Workers' Compensation

COVID-19 Spawns Push for Reforms in Workers' Compensation

California's workers' compensation system is a 100-year-old, constitutionally guaranteed system that provides workers the right to compensation for workplace injuries. This compensation includes medical treatment to "cure and relieve" the injury and, when appropriate, indemnity benefits in the form of temporary or permanent disability.

The system is rooted in an agreement between employers and employees, sometimes referred to as the "The Grand Bargain," where employers accept responsibility for all injuries and illnesses that occur in the course and scope of employment, even when they would otherwise have no legal liability. The workers, in exchange for the guaranteed coverage, relinquish the right to sue their employers in civil court.

When an employee files a workers' compensation claim, the employer generally has 90 days to accept or reject the claim. The employer is required to pay for up to $10,000 in health care services while the claim is being reviewed, even if it ultimately is denied. If the employer rejects the claim, the employee has the right to have his or her claim heard by a workers' compensation administrative law judge.

WORKERS' COMPENSATION CLAIMS AND COVID-19

When COVID-19 began to spread through California, many companies suffered financially and were forced to lay off employees or find ways to transition their workforce to teleworking, if possible. Many industries — such as health care providers, first responders, restaurants and grocery stores — scrambled to find ways to continue operating while doing all they could to protect workers from exposure to COVID-19.

Companies started to receive workers' compensation claims from workers claiming that they contracted COVID-19 at work and seeking compensation for medical treatment and benefits. Employers also faced lawsuits for workers' family members that were exposed. Whether those lawsuits are barred by the "exclusive remedy rule" that was developed as part of the Grand Bargain is being litigated in the appellate court.

While many employers promptly accepted COVID-19 claims in 2020, some denied claims because there was no evidence the diagnosis was work-related, and some claims lacked any diagnosis or positive test of COVID-19. According to the California Workers' Compensation Institute, a review of claims filed on or before April 30, 2020, shows that 69.7% of claims that were denied were due to negative results on a COVID-19 test. These included claims filed by workers because their co-workers had showed symptoms even though they themselves showed no symptoms and had not tested positive for COVID-19. Data through fall 2021 shows that employers still are accepting the majority of COVID-19 workers' compensation claims.

In May 2020, Governor Gavin Newsom signed Executive Order N-62-20, which created a disputable presumption that employee COVID-19 diagnoses between March 19, 2020, and July 5, 2020 were contracted at work and therefore covered by workers' compensation.

On September 17, 2020, the Governor signed SB 1159 (Hill; D-San Mateo; Chapter 85), which codified Executive Order N-62-20 and also extended the rebuttable presumption to COVID-19 illnesses diagnosed after July 5, 2020 by certain emergency responders and health care professionals who had worked within 14 days of the positive test, as well as employees who performed work at a worksite within 14 days of an outbreak of COVID-19. SB 1159 defined "outbreak" as four employees testing positive for COVID-19 where the employer has 100 or fewer employees or 4% of employees testing positive where the employer has more than 100 employees. Not only does SB 1159 shift the burden to the employer to dispute the claim that the contraction of COVID-19 was work-related, but the bill also shortened the time to accept or reject a claim to 30 or 45 days, depending on the circumstances.

The Workers' Compensation Insurance Rating Bureau of California has indicated SB 1159 may result in between $2.2 billion and $33.6 billion in increased costs per year to the workers' compensation system. The cost to the system has not yet been determined, and it likely will be several years before that data is available.

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POTENTIAL CHANGES TO SYSTEM ON HORIZON

Although SB 1159 was a significant expansion of benefits enacted in 2020, a number of workers' compensation bills were introduced in 2021. These provide a good indication of the types of issues employers can expect to see as part of a large conversation about changing the workers' compensation system.

• **Expanding Presumptions of Workplace Injury**. Perhaps the most prevalent issue has been the increased effort to add disputable and even conclusive presumptions to workers' compensation claims. To succeed on a workers' compensation claim, the burden generally is on the injured worker to present some medical evidence that the illness is related to work. The employment need not be the sole cause of the injury, but there needs to be evidence that the injury arises out of and in the course of the employment. In other words, the employment and injury must be causally linked.

A rebuttable presumption that the injury is compensable places the burden on the employer. The employer must accept the claim unless it can show that there is no causal connection between the claim and the employment. This places a tremendous burden on the employer, which now must conduct discovery into the employee's other nonwork activities and whom the employee interacted with to try to demonstrate that the employee did not contract COVID-19 at work.

Although some employers may have the means to try to trace the exposure or hire companies to administer tests on site, many employers do not — in large part because of the financial hits from the economic recession. The employer's burden also applies equally for the next three years to all employees who work at a worksite, even if some employees have very little risk of exposure given the nature of their position or precautions taken by the employer.

Historically, presumptions have been applied only in rare circumstances, such as to claims brought by public safety workers who hold hazardous positions with great risk of injury, such as firefighters and peace officers. Even then, the presumption applies only to certain alleged injuries.

Although COVID-19 presents a unique situation, there is concern that more presumptions will begin to be applied to other types of workers' compensation claims in the future involving infectious diseases, which are difficult to trace. Indeed, SB 213 (Cortese; D-San Jose) as introduced would have created a presumption of industrial causation for all hospital employees who provide direct patient care and manifest any one of many identified infectious diseases. As noted in the report issued by the California Workers' Compensation Institute, "[i]nserting presumptions disrupts the normal process of determining whether the injury is related to employment" and they therefore should be used sparingly.

• **Shortening Claims Review Periods**. SB 1159 shortened the window of time for employers to review potential claims. An employer and its claim adjuster usually have 90 days to review a claim to determine whether to accept or deny coverage. During that time, the claim is investigated, including gathering and reviewing medical evidence. SB 1159 sets precedent for shortening that time frame to just 30 or 45 days, depending on the date of the alleged injury and worker's job title. That time frame is especially short where the employee may be ordered to quarantine for a minimum of two weeks, severely limiting the ability to investigate the claim.

SB 335 (Cortese; D-San Jose) would have shortened the time frame for *all* claims to just 45 days, or 30 days for claims with a presumption. The most probable outcome from this proposed change is a higher number of denials of coverage as a result of not being able to complete the initial discovery process. This is because employers would not be able to identify, acquire and evaluate the records and information necessary to make a fair determination. They certainly will not have time to identify a medical evaluator, set an appointment, deliver appropriate records, and obtain a high-quality medical report to determine causation and inform their decision making. The change also would punish the worker by shortening the amount of time during which they can receive medical care during the discovery phase.

• **Medical Provider Networks**. Two bills introduced in 2021 sought to address medical provider networks.

AB 1465 (Reyes; D-San Bernardino) would have established a statewide medical provider network that any employee could opt into. A state-established medical provider network would have considerably undermined existing medical provider networks because employers would have no means by which to keep out bad providers. The barrier for admittance into the state network is extremely low, with essentially no ability for the state to eliminate problematic providers. Not only does this greatly inhibit an injured worker's ability to obtain quality care, but it will increase frictional costs in the workers' compensation system. These frictional costs are difficult to quantify, but include increased litigation, increased medical-legal evaluations, changes in medical utilization, increased dispute resolution over bills and medical review, and slower return-to-work rates.

AB 399 (Salas; D-Bakersfield) would have made a series of reforms to the medical provider networks, including

implementing hours requirements for providers, increasing required disclosures, implementing changes to bill reviews, and significantly increasing penalties. Such sweeping reforms historically have been part of negotiations between all stakeholders, which is essential to preserving the delicate balance of the workers' compensation system.

BALANCED APPROACH

In recent years, California has fluctuated between being the first and fourth most expensive workers' compensation systems in the nation. According to a biennial report issued by the state of Oregon on national workers' compensation rankings, California employers pay 150% of the national median cost to secure required coverage. (*See 2020 Oregon Workers' Compensation Premium Rate Ranking Summary*, available at: *https://www.oregon.gov/dcbs/reports/Documents/general/prem-sum/20-2082.pdf*.)

In recognition of the unique and costly nature of California's workers' compensation system, major reforms have been rooted in extensive negotiations between relevant interest groups, including the Governor, workers, employers, insurers, and attorneys. In 2012, Governor Edmund G. Brown Jr. signed SB 863 (De León; D-Los Angeles; Chapter 363), which made wide-ranging changes, such as increased benefits to workers, cost-saving efficiencies, and new independent processes for resolving medical treatment issues and billing disputes. Subsequent reforms enacted significant anti-fraud legislation to prevent abuses in the system. As a result, claim and cost trends in California's system have remained largely stable for the last decade.

There still is little data about COVID-19's long-term impact on the system. While the filing of nearly 150,000 COVID-19-related claims was offset in part by a reduction in the number of nonCOVID-19 claims filed, some expect to see a rise in post-employment, cumulative trauma claims in the coming years as a result of the higher unemployment rate. These claims are highly associated with late reporting, slow development, significant litigation and high frictional costs.

The impact from COVID-19 claims and post-pandemic employment trends poses questions for the long-term stability of California's workers' compensation system. For this reason, it is especially important that any workers' compensation legislation be vetted thoroughly. Changes that are unsupported by data and not reviewed by the system's primary stakeholders will destabilize the system by increasing litigation, increasing frictional costs, increasing rates, delaying access to medical care, and delaying the return of workers to jobs — all of which is bad for both employers and workers.

CALCHAMBER POSITION

The workers' compensation system was created to provide a cost-efficient and expedited way to compensate employees for workplace injuries. Once an employee establishes that an injury is work-related, the employee is entitled to compensation, regardless of fault. Adding "rebuttable," or even worse, "conclusive" presumptions that an injury is work-related, limiting an employer's ability to investigate claims, or expanding the injuries resolved in the workers' compensation system could overwhelm the system and significantly increase costs.

The Legislature must be cautious when proposing changes to the workers' compensation structure so as to maintain a balanced system that provides fair benefits to workers while minimizing costs and unfair pressures on employers.

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