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Management Labor Advisory Committee
Submitted Via Email

Re: SB 801-1

Dear Co-Chairs Winther and Wood:

Per Co-Chair Winther's request, I submit this additional testimony regarding problems with SB 801-1.

1. SB 801-1 Has Had Woefully Insufficient Discussion & Analysis

SB 801-1 was introduced on March 12, 2021 with little-to-no:

- Notice
- Discussion with Stakeholders
- Analysis
- Debate

Nevertheless, it is scheduled for a possible work session next week.

The lack of an open, thorough process of a bill that would be the most dramatic and significant change to the Oregon Workers' Compensation system in 36 years is shockingly imprudent and unfair

2. SB 801-1 Is Unconstitutional, Illegal and Void

- *SB 801-1 Violates the Contracts Clause (Article 1 Section 10) of the US Constitution*

    - Article 1 Section 10 provides that "No State shall…pass any…Law impairing the Obligation of Contracts."

    - There is no dispute that SB 801-1 obliterates an entire market of Third-Party Administrators (TPAs) and internal claim processing by self-insured employers. Thus:

        - There can be no dispute that the consequences of SB 801-1 would be to entirely end all contracts between self-insured their TPAs

        - There would also likely be interference of the contracts of TPAs with their landlords, and any other long-term contract entered based on the reasonable assumption over the past many decades that self-insured employers would continue to be able to contract with TPAs for claim processing

    - United States Trust Co v. New Jersey, 431 US 1 (1977). The US Supreme Court held that the Contract Clause prohibited NJ's retroactive release of an earlier covenant that totally eliminated a security provision for bond holders unconstitutionally impaired the obligation of the bond holders.

        - The state's police and regulatory powers are not limitless; Mr. Selvaggio's asserted analysis to the contrary and distinguishing SB 801-1 has no merit.

        - The Supreme Court struck down the NJ statute because it "totally eliminated an important security provision for the bondholders and thus impaired the obligation of the States' contract" "because the repeal was neither necessary to achievement of the plan nor reasonable in light of the circumstances."

        - The Court's reasoning controls here: SB 801-1 would totally eliminate not merely the terms of contract but the contracts themselves; Mr. Selvaggio has provided no plausible argument that a less "contract-impairing" change could solve his asserted vague and inarticulate "problem" of "perverse" and "unfair" claim processing by self-insured employers that requires such a drastic solution: the elimination of an entire segment of business in Oregon—TPAs and/or internal processing.

    - Allied Structural Steel Co v. Spanaus, 438 US 234 (1978). The US Supreme Court held that a Minnesota law that levied a fee on all pension plans violated the Contract Clause because it impaired a company's contractual obligations to its employees under its pension plan made long before the fee was levied. Relying on *US Trust v. NJ* cited above, the Court reasoned: "While the Contract Clause does not operate to obliterate the police power of the States, it does impose some limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power. Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." Again, the Court struck down the state statute because its impairment of contract was not justified—less onerous means were available. This case further supports SB 801-1 as unconstitutionally violating the Contract Clause.

- *SB 801-1 Violates Federal Antitrust Law*

    - The Sherman Antitrust Act of 1890 outlaws "every contract, combination, or conspiracy in restraint of trade," and any "monopolization, attempted monopolization, or conspiracy or combination to monopolize." The seminal case applying Federal Antitrust laws to a state action is California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 US 97 (1980).

- Generally speaking, states retain power to regulate, including anticompetitive policies, but only if the antitrust injury is the direct result of a clear sovereign act. Well known examples include: utilities, garbage collection, cable, liquor, etc. However, like the Contracts Clause analysis above, the State power is not limitless. The seminal case explaining the limit is California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 US 97 (1980).

- In *Midcal*, the United States Supreme Court struck down a California statute that required all wine producers and wholesalers to file fair trade contracts or price schedules with the State, and a wholesaler who sold wine below that price would be fined. The Court explained that a state "may displace competition with *active state supervision* if the displacement is both intended by the State and *implemented in its specific details*. *Actual state involvement, not deference to private pricefixing arrangements under the general auspices of state law*, is the precondition for immunity from federal law" (emphasis added).

- *Midcal* is on point. SB 801-1 fixes the price of claim processing to SAIF's determination: "The corporation may charge and receive from the self-insured employer compensation for the corporation's expenses in providing claim processing services" at a rate set by SAIF (SB 801-1 at 656.262(b)(D), p 17-18). SB 801-1's deference to SAIF's price-fixing is expressly prohibited by the United States Supreme Court in *Midal* as quoted above. Consequently, SB 801-1 violates the Federal Sherman Act and will, consequently, be struck down.

3. SB 801-1 Is Based on Invalid "Statistical" Analysis

- Mr. Selvaggio alleges: "by a quantitative analysis, we know that there is a problem here, whereby any particular worker is less likely to have their claim covered if they are employed by a self-insurer. This is a mathematical fact."

<u>This is patently false</u>

- Respectfully, the submitted statistical analysis would be thrown out of court under Oregon and Federal Rules of Evidence 702 as unscientific and unreliable.

- In particular: the extrapolation from cherry-picked numbers pulled from WCD "acceptance rates" to somehow mathematically conclude that there is a "problem here" of "perverse" and "unfair claims" processing requiring the drastic action of ending TPAs and self-insured internal claim processing *has zero basis* in fact, reason or mathematics.

  The only mathematical fact that may be drawn from the WCD "acceptance rate" data is that there were acceptances and denials of the numbers provided—any inference or extrapolation as to WHY those numbers are what they are cannot be made from the differences in the numbers. Period.

- To do so as advocated by the proponents of SB 801-1 would be mere supposition and speculation on which neither MLAC nor the Oregon Legislature should rely as a matter of sound decision making, much less in deciding whether to make the greatest change to the Oregon workers' compensation sytem in 36 years. Now THAT would be perverse.

For these reasons, I urge the Committee to recommend against SB 801-1.

Respectfully submitted,
WALLACE, KLOR, MANN,
CAPENER & BISHOP, P.C.

Benjamin C. Debney