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TO: Representative Barbara Sears

FROM: Josh Brown, Esq.
Legislative Advocate for the Ohio Municipal League
Executive Director, Ohio Association of Public Safety Directors

RE: Requests Regarding SB 5 and PTSD Language in the Senate Budget

Dear Members of the General Assembly,

The Ohio Municipal League, on behalf of our members, write in opposition to Senate Bill 5 and the language from SB 5 which has been inserted into the Senate Budget.

SB 5 proposes to make so-called mental-mental claims in the context of Post Traumatic Stress Syndrome (PTSD) generally compensable under Ohio Worker's Compensation. This would eliminate the physical injury requirement (so-called physical-mental) and allow peace officers, firefighters, and emergency medical workers to become eligible for workers compensation benefits once they have been diagnosed with work-related PTSD. The "physical-mental" requirement is a long-standing precedent in Ohio's workers compensation system with a century of case-law and experience behind it.

First, we would like to address the issue of "mental health parity," which we support in principle. The question is the application and definition of the word "parity." Merriam Webster defines "parity" as "the state of being equal." It cannot be construed to mean "same" as there are real differences between mental health claims and physical health claims. Adjustments must be made for the real differences between the two types of claims. Below, we lay out a road-map for doing this in a way that maintains "parity."

Although the legislation is well-intentioned, sorting out the differences in mental and physical claims gives rise to a host of complicated and essential issues that must be resolved during the legislative process. This memo is organized to address the following issues:

- 1) some employees pose an elevated risk for PTSD;
- 2) a diagnosis of PTSD is highly subjective;
- 3) the diagnosis of the cause of PTSD is highly difficult to determine, and;
- 4) some jobs pose an elevated risk of PTSD.

Preliminary Issue: What Do Other States Do?

Ohio's long-held precedent on PTSD compensation is, by no means, unusual. The vast majority of states either require a physical component (like Ohio) or require the stimulus to be unusual for the employee's position. The following states do not offer coverage for mental-mental conditions under any circumstances: Alabama, Arkansas, Connecticut, Florida, Georgia, Idaho, Kentucky, Minnesota, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, and Wyoming.

Only three states award compensation for mental-mental claims, without regard for the occurrences which led to the condition: Alaska, California, and Hawaii.

* See page 4 for a discussion of what the remaining states do.

Enumerated Issues:

1. Some Employees Pose an Elevated Risk of PTSD (“Eggshell Skull” Issues)

An employer normally has to take an employee as it finds him or her, which is often referred to as the “eggshell skull principle.” That means that usually the employer has to compensate the employee for medical claims, even if that employee can be identified as presenting a higher claim risk.

For example, an employee may have a heart condition that nobody knows about that leads to an injury under otherwise normal labor conditions. In that case, the employer still has to compensate the employee for the injury, regardless of the fact that the employee had an “eggshell skull” i.e., was more susceptible to particular injury than a normal person. The employer cannot argue that a normal person would not have suffered the injury.

Consequently, it is likely that employers will seek prevention and early identification as a part of their overall risk management efforts—whether explicit or not. This could lead to various types of discrimination, especially against women, who are twice as likely to experience PTSD and military veterans who have the stigma (fair or not) of being more susceptible to PTSD.

The employer is in classic catch-22. On one hand, if they do not mitigate potential PTSD claims with a prevention and identification program, then they will take on employees who present an elevated risk of high cost claims (i.e., potential eggshell skull employees). Conversely, if they do implement such programs, then they open the door to discrimination claims and certainly bad press.

REQUEST:

If PTSD claims are to be generally compensable, then state law should provide guidance on what risk-factors may be taken into consideration in the injury-risk phase of the hiring process.

Certainly, it is a legitimate concern that genuine risk assessments could be attacked for lack of political correctness. Only state law could provide the necessary cover for public employers.

2) PTSD Diagnosis is Subjective

Unlike the traditional compensable claims in Ohio, there is a significant subjective component to the diagnosis of PTSD. There is nothing for the Doctor to observe in terms of physical symptoms. Many of the elements considered in the diagnosis of PTSD are simply the result of question and answer. I.e., the element of “distressing memories” may be satisfied when the doctor asks “have you had distressing memories related to [stress in question],” and the employee merely answers “yes.” Because of this, there is an elevated risk of an expensive misdiagnosis.

The criteria for a PTSD diagnosis has recently undergone a significant and controversial change. It has been moved from DSM-IV to DSM-5, meaning it has been reclassified as a Trauma and Stress or Related Disorder—until recently it was considered an anxiety disorder. Please see Exhibit 1 for full review of the issue. However, please note on the second page of this Exhibit 1 that “Some attendees at the 2012 American Psychiatric Association Annual Meeting . . . also questioned whether *injury* is too imprecise a word for medical diagnosis.” (Emphasis added).

REQUEST:

If PTSD is to be generally compensable by Ohio Workers Compensation, we would ask that the General Assembly set a standard for how certain the diagnosis should be. We would ask that a doctor offering this diagnosis show facts which establish each element of the most current diagnosis standards and facts which establish the degree of certainty with which he/she has made that diagnosis. When possible, the doctor should weigh observable factors more heavily than non-observable. The degree of certainty should be something analogous to “beyond a reasonable doubt” given the highly subjective nature of the diagnosis and controversy surrounding the diagnostic criteria.

3) PTSD Causation is Highly Subjective and Difficult

Workers Compensation is supposed to cover work-related injuries only. The difficulty in determining the cause of a PTSD diagnosis could force employers to pay for claims that are not work-related.

Take the recent case, *Rizzo v. Kean University*, 2014 N.J. Super. Unpub. LEXIS 1358 (June 11, 2014) as a recent example. Here, the claimant was allegedly locked in a room and sexually harassed by her employer. She testified that she was especially vulnerable to harm from the incident because she had been abused sexually as a child.

Here, we see the classic “eggshell skull” issue. The Judge denied her claim because the evidence showed that her PTSD was caused by trauma she experienced as a child, not the incident that allegedly triggered her emotional difficulties. The incident at work merely “triggered” preexisting conditions which were not work-related. This case was very costly for the employer because it went all the way to the state appellate courts before it was resolved.

REQUEST:

If PTSD is to be generally compensable under Ohio Workers Compensation, we would ask that the General Assembly determine what degree of work-related causation is required. If it is determined that the PTSD was caused by a mix of work-related and non-work-related conditions,

then we would suggest that the reviewing entity be able to find that the PTSD was more than 50% caused by work-related conditions, i.e., that the work-related condition be the preponderance of the cause of the condition.

4) Some Jobs Pose Elevated Risk of PTSD (“Unusual” Stimulus Requirement)

This legislation gives rise to the important question: will the legislature allow employers to show that a claim should not be compensable unless the circumstance that led to the alleged PTSD was unusual for the job or that the average person in that job should be able to handle the stress in question? More simply put, as an example, we think police officers should be expected to handle stresses that they know all police officer have to be able to handle—a police officer should not be able to make a workers compensation claim for experiencing an incident that is normal for police officers.

Where the level of stress faced by the employee is objectively quite ordinary (i.e., ordinary to the normal person), although *subjectively* very difficult (i.e., very difficult to that particular employee), the bulk of the U.S. jurisdictions—either through court decision or actual statute—deny compensability for mental injury claims, including those related to PTSD.

States where PTSD is not compensable unless the stimulus is “unusual” include: Colorado, Illinois, Iowa, Louisiana, Maine, Mississippi, Missouri, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, and Vermont. Some states only allow for compensation in mental-mental cases if the mental stimulus is sudden, they include: Colorado, Louisiana, Maryland, Tennessee and Virginia.

REQUEST:

First, if PTSD is to be generally compensable under Ohio Workers Compensation, then there should be a requirement that the stimulus be “unusual” and “sudden.” Secondly, Ohio should join the bulk of US jurisdictions in requiring that the level of stress be “objectively” unusual to the typical person who holds the claimant’s job.

Another issue under this heading is whether the employee should be employed for a certain period of time before seeking compensation for PTSD. For example, we think that a new police officer who experiences PTSD after his or her first difficult incident—after having been on the job for merely a month—should not be compensated. That officer, presumably knew the unique stresses and discovered soon that he or she could not handle it. Having knowingly entered into a profession with known difficulties, the proper course is for the officer to find another way to serve, not to file an expensive workers compensation claim. California requires the person to serve for at least 6 months before PTSD is general compensable (California is one of only three states—Alaska and Hawaii are the other two—in the US that make PTSD general compensable).

REQUEST:

If PTSD is to be generally compensable under Ohio Workers Compensation, then there should be a probationary period (we recommend one year) before this is to kick in.

Thank you for your consideration.