

March 2, 2021

The Honorable Bobby Scott
Chairman
Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

The Honorable Virginia Foxx
Ranking Member
Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

The Honorable Patty Murray
Chair, Senate Committee on Health
Education, Labor, and Pensions
428 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Richard Burr
Ranking Member, Senate Committee
on Health Education, Labor, and
Pensions
428 Dirksen Senate Office Building
Washington, DC 20510

Dear Chair Murray, Ranking Member Burr, Chairman Scott, and Ranking Member Foxx:

We are writing to express opposition to amendment to the U.S. Longshore and Harbor Workers' Compensation Act (Longshore Act) that would establish statutory presumptions of coverage and compensability for illnesses that were not caused in the course of employment and did not arise from work covered by the Longshore Act.

Specifically, Section 2104 in Subtitle B-Labor Matters in the American Rescue Plan Act of 2021 would establish a presumption of coverage and compensability under the Longshore Act to maritime employees who contract COVID-19 at any time between January 27, 2020 and January 27, 2023. Section 2104 would create a presumption that an employee who contracted COVID-19 is not required to show that the illness arose at work and provide medical proof of the illness. Particularly on a retroactive basis, this proposal violates long-established law, re-writes existing employer/insurer contracts, and raises constitutional issues.

Further, a no-fault workers' compensation system is effective only if it is limited to illness and injury "arising out of and in the course of employment." Section 2104 would convert workers' compensation from a system that provides benefits to workers suffering workplace injuries to a form of guaranteed income replacement for non-injured workers. Extending the presumption for almost three years, until January 27, 2023, is impossible to justify since citizens are

engaging in social activities outside of work. It is therefore unreasonable to assume an individual must have contracted COVID-19 at work. In some cases, individuals are working from home in environments that are not within the control of the employer.

The Longshore Act already provides for a presumption.

Under Section 920 claims come within the provisions of the chapter in any proceeding for the enforcement of a claim for compensation in the absence of substantial evidence to the contrary. The creation of a presumption of coverage and compensability would conflict with Section 920.

A diagnosis of COVID-19 or exposure to others diagnosed with COVID-19, without more evidence of causation of illness arising from employment, should not create a presumption that an individual became ill or was injured on the job.

A presumption that an individual is entitled to be paid based only on a COVID-19 diagnosis is inconsistent with the fundamentals of workers' compensation that there must be sufficient evidence that the illness arose in the course of employment. To the extent that the illness results in the individual's inability to work, sick leave may be available, and treatment may be available through health insurance. Division E of the Families First Coronavirus Response Act of 2020 provides emergency paid sick leave that could be used for treatment of COVID-19 illnesses.

Even if an individual is deemed to have an injury arising out of or in the course of employment for which compensation is payable under the Longshore Act the individual is not "entitled" to be paid a particular amount or for a particular period of time.

As is true for other infectious diseases in the general population, individuals may be infected with COVID-19 virtually any place. This fact has been demonstrated throughout the world with travel restrictions, social distancing, and the wearing of masks. The Centers for Disease Control (CDC) maintains guidelines to assist individuals with measures recommended to avoid infection and the spread of COVID-19 to others.

A diagnosis of COVID-19 or exposure to individuals with COVID-19, without further evidence of injury or illness should not be compensable.

A diagnosis or exposure to others diagnosed with COVID-19 does not provide sufficient evidence of disability. Many individuals testing positive for COVID-19 are asymptomatic. If an individual is directed to leave employment due to testing positive for COVID-19 without impairment in performing work, he or she may be

eligible for unemployment compensation and/or sick leave or other leave, but the loss of work is not due to disability.

It is unclear the compensation for which an individual may be “entitled”

The fact that an individual tests positive for COVID-19 could result in no injury or illness, or a short-term medical need, or a temporary total or partial disability for a short period of time, but the determination would otherwise be determined under applicable provisions of the Longshore Act.

The Proposal Raises Concerns for the Senate Parliamentarian.

The Congressional Budget Office has projected that the proposal in Section 2104 would result in increased federal outlays of \$224 million over the period of 2021 through 2030. This amount is significantly less than the cost impact to employers and workers’ compensation insurance plans.

Maritime Industry representatives indicate that the cost of the proposal just in the maritime industry is projected to be approximately \$900 million and there will be costs associated with claims under this provision for many years after 2030. This extended impact is due to Longshore Act provisions that permit claims in cases of workplace exposure to be filed many years after claimed exposure.

Section 2104 proposes a reimbursement drop dead date in 2030 but does not set a time bar for a claimant filing claims. Therefore, should a claimant file in 2040, employers and insurance plans would be bound by the presumption, but would not be reimbursed for the claim. With “occupational disease” the claim time bar does not start running until a physician specifically tells a claimant he or she has a condition that is work-related. Longshoremen often file hearing loss, asbestosis, COPD, and repetitive stress claims many years after the point in time of claimed presumed causation of illness. The benefits of the Longshore Act are for life, but reimbursement to employer/carriers ends after 10 years; moreover, there is no time bar set preventing the employee from asserting a claim after the 10-year reimbursement period.

Section 2104 not only impacts the maritime industry, but all of the employers and industries with employees covered under the Longshore Act. The Longshore Act covers employees working for shipbuilders, non-appropriated fund employees, U.S. government contractors working in foreign countries under the Defense Base Act, and individuals employed in outer continental shelf work.

Points for review by the parliamentarian include:

- The provisions of Section 2104 primarily represent a policy change;

- The section does have a budget effect, but the effect is incidental to the policy change;
- The cost incurred by employers and workers' compensation plans as a result of the policy change is significantly greater than the CBO projected \$224 million in increased federal outlays;
- Section 2104 as written is likely to increase the federal deficit in years after 2030;
- Section 2104 creates increased administrative costs and costs associated with the risk that federal appropriations will not provide for timely and complete reimbursement.

For the reasons set forth above, we oppose the enactment of Section 2104, as it would create a presumption of coverage and compensability for illness due to COVID-19 without meeting the terms of the Longshore Act with respect to causation in the course of employment and that the illness arose from employment.

Sincerely,

Alternative Risk Ltd.

American Property Casualty Insurance Association (APCIA)

Alabama Self-Insured Workers' Compensation Fund

Arkansas State Chamber of Commerce

Arizona Chamber of Commerce and Industry

Associated Industries of Arkansas

Associated Industries of Massachusetts

California Coalition on Workers' Compensation (CCWC)

California Self-Insurers Association (CSIA)

Catapult

Ceres Terminals, Inc.

Connecticut Business and Industry Association

Georgia Association of Manufacturers

The Illinois Chamber of Commerce

Indiana Chamber of Commerce

The Indiana Manufacturers' Association

Iowa Association of Business and Industry

The Kansas Chamber

The Kentucky Chamber of Commerce

Louisiana Association of Business and Industry

Louisiana Association of Self Insured Employers

Michigan Chamber of Commerce

Michigan Manufacturers Association

Michigan Self-Insurers' Association (MSIA)
National Association of Waterfront Employers (NAWE)
National Council of Self Insurers (NCSI)
New Jersey Business and Industry Association
New Jersey State Chamber of Commerce
The Business Council of New York State
The North Carolina Chamber
North Carolina Homebuilders Association
North Carolina Retail Merchants Association
The Ohio Chamber of Commerce
Ohio Manufacturers' Association
Oregon Business and Industry
Pennsylvania Chamber of Business and Industry
Public Risk Innovation, Solutions, and Management (PRISM)
The Self Insurance Institute of America
Signal Mutual Indemnity Association Ltd
U.S Chamber of Commerce
UWC - Strategic Services on Unemployment
& Workers' Compensation (UWC)
The Virginia Chamber of Commerce
Washington Food Industry Association
Washington Retail Association
Marriott International, Inc.
People Systems