



Legislative and Industry Updates – October 22, 2018

The 2018 legislative session has come to an end and many bills that made their way to the Governor's desk for action by September 30, 2018. The following is an update on some of the key bills that may impact the Workers' Compensation program.

LEGISLATIVE ACTIVITY

AB 479 Permanent Disability Apportionment (Gonzalez-Fletcher)

AB 479 will require that industrial injuries/illnesses with Permanent Disability (PD) resulting from breast cancer, consider permanent impairments including the presence or absence of the organ, skin disfigurement, and pain, among other things including a provision that childbearing age not be a factor when determining impairment.

This bill is seen as another attempt by the author at addressing assumed PD rating inadequacies that adversely impact female employees. Previous bills submitted by this author under this assumption (AB 1643 and AB 305) have been vetoed by Governor Brown.

STATUS – GOVERNOR'S VETO. In part, the Governor's veto message reads *"This bill would require physicians to consider a specific list of impairments when determining a worker's disability for the purposes of workers' compensation when that worker suffers from breast cancer. This proposal is similar to three previous measures that I have vetoed Assembly Bill 570 in 2017, Assembly Bill 1643 in 2016 and Assembly 305 in 2015. This bill and its predecessors have repeatedly singled out specific conditions and proposed a special set of rules that apply to them. This would result in an even more complex workers' compensation system that would essentially be "disease by statute," which would ultimately burden injured workers seeking quick resolution to their claims."*

AB 1749 Off-Duty Police Officers (Daly)

This bill is in response to the Las Vegas shooting incident from which several off duty Police Officers in attendance at the concert have filed Workers' Compensation claims for injury. Many, if not all, of these claims have been denied and are currently in litigation.

Labor Code 3600.2(a) currently provides for Workers' Compensation benefits for a "peace officer" when they are injured "from performing his duties as a peace officer by reason of engaging in the apprehension or attempted apprehension of law violators or suspected law violators, or protection or preservation of life or property, or the preservation of the peace anywhere in this state, including the local jurisdiction in which he is employed, but is not at the time acting under the immediate direction of his employer, he or his dependents, as the case may be, shall be accorded by his employer all of the same benefits, including the benefits of this division, which he or they would have received had that peace officer been acting under the immediate direction of his employer."

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This code provides that the activity must occur in the State of California. As the Las Vegas shooting incident occurred in the State of Nevada, coverage under this code is not provided. AB 1749 would provide that the coverage is extended if the duties engaged in occur in this State or in another State. The bill does not provide for a “presumption” of compensability.

Concerns with the bill include the increased assumption of risk for Public Entities and 24/7 coverage for Safety Officers regardless of where they may be. Working with Legislative staff, significant amendments were made “to clarify that the payment of peace officer workers' compensation benefit claims is not required for injuries sustained outside of California but is discretionary in accordance with specified policies, for specified actions.” The bill reads:

“(b) Nothing in this section shall be deemed to: (4) Preclude an employer, at its discretion or in accordance with written policies adopted by resolution of the employer’s governing body, from accepting liability for compensation under this division for an injury sustained by a peace officer, as defined in Section 50920 of the Government Code, by reason of engaging in the apprehension or attempted apprehension of law violators or suspected law violators, or protection or preservation of life or property, or the preservation of the peace, outside the state of California, but who was not at the time acting under the immediate direction of his or her employer, including any claims for injuries sustained by peace officers during the October 1, 2017, mass shooting in Las Vegas, Nevada, if the employer determines that providing compensation serves the public purposes of the employer. For claims filed pursuant to this paragraph by peace officers for injuries sustained during the October 1, 2017, mass shooting in Las Vegas, Nevada, the date of injury for purposes of subdivision (a) of Section 5405 shall be deemed the operative date of the act adding this paragraph. Acceptance of liability under this subdivision shall not affect the determination of whether or not the peace officer acted within the scope of his or her employment for any other purpose.

Note – it is recommended prior to adoption of a resolution or policy providing this expansion of coverage that discussions be undertaken with program management and excess carriers.

STATUS – APPROVED.

AB 2334 OSHA Reporting (Gonzalez-Fletcher, Thurmond)

This bill will require the electronic submission of certain injury and illness information to the Cal/OSHA, It will require Cal/OSHA to create a searchable data base of the annually reported information. Supports state the current manual posting of the OSHA 300A does not provide the public an opportunity to access and review the information.

The analysis of this bill estimates the “Department of Industrial Relations (DIR) will incur initial special fund costs of \$1.8 million and \$1.3 million ongoing annually for internet technology (IT) and staffing resources to develop and maintain the database.”

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The bill would also allow Self-Insurance Plans to release information regarding Public Entities, JPAs and Public Self-Insured entities workers' compensation information and that the Department of Industrial Relations may release information regarding the administration and solvency of Self-Insured Public Entities.

STATUS – APPROVED.

SB 880 Workers' Compensation – Prepaid Cards (Pan)

This bill proposed a pilot program that would run until January 1, 2023 allowing the State Compensation Insurance Fund (SCIF) to provide Temporary disability payments to injured workers via prepaid card accounts. However, the bill has been amended to allow all employers to participate in the program and to relate to ALL disability benefits (Permanent and Total Disability). The would also require the employer provide "all necessary aggregated data" on their prepaid programs to the Commission on Health and Safety and Workers' Compensation upon request.

Participation is voluntary for the employer and employee. The implementation costs identified when the bill was to only apply to SCIF were noted in the "hundreds of thousands of dollars one-time, which would be offset by administrative cost savings within three years." The financial impact for implementation for smaller employers is not identified.

The bill requires the agreement of the injured worker, and that specific requirements are met including:

"For purposes of this section, a prepaid card shall also meet all of the following requirements:

- (i) Allow the employee to withdraw the entire balance on the card in one transaction without incurring fees.
- (ii) Allow the employee reasonable access to in-network automatic teller machines (ATMs).
- (iii) Allow the employee to make point-of-sale purchases without incurring fees from the financial institution.
- (iv) Prohibit a link to any form of credit, including a loan against future payments or a cash advance on future payments.

(B) The fees associated with the use of the prepaid card shall be disclosed to the employee in writing. The only permissible fees associated with the use of a prepaid card are those for a replacement card provided through expedited delivery, out-of-network ATM fees on the third and subsequent withdrawal per deposit, and fees associated with foreign transactions."

The analysis published on this bill states it "attempts to address the issue of unbanked workers receiving their TD benefits without significant fees".

STATUS – APPROVED.

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SB 899 (Pan)

Permanent Disability (PD) relating to industrial injury or illness requires the determining physician to address the issue of causation of the PD. This bill is an attempt to correct recent case-law (City of Jackson v WCAB (Rice)) which found apportionment of the employee's PD "to his personal history including "genetic issues".

Concerns exist as the bill erodes the apportionment granted in SB 899 (effective 2004), which provided that only the PD related to employment is awarded and that apportionment to other factors must be considered. Working with the legislative staff, the bill has been amended to remove the exclusion of genetics, and focus the bill on stating "excluding race, gender and national origin" would be required when determining apportionment.

STATUS – GOVERNOR'S VETO. The Governor's veto message reads "*Consistent with current law, this measure seeks to preclude a physician from using race, gender, or national origin as a basis for apportionment. I am vetoing this bill for many of the same reasons that I returned a similar measure in 2011 - Assembly Bill 1155.*

This bill is unnecessary as it would not change existing law and may disturb settled court decisions, which already provide protection from the inappropriate application of the apportionment statutes. Additionally, the proposed wording of the amended statute may create ambiguities in the law, resulting in increased litigation, costs for employers and confusion for injured workers and their representatives."

UPDATE ON THE DRUG FORMULARY –

Implementation of AB 1124 (2015), required the Division of Workers' Compensation (DWC) to adopt an evidence based drug formulary "to augment the provision of high-quality medical care, maximize health, and promote return to work in a timely fashion, while reducing administrative burden and cost."

The formulary became effective January 1, 2018 and applied to drugs dispensed on or after that date (regardless of the injury date). This formulary only applies to drugs dispensed for use outside of a clinical setting.

Physicians treating workers injured before January 1, 2018, receiving an ongoing course of drug therapy were required to review the treatment plan and develop a transition plan for care by April 1, 2018.

Initial concerns regarding the implementation of the formulary included fear for lack of cooperation from treating physicians and delays in obtaining appropriate documentation to support prescriptions. However, claims administrators have noted the expected "push back" from physicians has not occurred and the formulary process appears to be heading in the right direction.