health Authority and Bureau of Labor and Industries for their consideration.

Issues Without Consensus

The committee heard two distinct proposals for solutions for the issues raised about workers' compensation claim processing and benefits for COVID-19 claims (issues 6-13, 15-20). The committee was unable to reach a consensus agreement on recommending either proposal in whole. Each caucus has prepared a summary of their preferred proposal and the merits of each from the perspective of the supporting caucus. Management's proposal is in Appendix B and Labor's proposal in Appendix C.

We thank you for asking for our input. Though we could not achieve consensus on a larger recommendation in this short time frame, we stand ready to review any specific legislative proposals or continue discussions on this important topic.

Sincerely,



Diana Winther
Labor Co-Chair



Kimberly Wood
Management Co-Chair

Attachments

Appendix A - Issues List

		Addressed in recommendations
Workers' Compensation Claim Filing		
1	Request for SSN on 801 form may discourage undocumented workers from submitting a claim	X
2	Employers that don't let employees know that they can file a claim for COVID-19	X
3	Employers that try to coerce employees not to file a COVID-19 claim	X
4	Employers that retaliate against employees who file a COVID-19 claim	X
5	Lack of a consistent method/means for employees to record potential exposures	X
Workers' Compensation Claim Issues		
6	Lack of standard application as to whether COVID-19 is a workplace injury or occupational disease under the statutes	
7	Inconsistency in claims processing among carriers – how exposure is handled in terms of acceptance/denial/	
8	Time loss - level of investigation undertaken before acceptance/ denial	
9	Seemingly bad-faith denials from a couple of carriers whose denial rates far exceed other carriers'	(in part)
10	Carriers issuing denials at or before 14 days, potentially before exposed employee completes quarantine or has test results	
11	Issues with false negatives and false positives in COVID- 19 tests and their impact on claim acceptance/denials	
12	Question as to whether a presumptive case is considered COVID-19 positive status, even without a test	
13	Inability of a COVID-19 claimant to access co-workers' test results to prove more-likely-than-not causation	
14	Unclear requirements re: employer's burden to do contact tracing or inform other employees when one has tested positive	X
15	If employers are required to notify other employees of a positive test, lack of clarity about additional information (testing, quarantine, available benefits, ability to file a WC claim, etc.) that should be provided	(in part)
16	Handling of exposure with negative test not treated consistently.	
17	If quarantine time with a negative test is a covered claim, what are requirements for coverage? (i.e. Med provider must authorize, self quarantine ok, etc.)	

Leave Time/Pay/Employee Expenses		
18	Different requirements among different-sized employers to provide paid sick leave for quarantine periods	
19	Lack of a clear source of wages for someone without paid leave who is required to quarantine for 14 days, but never becomes ill or seeks medical attention	
20	Cost of a COVID-19 test for an employee exposed at work who tests negative and thus ineligible for an accepted workers' comp claim	
Workers' Compensation Rating Issues		
21	Impact of COVID-19 claims on employer experience mods obtained via NCCI	X
Personal Protection		
22	Not enough, or not enough of the right kind of PPE to meet the needs of the workforce	X
23	Question of what should happen in a workplace when despite employer's best efforts, appropriate PPE is unavailable	X
24	Not all businesses following face covering or social distancing requirements	X
25	Customers, co-workers refusing to comply with mandates for face coverings	X
26	Risk to employees when trying to enforce face-covering mandates among customers	X
27	OR-OSHA inundated with complaints, delays in response, changing mandates	X
28	Challenges associated with employers knowing that someone in their employment has tested positive, but can't identify potential exposures because OHA doesn't divulge who the employee is	X
29	Sufficiency of contract tracers to actually make an impact in tracking exposures	X
30	County health departments want information from employers, but don't share information about outside exposures that an infected employee may have	X
31	Unclear information about whether requirements for contract tracing are the same for all industries	X

Appendix B

Management Position on MLAC's COVID-19 Response

Over the past three weeks, MLAC heard testimony about challenges faced by individuals who believe they contracted COVID-19 at work and whose workers' comp claims were denied. Their testimony was emotional, and we empathize with those individuals. We also heard testimony from employers who described their efforts in responding to COVID-19, and their belief that Oregon's workers' compensation system is appropriately responding to the pandemic. And, we reviewed data from the Workers' Compensation Division (WCD) that reported on COVID-19 claims over the past several months.

In response to this testimony, we conclude that clear and consistent rules for processing COVID-19 claims should be adopted, to ensure workers are protected during a quarantine period and don't have to worry about the cost of a COVID-19 test, even if they don't ultimately have the condition.

We regret that MLAC was unable to reach a single recommendation, but we were unable to accept the sweeping "COVID presumption" that Labor advocates proposed. We oppose a presumption because the data tells us that the experience of those denied individuals is not the norm and because a COVID presumption would create its own set of disparities among Oregon workers.

According to the data provided to MLAC by WCD, 74 percent of the 557 COVID-19 claims filed have been accepted by the 25 separate insurers or self-insurers reporting COVID claims in Oregon. Of the 145 denied claims, an apparently disproportionate share of denials came from two specific insurers. The remaining 23 insurers approved 80 percent of filed claims. Denied claims for these latter insurers included a significant number of claims denied because the employee was determined not to have COVID. Even for denied claims, COVID testing costs were paid by most insurers, as was employee time loss due to quarantine.

We believe that DCBS should audit or otherwise review the procedures of insurers with apparent high COVID denial rates to determine whether their denials were reasonable and proper. We further believe that the enclosed "Draft COVID Rules" will create standards to right these apparent wrongs. But we do not think that claim processing decisions of two insurers should prompt the upending of the workers' compensation system's balance that a COVID presumption would represent.

Why we oppose the proposed presumption

The COVID presumption was offered as a solution before we heard testimony about the problems. It is simply a broad brush, not tailored to the issues we heard during testimony and not in keeping with Oregon's long-held standard that workers' compensation claims must be tied to injury and illness that occurs at work.

Beyond the fact that the need for a presumption isn't supported by data, here are the reasons for our opposition:

The presumption is remarkably broad

- 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 not by the actual exposure an employee has on the job to the public or co-workers.
 - A retail employee who works alone in a store providing only curbside, no-contact service, or an educational employee working from home, would receive the same presumption that their exposure/disease was job-related as a health care worker treating COVID-19 patients.
 - Someone who works in a covered industry but wasn’t on the job in the weeks before contracting COVID would receive the presumption.
- The presumption provides a catch-all to include any worker who dealt with the public in any capacity in a location covered by the Governor’s state of emergency, or any worker where 10 percent of employees have tested positive, regardless of when those tests occurred and what exposure the worker had.

The presumption threatens the “grand bargain” on which Oregon’s workers’ compensation system is based

- 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 un rebuttable 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 medical evidence” required to rebut it.
- Employers are not allowed to investigate the medical history of the worker’s off-work contacts to prove a confirmed source.

There are likely to be system-wide, unintended consequences of a presumption

The combination of the expansive list of workers covered, the tough rebuttal standard, and the benefits for non-work-related and non-COVID-related conditions appear to make Oregon’s presumption proposal the broadest in the country.

- Increased workers’ compensation costs will follow system-wide, to be borne by employers who 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.
- Presumption will likely lead to significant litigation over the meaning of currently undefined or unknown terms such as “known or suspected source,” “known and confirmed source,” “subject worker’s work site” (which seems to include the home), and “nevertheless working with the public.” Such litigation will put employees’ claims in limbo.

Why we support a rules-based solution

We support immediate rulemaking based on the “Draft COVID Rules” to protect workers who believe they have been exposed to or contracted COVID-19 in the workplace. Here’s why:

- The rules would apply to COVID claims processing for every employee in the state without a complex determination of whether the worker met the standard for a presumption. Accordingly, every employee would be assured that their claim is handled in a fair and consistent manner.
- The approach uses objective criteria and a verifiable framework by which approvals and denials can be measured.
- Its requirement that no claim can be denied for at least 14 days ensures that all workers will receive interim time-loss pay for a 14-day quarantine.

- It allows for quick implementation and subsequent ability to modify as needed, rather than the longer process of legislation and subsequent rulemaking. Changes that may be needed as the pandemic continues to unfold could be handled through the more flexible rule-making process, rather than waiting for the next legislative session.
- The rules are simple for workers, employers and insurers to understand, and will be a valuable asset in the education effort that MLAC members all agree is needed.
- It is tailored to address the specific issues that we heard during testimony.

We further support making the rules retroactive to the beginning of the outbreak to allow denied claimants access to the same process and a second review of their claims.

Testimony during our meetings indicated that there is nearly universal agreement that SAIF's approach to processing of COVID-19 claims is fair, reasonable, and gives the benefit of the doubt to the workers. WCD data shows that SAIF has accepted 87 percent of COVID claims thus far. The rules that we support were drafted by SAIF at MLAC's request to reflect its claims processing approach.

We believe that achieving a solution through rulemaking is a win-win for both workers and employers. We urge the Governor and Legislature to endorse this approach.

Members of MLAC Representing Management

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

DRAFT COVID RULES

During all coronavirus state-wide emergency orders, the following will apply. Enforcement of the following will end at the expiration of state-wide emergency orders. Authority exists for the Director of the Consumer and Business Services to enact and enforce these rules under ORS 656.726(4) and ORS 654.003(3) through ORS 654.003(5).

(1) For the purpose of this rule:

(a) "Coronavirus" or "COVID-19" is the infectious respiratory syndrome caused by the virus SARS-CoV-2.

(b) "Coronavirus test" or "COVID-19 test" means a viral test that checks samples from the respiratory system, such as a swab from the inside of a nose, to determine if an individual has an infection of SARS-CoV2, the virus that causes COVID-19.

(c) "Quarantine" means to put or hold in isolation by order of a medical service provider to prevent the spread of coronavirus.

(2) Under OAR 436-060-0140, insurers and self-insured employers must conduct a "reasonable investigation" before denying a claim. When a worker has filed a claim for coronavirus or coronavirus exposure, a reasonable investigation must include:

(a) Determining whether the nature of the worker's employment resulted in an exposure to coronavirus;

(b) Determining whether the worker did not work for a period of quarantine or otherwise at the direction of a medical service provider or public health professional, or the employer;

(c) If a worker has taken a coronavirus test, waiting for the worker's test results;

(d) If the worker tests positive for coronavirus or is given a presumptive diagnosis of coronavirus, and the source of the coronavirus exposure is unknown, the insurer or self-insured employer must obtain a medical opinion prior to issuing a denial.

(3) Compliance with section (2) of this rule requires at least 14 days from date of employer knowledge or notice before determining whether to deny a claim.

(4) An insurer or self-insured employer with more than ___ coronavirus claims will be audited by the Director of the Department of Consumer and Business Services if its coronavirus claim denial rate is at least ___ % higher than the average denial rate for coronavirus claims Oregon-wide. Audits under OAR 436-060-0200 consider whether insurers and self-insured employers have complied with investigation requirements and temporary disability payment requirements. Failure to reasonably investigate coronavirus claims or appropriately pay temporary disability will result in civil penalties as identified in OAR 436-060-0200.

Workers' compensation COVID-19 related claims as of July 10, 2020 by insurer name

Insurer type	Insurer	Accepted				Denied				Total
		Disabling		Nondisabling		Disabling		Nondisabling		
		Exposure	Disease	Exposure	Disease	Exposure	Disease	Exposure	Disease	
SAIF	SAIF CORPORATION	257	112	not reported		35	4	17	1	426
Private	ACE FIRE UNDERWRITERS INSURANCE COMPANY	0	0			0	2	0	0	2
Private	AMERICAN ZURICH INSURANCE COMPANY	0	2			1	0	0	0	3
Private	BERKLEY NATIONAL INSURANCE COMPANY	0	0			0	0	1	0	1
Private	BERKSHIRE HATHAWAY HOMESTATE INSURANCE COMPANY	0	0			1	0	0	0	1
Private	CHARTER OAK FIRE INSURANCE COMPANY	0	1			0	0	0	1	2
Private	GUIDEONE MUTUAL INSURANCE COMPANY	0	0			15	0	6	0	21
Private	INDEMNITY INSURANCE COMPANY OF NORTH AMERICA	0	0			0	0	1	0	1
Private	LM INSURANCE CORPORATION	0	0			0	1	0	0	1
Private	NEW HAMPSHIRE INSURANCE COMPANY	1	2			0	0	0	0	3
Private	PACIFIC INDEMNITY COMPANY	1	0			0	0	0	0	1
Private	SENTRY INSURANCE A MUTUAL COMPANY	0	0			1	0	0	0	1
Private	TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA	0	0			0	0	1	0	1
Private	XL INSURANCE AMERICA, INC.	0	0			1	0	0	1	2
Self-insured	ADVENTIST HEALTH SYSTEM/WEST	4	9			1	0	0	0	14
Self-insured	ASANTE	0	0			0	0	3	0	3
Self-insured	CIS TRUST	0	0			0	0	2	0	2
Self-insured	CITY OF ASHLAND	1	0			0	0	0	0	1
Self-insured	CITY OF SALEM	0	0			0	1	0	0	1
Self-insured	KAISER FOUNDATION HEALTH PLAN OF THE NORTHWEST	1	0			0	0	4	0	5
Self-insured	MULTNOMAH COUNTY OREGON	0	0	0	1	0	0	1		
Self-insured	PROVIDENCE HEALTH & SERVICES-OREGON	0	3	0	0	41	0	44		
Self-insured	SPECIAL DISTRICTS INSURANCE SERVICES TRUST	13	4	0	0	0	0	17		
Self-insured	TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON	0	0	1	1	0	0	2		
Self-insured	WASHINGTON COUNTY	1	0	0	0	0	0	1		
Total		279	133	56	10	76	3	557		

All data on this page excludes four potential claims where insurers have not yet reported full details.
 Source: Oregon Department of Consumer and Business Services, Central Services Division July 10, 2020

Who would get a presumption?

(8)(a) As used in this subsection, “essential worker” means a subject worker who, at an employer’s direction, must or may work at the subject worker’s work site as a:

Firefighter, a police or peace officer, a public safety personnel or officer as defined in ORS 181A.355,

Medical services provider including emergency medical technicians, physicians, nurses, physician and nursing assistants, hospital or medical clinic employees, pharmacy technicians, and home health and long term care employees,

Grocery or retail store employee,

Provider of janitorial or house-keeping services,

School employees,

Child care employees who remained on the job to care for essential worker’s dependents,

An agricultural worker as defined in ORS 315.163,

Employees at subject workers worksite where 10% or more of the employees have tested positive or presumed positive,

Employees whose job classification are not covered but who were nevertheless working with the public shall be covered under the presumption during a period in which a declaration of a state of emergency issued by the Governor is in effect for a location that includes the subject worker’s work site.

When would they get a presumption?

(b) A subject worker’s 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:

(A) the subject worker is an essential worker; and

(B) the subject worker is exposed at work to a known or suspected source of COVID-19/SARS-CoV-2 and the employer, medical provider or federal, state or local public health authority required the subject worker to remain away from the subject worker’s work site ; or

(C) the subject worker is exposed at work to a known or suspected source of COVID-19/SARS-CoV-2 and becomes symptomatic with COVID-19/SARS-CoV-2; or

(D) the subject worker becomes symptomatic and receives a diagnosis of COVID-19/SARS-CoV-2 from a medical provider or a federal, state or local public health authority; or

(E) the subject worker receives a laboratory-confirmed diagnosis of COVID-19/SARS-CoV-2; or

(F) the subject worker receives a presumptive positive test result for COVID-19/SARS-CoV-2.

How would an employer rebut the presumption?

(c) An insurer or self-insured employer may rebut the presumption set forth in paragraph (b) of this subsection, or may deny a claim filed under this section for exposure to or infection by COVID-19/SARS-CoV-2, only:

(A) with clear and convincing evidence that the conditions identified in paragraph (b)(A), (B), (C), (D), (E), and/or (F) do not apply to the subject worker; **and** (should be OR)

(B) with clear and convincing medical evidence that the conditions identified in paragraph (b) (B), (C), (D), (E), and/or (F) were caused by a known and confirmed source of COVID-19/SARS-CoV-2 unrelated to work as an essential worker.

(d) Notwithstanding ORS 656.027 (6) [Portland also].

SECTION 2. This 2020 Act being necessary for the immediate preservation of the public peace, health and safety, and emergency is declared to exist, and this 2020 Act takes effect on its passage and shall apply to work on or after March 8, 2020 and until 180 days after the date a declaration of a state of emergency issued by the Governor is lifted.

Appendix C - Labor Proposal

July 20, 2020

Governor Kate Brown
254 State Capitol
Salem, Oregon 97301-4047

Dear Governor Brown:

Thank you for the opportunity to review Oregon's Workers' Compensation system as it relates to COVID-19. Although the Management-Labor Advisory Committee (MLAC) was able to find some areas of agreement when it came to shortcomings in the system and ways to address those gaps, we were unfortunately unable to come to a unanimous conclusion on your request regarding evaluation of and recommendation for a presumption.

It is Labor's belief that both Management and Labor Committee members recognized that the system is not working as well as it should, although some stakeholders have suggested that it is. We also believe that both sides of the Committee, the participating stakeholders, and the Workers' Compensation Division staff all gave this specific issue a great deal of thought and energy, and the disappointment around not reaching consensus is very real, especially since we as a Committee have been successful in the past.

The difficulty we collectively faced stemmed in part from the fact that COVID-19 is unlike anything we as a Committee, or we as Oregonians, have faced in over a century. The Labor Committee members understand our role in keeping the Workers' Compensation system balanced and beneficial to all, but these unprecedented times call for a solution to match the gravity of the crisis we face. The data from the Department of Consumer and Business Services, based on the claims reported as of July 16, 2020, shows a claim denial of 13% by SAIF, and a 67% denial rate by other insurers. This calculation does not include accepted non-disabling claims, however, from the preliminary data call we received from the Workers' Compensation Division dated July 16, 2020 – respondents, including SAIF, provided acceptance data on only 125 non-disabling claims. To be clear, non-disabling claims do not entitle a worker to time loss. This dramatic difference in claims was alarming and warrants a serious solution.

The conviction from Labor on the need for a presumption is intensified by the fact that we are again seeing a rise in COVID-19 cases. We do not know when this pandemic will end, but we do know we will keep asking Oregon's frontline workers to keep caring for us when we are ill, to respond when we call 911, to keep our refrigerators stocked and our families fed, and to keep what remains of our economy going. Labor believes that our frontline workers deserve more access to the workers compensation system than they currently have without a presumption.

Under the current system, workers bear the burden to prove where they contracted COVID-19. With a virus that does not have instantaneous symptoms and that can be transmitted by an individual who is asymptomatic, this becomes an impossible task for a frontline worker

providing essential services to the public. This is further complicated by citizens that do not take this pandemic seriously, and do not stay home when they have been exposed or are sick, nor follow social distancing guidelines and face covering requirements. Firefighters, police officers, health care providers, as well as workers in retail, grocery, agriculture, and other essential services, are literally putting their lives on the line to keep this state running. Giving them an impossible burden to meet when they file a workers' compensation claim feels like a punishment for their dedicated service. This disappointment was articulated to members of MLAC from a Salem police officer and Hood River nurse; they both categorized this feeling as a betrayal. We won't soon forget the despair in their voices as they told us about their dedication to their service only to be denied medical coverage and wage replacement when they needed it most.

We have included the most recent draft of the presumption that Labor is recommending with this letter because we feel that this is what is necessary to address what the data revealed – that there is a disparity in the way claims are processed. This appears in part due to a lack of clear requirements, but more importantly because of the heavy burden workers face as explained above. Both Labor and the coalition that drafted this language recognize that Management had some good questions on its applicability. With that said, there has been significant movement from the original LC-293 draft from May 28, 2020, and those changes are reflective of the coalition's attentiveness to stakeholder concerns.

It would have been Labor's preference for MLAC to unanimously agree to recommend that we as a Committee continue to explore the presumption language, but our Management counterparts prefer a different solution. We do want to thank SAIF for being so responsive to the Committee's request to generate the COVID Claims Process and Accountability Rule, and we understand Management finds it appealing because of its limited deviation from how the Workers' Compensation system operates now. We as workers and worker advocates are grateful to SAIF and how they are treating the COVID-19 claims process. And we want to express that we have great respect for those serving on the Management side of MLAC, and know that they care about Oregon workers. But Labor believes that the COVID Claims Process and Accountability Rule will not go as far as they hope, will likely face legal issues with making policy into requirements, may not be legally possible to accomplish in Rule, and will not ultimately address the true heart of the problem, which is the burden the worker faces in proving a claim.

The claims process as it stands now suffers from inconsistency regarding how COVID-19 exposure is treated, including whether or not time loss is paid, who can authorize quarantine and time loss, what benefits are available when the test results are negative, and vagueness around what a reasonable investigation is when it comes to determining whether or not the claim stemmed from a workplace injury. But what the data and testimony revealed to us as most important is what happens in the scenario when the investigation reveals both workplace and external exposures - or even more challenging – when the investigation does not identify exposure at work or outside of work. This last scenario is the most troubling for frontline workers because they are required to interact with the public, such as when responding to the scene of a car accident or in the checkout line at the grocery store, and there is no way of knowing if the individuals they serve carry COVID-19. Requiring a medical provider to make

that determination is in no way guaranteed to grant the worker the benefit of the doubt they deserve, not to mention the heavy burden on medical providers this will likely cause – medical providers that already have enough to do in this pandemic. We believe this problem can only be solved with a presumption.

To further add to our concerns is a lack of meaningful remedy when an insurer has failed to conduct a reasonable investigation. The Workers' Compensation Division can only make that finding when the claim is completely closed and no longer able to be appealed. This means that even if the insurer is found to have not done their due diligence in the investigation, the worker will never receive the benefit of that finding. There may be a fine involved, that but does nothing for the worker whose claim was denied, nor are we convinced the fine will be enough to incentivize insurers to do better on the next claim.

Management has pointed out that the rebuttable presumption in the draft presumption language is an impossible burden to meet. As Labor, we are sympathetic to that concern, but given a choice between having the employers and insurers have the burden of proof or the frontline worker, we believe the employers and insurers are better positioned to bear that weight. They have greater access to the time and resources it takes to make a case, not to mention a greater familiarity with the system itself. And although a worker can always get an attorney, not all do, and to say that getting representation is a solution just sets the system up for what we believe is unnecessary conflict and strife and it leaves the worker without workers' compensation benefits while the claim is appealed.

Labor would also like to point out that those workers who testified regarding their work experience with COVID-19 suffered more than just from the illness. They also suffered the stress of facing a battle with the insurer over their claim denial, loss of paid time off that should have been preserved for future needs, and the feeling of rejection when they were performing essential services for us all. Our workers deserve better.

Labor would also like to take this opportunity to address the fact that the Labor side of MLAC has been down one member for a significant amount of time now, despite there being a least one qualified applicant. We implore you to move forward with an appointment. Serving on MLAC is time-consuming and complex, and if you or the Legislature intend to continue assigning the Committee with such substantial tasks, it is only fair that Labor have the same membership count as Management. Otherwise we are not only down one vote, but are also forced to function with a reduction in availability, insight, and thoughtful recommendations. Neither Labor, MLAC, nor Oregonians benefit from this situation.

Sincerely,

On behalf of the Labor Members of MLAC
Diana Winther
Labor Co-Chair

D R A F T

SUMMARY

Adds exposure to or infection by severe acute respiratory syndrome coronavirus 2 to definition of occupational disease for purposes of workers' compensation. Specifies presumptions as to compensability that apply to subject worker's death, disability, impairment of health, loss of work time and expenses of medical treatment or services, including diagnostic or preventative medical treatment or services.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to the compensability of COVID-19 as an occupational disease for
3 the purposes of workers' compensation; amending ORS 656.802; and de-
4 claring an emergency.

5 **Be It Enacted by the People of the State of Oregon:**

6 **SECTION 1.** ORS 656.802 is amended to read:

7 656.802. (1)(a) As used in this chapter, "occupational disease" means any
8 disease or infection arising out of and in the course of employment caused
9 by substances or activities to which an employee is not ordinarily subjected
10 or exposed other than during a period of regular actual employment therein,
11 and which requires medical services or results in disability or death, in-
12 cluding:

13 (A) Any disease or infection caused by ingestion of, absorption of,
14 inhalation of or contact with dust, fumes, vapors, gases, radiation or other
15 substances.

16 (B) Any mental disorder, whether sudden or gradual in onset, which re-
17 quires medical services or results in physical or mental disability or death.

18 (C) Any series of traumatic events or occurrences which requires medical

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 services or results in physical disability or death.

2 **(D) Exposure to or infection by severe acute respiratory syndrome**
3 **coronavirus 2 (SARS-CoV-2).**

4 (b) As used in this chapter, “mental disorder” includes any physical dis-
5 order caused or worsened by mental stress.

6 (2)(a) The worker must prove that employment conditions were the major
7 contributing cause of the disease.

8 (b) If the occupational disease claim is based on the worsening of a pre-
9 existing disease or condition pursuant to ORS 656.005 (7), the worker must
10 prove that employment conditions were the major contributing cause of the
11 combined condition and pathological worsening of the disease.

12 (c) Occupational diseases shall be subject to all of the same limitations
13 and exclusions as accidental injuries under ORS 656.005 (7).

14 (d) Existence of an occupational disease or worsening of a preexisting
15 disease must be established by medical evidence supported by objective
16 findings.

17 (e) Preexisting conditions shall be deemed causes in determining major
18 contributing cause under this section.

19 (3) Notwithstanding any other provision of this chapter, a mental disorder
20 is not compensable under this chapter unless the worker establishes all of
21 the following:

22 (a) The employment conditions producing the mental disorder exist in a
23 real and objective sense.

24 (b) The employment conditions producing the mental disorder are condi-
25 tions other than conditions generally inherent in every working situation or
26 reasonable disciplinary, corrective or job performance evaluation actions by
27 the employer, or cessation of employment or employment decisions attendant
28 upon ordinary business or financial cycles.

29 (c) There is a diagnosis of a mental or emotional disorder which is gen-
30 erally recognized in the medical or psychological community.

31 (d) There is clear and convincing evidence that the mental disorder arose

1 out of and in the course of employment.

2 (4) Death, disability or impairment of health of firefighters of any poli-
3 tical division who have completed five or more years of employment as fire-
4 fighters, caused by any disease of the lungs or respiratory tract, hypertension
5 or cardiovascular-renal disease, and resulting from their employment as
6 firefighters is an "occupational disease." Any condition or impairment of
7 health arising under this subsection shall be presumed to result from a
8 firefighter's employment. However, any such firefighter must have taken a
9 physical examination upon becoming a firefighter, or subsequently thereto,
10 which failed to reveal any evidence of such condition or impairment of
11 health which preexisted employment. Denial of a claim for any condition
12 or impairment of health arising under this subsection must be on the basis
13 of clear and convincing medical evidence that the cause of the condition or
14 impairment is unrelated to the firefighter's employment.

15 (5)(a) Death, disability or impairment of health of a nonvolunteer fire-
16 fighter employed by a political division or subdivision who has completed
17 five or more years of employment as a nonvolunteer firefighter is an occu-
18 pational disease if the death, disability or impairment of health:

19 (A) Is caused by brain cancer, colon cancer, stomach cancer, testicular
20 cancer, prostate cancer, multiple myeloma, non-Hodgkin's lymphoma, cancer
21 of the throat or mouth, rectal cancer, breast cancer or leukemia;

22 (B) Results from the firefighter's employment as a nonvolunteer fire-
23 fighter; and

24 (C) Is first diagnosed by a physician after July 1, 2009.

25 (b) Any condition or impairment of health arising under this subsection
26 is presumed to result from the firefighter's employment. Denial of a claim for
27 any condition or impairment of health arising under this subsection must be
28 on the basis of clear and convincing medical evidence that the condition or
29 impairment was not caused or contributed to in material part by the
30 firefighter's employment.

31 (c) Notwithstanding paragraph (b) of this subsection, the presumption es-

1 tablished under paragraph (b) of this subsection may be rebutted by clear and
2 convincing evidence that the use of tobacco by the nonvolunteer firefighter
3 is the major contributing cause of the cancer.

4 (d) The presumption established under paragraph (b) of this subsection
5 does not apply to prostate cancer if the cancer is first diagnosed by a phy-
6 sician after the firefighter has reached the age of 55. However, nothing in
7 this paragraph affects the right of a firefighter to establish the
8 compensability of prostate cancer without benefit of the presumption.

9 (e) The presumption established under paragraph (b) of this subsection
10 does not apply to claims filed more than 84 months following the termination
11 of the nonvolunteer firefighter's employment as a nonvolunteer firefighter.
12 However, nothing in this paragraph affects the right of a firefighter to es-
13 tablish the compensability of the cancer without benefit of the presumption.

14 (f) The presumption established under paragraph (b) of this subsection
15 does not apply to volunteer firefighters.

16 (g) Nothing in this subsection affects the provisions of subsection (4) of
17 this section.

18 (h) For purposes of this subsection, "nonvolunteer firefighter" means a
19 firefighter who performs firefighting services and receives salary, hourly
20 wages equal to or greater than the state minimum wage, or other compen-
21 sation except for room, board, lodging, housing, meals, stipends, reimburse-
22 ment for expenses or nominal payments for time and travel, regardless of
23 whether any such compensation is subject to federal, state or local taxation.
24 "Nominal payments for time and travel" includes, but is not limited to,
25 payments for on-call time or time spent responding to a call or similar non-
26 cash benefits.

27 (6) Notwithstanding ORS 656.027 (6), any city providing a disability and
28 retirement system by ordinance or charter for firefighters and police officers
29 not subject to this chapter shall apply the presumptions established under
30 subsection (5) of this section when processing claims for firefighters covered
31 by the system.

1 (7)(a) As used in this subsection:

2 (A) "Acute stress disorder" has the meaning given that term in the
3 DSM-5.

4 (B) "Covered employee" means an individual who, on the date a claim is
5 filed under this chapter:

6 (i) Was employed for at least five years by, or experienced a single trau-
7 matic event that satisfies the criteria set forth in the DSM-5 as Criterion A
8 for diagnosing post-traumatic stress disorder while employed by, the state,
9 a political subdivision of the state, a special government body, as defined in
10 ORS 174.117, or a public agency in any of these occupations:

11 (I) A full-time paid firefighter;

12 (II) A full-time paid emergency medical services provider;

13 (III) A full-time paid police officer;

14 (IV) A full-time paid corrections officer or youth correction officer;

15 (V) A full-time paid parole and probation officer; or

16 (VI) A full-time paid emergency dispatcher or 9-1-1 emergency operator;

17 and

18 (ii) Remains employed in an occupation listed in sub-subparagraph (i) of
19 this subparagraph or separated from employment in the occupation not more
20 than seven years previously.

21 (C) "DSM-5" means the fifth edition of the Diagnostic and Statistical
22 Manual of Mental Disorders published by the American Psychiatric Associ-
23 ation.

24 (D) "Post-traumatic stress disorder" has the meaning given that term in
25 the DSM-5.

26 (E) "Psychiatrist" means a psychiatrist whom the Oregon Medical Board
27 has licensed and certified as eligible to diagnose the conditions described in
28 this subsection.

29 (F) "Psychologist" means a licensed psychologist, as defined in ORS
30 675.010, whom the Oregon Board of Psychology has certified as eligible to
31 diagnose the conditions described in this subsection.

1 (b) Notwithstanding subsections (2) and (3) of this section, if a covered
2 employee establishes through a preponderance of persuasive medical evidence
3 from a psychiatrist or psychologist that the covered employee has more
4 likely than not satisfied the diagnostic criteria in the DSM-5 for post-
5 traumatic stress disorder or acute stress disorder, any resulting death, disa-
6 bility or impairment of health of the covered employee shall be presumed to
7 be compensable as an occupational disease. An insurer or self-insured em-
8 ployer may rebut the presumption only by establishing through clear and
9 convincing medical evidence that duties as a covered employee were not of
10 real importance or great consequence in causing the diagnosed condition.

11 (c) An insurer's or self-insured employer's acceptance of a claim of post-
12 traumatic stress disorder or acute stress disorder under this subsection,
13 whether the acceptance was voluntary or was a result of a judgment or or-
14 der, does not preclude the insurer or the self-insured employer from later
15 denying the current compensability of the claim if exposure as a covered
16 employee to trauma that meets the diagnostic criteria set forth as Criterion
17 A in the DSM-5 for post-traumatic stress disorder or acute stress disorder
18 ceases being of real importance or great consequence in causing the disabil-
19 ity, impairment of health or a need for treatment.

20 (d) An insurer or self-insured employer may deny a claim under paragraph
21 (c) of this subsection only on the basis of clear and convincing medical evi-
22 dence.

23 (e) Notwithstanding ORS 656.027 (6), a city that provides a disability or
24 retirement system for firefighters and police officers by ordinance or charter
25 that is not subject to this chapter, when accepting and processing claims for
26 death, disability or impairment of health from firefighters and police officers
27 covered by the disability or retirement system, shall apply:

28 (A) The provisions of this subsection; and

29 (B) For claims filed under this subsection, the time limitations for filing
30 claims that are set forth in ORS 656.807 (1) and (2).

31 **(8)(a) As used in this subsection, "essential worker" means a sub-**

1 **ject worker who, at an employer’s direction, must or may work at the**
2 **subject worker’s work site during a period in which a declaration of**
3 **a state of emergency issued by the Governor is in effect for a location**
4 **that includes the subject worker’s work site.**

5 **(b) A subject worker’s death, disability, impairment of health, loss**
6 **of work time or expenses of medical treatment or services, including**
7 **diagnostic or preventative medical treatment or services, is presumed**
8 **to be compensable as an occupational disease if the subject worker is**
9 **an essential worker and:**

10 **(A) Received a diagnosis of coronavirus disease 2019 (COVID-19)**
11 **from a medical provider or a federal, state or local public health au-**
12 **thority;**

13 **(B) Received a laboratory-confirmed diagnosis of COVID-19;**

14 **(C) Received a presumptive positive test result for COVID-19; or**

15 **(D) An employer, medical provider or federal, state or local public**
16 **health authority required the subject worker to remain away from the**
17 **subject worker’s work site because of a suspected or confirmed expo-**
18 **sure to SARS-CoV-2.**

19 **(c) An insurer or self-insured employer may rebut the presumption**
20 **set forth in paragraph (b) of this subsection, or may deny a claim filed**
21 **under this section for exposure to or infection by SARS-CoV-2, only**
22 **with clear and convincing evidence that the conditions identified in**
23 **paragraph (b)(A), (B), (C) and (D) of this subsection do not apply to**
24 **the subject worker.**

25 **(d) Notwithstanding ORS 656.027 (6), a city that provides a disability**
26 **or retirement system for firefighters and police officers by ordinance**
27 **or charter that is not subject to this chapter, when accepting and**
28 **processing claims from firefighters and police officers covered by the**
29 **disability or retirement system, shall apply:**

30 **(A) The provisions of this subsection; and**

31 **(B) For claims filed under this section for exposure to or infection**

1 by SARS-CoV-2, the time limitations for filing claims that are set
2 forth in ORS 656.807 (1) and (2).

3 SECTION 2. This 2021 Act being necessary for the immediate pres-
4 ervation of the public peace, health and safety, an emergency is de-
5 clared to exist, and this 2021 Act takes effect on its passage.

6

Potential amendments to LC 293

Replace language on page 6, line 31 through page 8 lines 1-6 with the following:

(8)(a) As used in this subsection, “essential worker” means a subject worker who, at an employer’s direction, must or may work at the subject worker’s work site as a firefighter, a police or peace officer, a public safety personnel or officer as defined in ORS 181A.355, a medical services provider including emergency medical technicians, physicians, nurses, physician and nursing assistants, hospital or medical clinic employees, pharmacy technicians, and home health and long term care employees, a grocery or retail store employee, a provider of janitorial or house-keeping services, school employees, Child care employees who remained on the job to care for essential worker’s dependents, an agricultural worker as defined in ORS 315.163, employees at subject workers worksite where 10% or more of the employees have tested positive or presumed positive, employees whose job classification are not covered but who were nevertheless working with the public shall be covered under the presumption during a period in which a declaration of a state of emergency issued by the Governor is in effect for a location that includes the subject worker’s work site.

(b) A subject worker’s 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:

(A) the subject worker is an essential worker; and

(B) the subject worker is exposed at work to a known or suspected source of COVID-19/SARS-CoV-2 and the employer, medical provider or federal, state or local public health authority required the subject worker to remain away from the subject worker’s work site ; or

(C) the subject worker is exposed at work to a known or suspected source of COVID-19/SARS-CoV-2 and becomes symptomatic with COVID-19/SARS-CoV-2; or

(D) the subject worker becomes symptomatic and receives a diagnosis of COVID-19/SARS-CoV-2 from a medical provider or a federal, state or local public health authority; or

(E) the subject worker receives a laboratory-confirmed diagnosis of COVID-19/SARS-CoV-2; or

(F) the subject worker receives a presumptive positive test result for COVID-19/SARS-CoV-2.

(c) An insurer or self-insured employer may rebut the presumption set forth in paragraph (b) of this subsection, or may deny a claim filed under this section for exposure to or infection by COVID-19/SARS-CoV-2, only:

(A) with clear and convincing evidence that the conditions identified in paragraph (b)(A), (B), (C), (D), (E), and/or (F) do not apply to the subject worker; and

(B) with clear and convincing medical evidence that the conditions identified in paragraph (b) (B), (C), (D), (E), and/or (F) were caused by a known and confirmed source of COVID-19/SARS-CoV-2 unrelated to work as an essential worker.

(d) Notwithstanding ORS 656.027 (6) [Portland also].

SECTION 2. This 2020 Act being necessary for the immediate preservation of the public peace, health and safety, and emergency is declared to exist, and this 2020 Act takes effect on its passage and shall apply to work on or after March 8, 2020 and until 180 days after the date a declaration of a state of emergency issued by the Governor is lifted.