



Legislative and Industry Updates – April 1, 2019

Workers' Compensation activity is underway in the Legislature. A review of currently proposed bills provides that several may have a significant impact to the BCJPIA program. An update on those which may impact the Workers' Compensation program is provided.

LEGISLATIVE ACTIVITY

AB 5 Independent Contractor Status (Gonzalez)

A recent California Supreme Court unanimous decision (*Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, (2018) 4 Cal.5th 903) regarding misclassified workers, established an "ABC test" to determine if the workers were actual employees or independent contractors. The ABC test states an employer must meet all 3 of the following to prove that a worker is NOT an employee:

- a) The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- b) That the worker performs work that is outside of the usual course of the hiring entity's business; and
- c) That the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.

AB5 proposes to codify the *Dynamex* decision, defining its application to additional employment benefits, including workers' compensation.

STATUS – Committee Hearing 04/03/19.

AB 71 Independent Contractor Status (Melendez and Kiley)

This bill acknowledges the "ABC test" noted in AB 5 and proposes instead to require a determination of independent contractor status to rely upon "a specific multifactor test, including whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired, and other identified factors". The bill lists 10 factors that could be considered, but not limited to in determining employment status:

"(1) Whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired, which is the principal factor.

(2) Whether the one performing services is engaged in a distinct occupation or business.

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- (3) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision.
- (4) The skill required in the particular occupation.
- (5) Whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work.
- (6) The length of time for which the services are to be performed.
- (7) The method of payment, whether by the time or by the job.
- (8) The right to discharge at will, without cause.
- (9) Whether or not the work is part of the regular business of the principal.
- (10) Whether or not the parties believe they are creating the relationship of employer-employee.
- (c) The individual factors set forth in subdivision (b) above shall not be applied mechanically as separate tests, but shall be intertwined.
- (d) The test set forth in this section shall apply to any determinations before an administrative agency or court.”

STATUS – Introduced.

AB 749 Settlements (Stone, Gonzalez and Reyes)

This bill proposes to prohibit employment settlements entered in to on or after January 1, 2020 from including a provision the employee is restricted from returning to work for the employer. Employment status may be important to the resolution of a Workers’ Compensation claim and can determine when benefits are payable. There can be instances where the specifics of a Workers’ Compensation settlement depend upon employment status. While the settlement of Workers’ Compensation claims does not directly involve termination of employment agreements, there is concern that underlying personnel issues resolved by agreement may complicate and/or delay Workers’ Compensation case resolution.

Staff will continue to monitor this proposal for impact to the Workers’ Compensation program.

STATUS – Committee Hearing 04/09/19.

AB 932 Firefighter Injuries Out of State (Low and Petrie-Norris)

Similar to AB 1749 from the last session which expanded out of state coverage for Peace Officers **IF** the employer had passed a resolution agreeing to provide coverage, this proposal expands out of state coverage for Firefighters, including those which may have been injured during the Las Vegas shooting 10/01/17. At this time, one of the primary differences in the bill as proposed is that it **DOES NOT** require a resolution from the employer to provide coverage.

It is recognized this bill is in its infancy and further amendments are expected.

STATUS – Committee Hearing 04/03/19.

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AB 1107 Medical Treatment (Chu and Reyes)

All employers are required to have an approved Utilization Review (UR) process in place to review, approve, modify or deny medical care. This review relies upon the medical expertise of UR and application of the Medical Treatment Utilization Standards. UR disputes can be escalated by the physician or employee to the Independent Medical Review (IMR) process as established in SB 863. Analysis of the IMR process shows over 90% of the IMR reviews uphold the original UR findings.

This bill proposes to again place the determination of medical care back in the hands of the Workers' Compensation Appeals Board (WCAB), rather than medical professionals and would appear to eliminate application of the Medical Treatment Utilization Standards (MTUS). Medical care requested by a primary or secondary treating physician would be exempted from the UR and IMR process if the employee has a "serious chronic condition", or the care has been previously "authorized by the employer, and the employer fails to demonstrate a specified change in the employee's circumstances or condition" or the requesting physician is a member of the employer's Medical Provider Network (MPN).

Returning the decision of medical care to a legal, rather than medical opinion, will result in increased claims costs to employers and delayed medical care to injured workers as they wait for litigation to resolve.

STATUS – Committee Hearing 04/24/19.

AB 1400 Fire Service Personnel (Kamlager-Dove)

Existing law provides for a presumption of compensability for cancer arising from the employment of active firefighters. This bill would expand that presumption to "Fire Service Personnel".

There is no current definition within the bill for Fire Service Personnel, other than those with "exposure to active fires or health hazards resulting from firefighting operations". Without clarification, this presumption can apply to any and all staff and volunteers of a Fire Station, who may or may not have any more DIRECT exposure to carcinogens than the general public.

When considering the number of schools, public offices and businesses closed during the last fire season due to unhealthy air from the fires, this expansion of the cancer presumption significantly increases the financial exposure for Public Entities.

STATUS – Committee Hearing 04/24/19.

SB 416 Peace Officer Definition (Hueso)

This bill proposes to expand the 10 current presumptive injuries to Peace Officers as defined by "*Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, except for those peace officers described in subdivision (b) of Section 830.1, and Sections 830.39 and 830.4 of the Penal Code.*" This section of code is very extensive (approximately 30 pages in length) and includes:

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“A housing authority patrol officer employed by the housing authority of a city, district, county, or city and county”

“Persons designated as a security officer by a municipal utility district pursuant to Section 12820 of the Public Utilities Code”

As currently stated; the bill proposes to expand the presumptive injuries well beyond their original intention and will result in increased costs to Public Entities throughout the State.

The bill is supported by Peace Officers’ Research Association of California (Sponsor); California Statewide Law Enforcement Association; Compton School Police Officers Unit; Los Angeles School Police Management Association; Los Angeles School Police Officers Association; San Diego County Assistance Investigators Association

The bill is opposed by California Association of Joint Powers Authorities; California Coalition on Workers’ Compensation; California State Association of Counties; CSAC Excess Insurance Authority; League of California Cities; Rural County Representatives of California, Urban Counties Caucus

STATUS – Committee Hearing 04/08/19.

SB 542 PTSD Presumption (Stern)

This bill will add to the 10 current presumptive injuries for Safety Officers, coverage for “mental health condition or mental disability that results in a diagnosis of post-traumatic stress or mental health disorder”, and further states this provision would apply to claims filed or pending on or after 01/01/17. Effectively, applying a presumption to a claim 2 years after it was filed.

Appropriate medical and psychiatric care is to be provided to all injured workers as it relates to their employment. While this bill does reference the care provided, it first addresses determination of compensability through the presumptive injury. Combining post-traumatic stress (PTSD) and a general mental health disorder as one presumptive injury opens up the psychiatric injury to wide interpretation, leading to increased costs to Public Entities which may not relate to actual employment injury.

STATUS – Introduced.