THE STATE of ALASKA
GOVERNOR BILL WALKER

Department of Labor and Workforce Development

Office of the Commissioner

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April 14, 2018

The Honorable Anna MacKinnon
Senate Finance Co-Chair
State Capitol, Room 516
Juneau, AK 99801

Dear Co-Chair MacKinnon:

Thank you for the opportunity to provide testimony in support of HB 79 on April 13, 2018. To clarify some of the concerns raised by the committee and public testimony, I offer the following responses.

Concern #1: ***The Department should not be conducting payroll audits nor assess a penalty for an employer's inadvertent misclassification*** **(Secs. 9, 35).**
The department does not conduct payroll audits. It does, however, investigate worker misclassification, which necessarily includes obtaining evidence from employers on job duties and payments or wages. In 2005, the Legislature created the workers' compensation special investigations unit (SIU). It tasked the unit with investigating fraudulent acts relating to workers' compensation committed by any person (worker, treatment provider, or employer). The goal of an insurance company's policy audit is to correct premium mistakes based on actual job duties (class code), actual number of employees, and actual wages, regardless of the number of times mistakes are made or whether the mistakes are inadvertent or deliberate. The goal of the SIU, however, is to identify, investigate, and deter workers' compensation fraud. If the SIU cannot investigate employer documents to determine compliance with the Alaska Workers' Compensation Act, then it cannot do the job the Legislature charged it with completing.

HB 79 sets a maximum penalty for violations of the Alaska Workers' Compensation Act. The amount of penalty actually assessed, however, will be determined on a sliding scale set out in regulation by the Alaska Workers' Compensation Board, which is made up of both labor and industry members. Penalties are not intended to destroy businesses or cause the loss of employment, but case law provides that civil penalties under the Act be restorative. Inadvertent failure to insure is already addressed in current regulation, where the penalty is assessed at the amount of the premium an employer would have paid had the employer been properly insured under the law. This ensures the employer does not financially benefit from violating the law and meets the restorative goal. Similar to our current system for an employer's failure to insure, inadvertent misclassification violations will fall on the low end of the scale, and willful or intentional violations on the high end.

Concern #2: ***Fines for failing to produce records are unnecessary*** **(Sec. 11).**
The Workers' Compensation Division must prove its case based on the records it receives from employers. The current law unintentionally rewards employers for failing to provide records they are

legally required to keep. Unscrupulous employers have learned how to game the system and frequently refuse to provide records, knowing that this often prevents the division from proving its case. It also means an employer who refuses to provide records is frequently penalized less severely than an employer who lawfully keeps and provides the records to the division. Section 11 in HB 79 corrects these issues. Employers who timely provide proper records will be unaffected by this change.

Concern #3: *Fines for failing to timely file proof of insurance are unnecessary because the system works well* (Sec. 13).
The division expends valuable time and resources investigating what appears to be an employer's failure to insure, only to find there was an insurance policy in place that had not yet been reported to the division. Section 13 in HB 79 corrects this by requiring insurers to timely file proof of insurance or face a fine of $100 for each day an insurer is late filing proof of coverage, with a maximum of $1,000 for each late filing. Anecdotally, insurance companies prioritize filing proof of insurance in states with an untimely filing penalty over states, like Alaska, that do not have one.

Concern #4: *The Department is eliminating the statute of limitations on claims* (Sec. 19).
HB 79 does not alter AS 23.30.105, the statute which provides a two-year time limitation for filing a claim. It does affect AS 23.30.110(c), the statute relating to hearing requests. Under current law, once an injured worker files a claim, an employer must accept or deny the claim. If the employer denies the claim, AS 23.30.110(c) requires the injured worker to request a hearing on the claim (or additional time to prepare for hearing) within two years. If the worker does not do so, the claim will be denied as a matter of law.

What the division seeks to curb is protracted and expensive litigation, and wasted division resources, in bringing a workers' compensation claim to resolution. Under HB 79, after a worker files a claim, the board will issue a scheduling order setting out discovery deadlines and a hearing date. Since a claimant will no longer be required to request a hearing, the time limit on doing so is moot. A flowchart explaining this process is attached for reference.

Concern #5: *The Department is eliminating the seven day grace period for paying benefits* (Sec. 23).
Under current law, compensation must be paid every 14 days with a seven-day grace period before a penalty is due. Practically speaking, this means an employer has 21 days to pay compensation. In its original version, HB 79 called a spade a spade and gave an employer 21 days to pay compensation, and eliminated the grace period. The House Judiciary Committee amended the language to give an employer 14 days with no grace period. The Department remained neutral on the amendment.

Concern #6: *Instead of a penalty, treatment not timely denied should be deemed approved* (Sec. 26).
HB 79 imposes a duty on an employer to either preauthorize or deny a written request for medical care within 60 days. If the employer fails to do so, it will owe a 25% penalty on the amounts untimely authorized; this penalty is in line with the penalty for failing to timely pay medical bills. If treatment is approved by inaction, the consequence for inadvertently missing a deadline would be automatic payment of what could be very expensive treatment such as surgery, including all follow-up surgeries and follow-up care, even if the treatment is clearly not work-related. A 25% penalty incentivizes timely payment while keeping a proportional consequence.

Concern #7: *"Knowingly" is not well-defined* (Sec. 36).
"Knowingly" has already been defined in case law for purposes of workers' compensation fraud. *See, e.g.*, ARCTEC Services v. Cummings, 295 P.3d 916 (Alaska 2013).

There were some concerns raised in committee that the division is implementing new penalties to finance its operations. To clarify, penalties collected under the provisions of Sections 9, 11, and 13 are statutorily required to go into the Benefits Guaranty Fund, otherwise known as the injured worker fund. The Benefits Guaranty Fund provides compensation and benefits to employees who were injured while working for an uninsured employer.

Please don't hesitate to contact me if you have additional questions.

Sincerely,

Heidi Drygas
Commissioner

cc: Chuck Brady, President, Workers' Compensation Committee of Alaska
John MacKinnon, Executive Director, Associated General Contractors of Alaska
Rick Shattuck, C.I.C, Chairman, Shattuck and Grummett Insurance
Saigen Harris, Project Manager, F&W Construction Company
Sam Robert Brice, President, Bilista Holding LLC

Workers' Compensation

Process When Employer Denies Benefits