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A Review of 2022 California Workers' Compensation Bills

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About Michael Sullivan & Associates LLP

- The firm provides high-quality litigation in defense of workers' compensation claims, employment issues, immigration law and insurance litigation.

- Offices in El Segundo, Fullerton, San Diego, Westlake Village, Ontario, Fresno, Emeryville, Sacramento and San Jose.

- Author of "Sullivan on Comp," which covers the complete body of California workers' compensation law.

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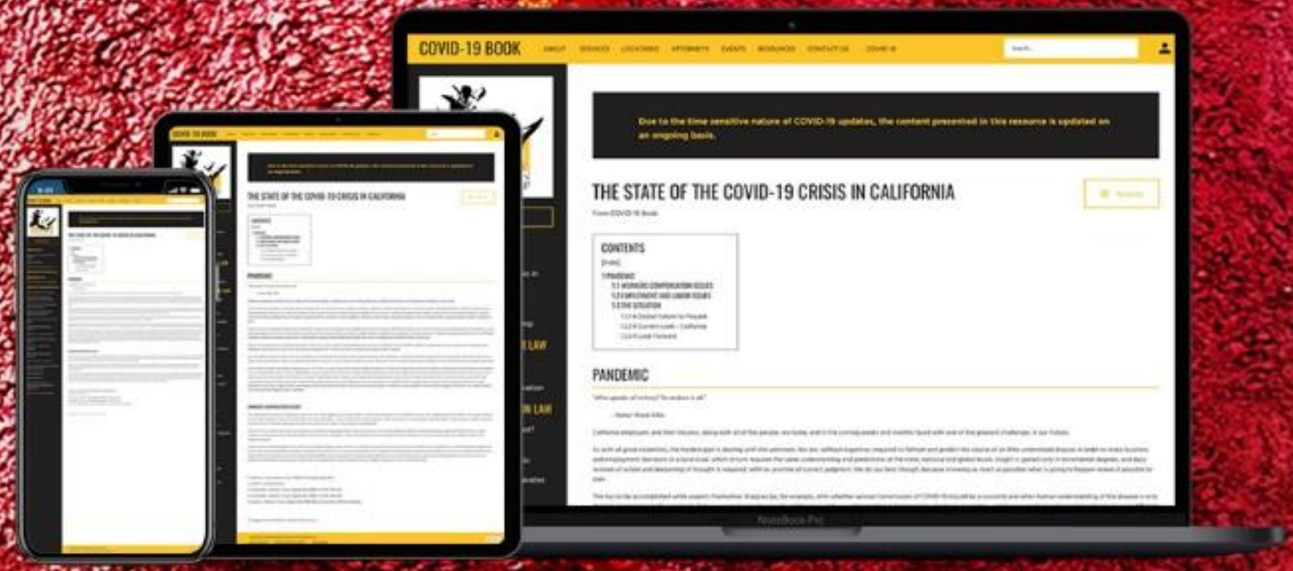
Navigating COVID-19:

A Legal Guide for California Employers



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Plan For This Session

- Discuss the workers' compensation bills that were signed by Gov. Newsom.
- Discuss the impact of the bills.
- The bills go into effect Jan. 1, 2023, but perhaps the most significant change has retroactive application.
- Limited time, but questions are encouraged.

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Bills Discussed

- **AB 1751** – Extends COVID-19 presumptions until Jan. 1, 2024.
- **AB 2148** – Extends the law for employee prepaid card accounts until Jan. 1, 2024.
- **AB 2848** – Requires the administrative director to contract with an outside independent research organization to evaluate the impact of the provision of medical treatment within the first 30 days after a claim is filed. The report is to be completed before July 1, 2023.
- **SB 1002** – Expands the meaning of medical treatment to include services of a licensed clinical social worker (LCSW).
- **SB 1127** – Multiple changes including: (1) increases disability benefits for cancer claims under LC 3212.1 from 104 weeks to 240 weeks; (2) reduces investigation period for injuries covered by statutory presumptions; and (3) increases penalties for unreasonably denying claims covered by a statutory presumption.

AB 1751

- In 2020, SB 1159 established a rebuttable presumption that illness or death resulting from COVID-19 is compensable for front-line workers and employees who contract COVID-19 due to a workplace outbreak. The presumption was set to expire Jan. 1, 2023.

- AB 1751 extends the presumption until Jan. 1, 2024. An earlier version would have kept it until Jan. 1, 2025.

- AB 1751 adds these front-line workers to the presumption under LC 3212.87:

  - Active firefighting members of: (1) the Department of State Hospitals; (2) the Department of Developmental Services; (3) the Military Department; and (4) the Department of Veterans Affairs.

  - Peace officers under Penal Code Section 830.38, which covers a state hospital under the jurisdiction of the Department of State Hospitals and the Department of Developmental Services.

AB 2148

- In 2018, SB 880 was passed to allow employers, with written consent of the employee, to deposit indemnity payments in a prepaid card account.
- The program was passed over concern that communities of color faced discrimination by financial institutions “in myriad indirect ways stemming from a legacy of institutional racism.”
- The program was designed for the convenience of many injured workers by allowing their disability benefits to be deposited directly into a specified bank account. It also allowed workers without banks to access their workers’ compensation benefits.
- The program was set to expire Jan. 1, 2023.
- AB 2148 extends the program until Jan. 1, 2024, with no other changes.

AB 2848

- LC 4610(q) requires the administrative director to contract with an outside independent research organization to evaluate and report on the impact of the provision of medical treatment within the first 30 days of filing for claims filed between Jan. 1, 2017 and Jan. 1, 2019.
- The purpose of the study is to allow the state to better understand workers' use of medical treatment in the workers' compensation system.
- The report was to be completed before Jan. 1, 2020. It wasn't.
- AB 2848 requires the report to be completed before July 1, 2023. It also extends the review to claims filed from Jan. 1, 2017 to Jan. 1, 2021.

SB 1002

- Existing law allows treatment with marriage and family therapists, clinical counselors or clinical social workers, but the authorizing statute LC 3209.8, allows such treatment only "with approval of the employer."

- SB 1002 authorizes qualified licensed clinical social workers (LCSW) to assess, evaluate and treat the behavioral and mental health needs of injured workers within the workers' compensation system.

- The Legislature supports growth of the workers' compensation system to encompass more mental health care, particularly as the COVID-19 pandemic has contributed to an increasing number of claims for post-traumatic stress (PTSD), anxiety and depression.

- It believes that the limited number of psychologists and psychiatrists in the state have made it difficult to meet the mental health needs of injured workers.

SB 1002

- In LC 4600, the definition of treatment is amended to include LCSW services.
- LC 3209.11 is added to allow treatment with an LCSW on referral from a physician.
- There is no language requiring the employer's approval. But any medical treatment must be medically necessary, so there is no reason a request for LCSW services can't be sent to utilization review.
- MPNs may add LCSWs to their provider listing.
- Pursuant to LC 3209.11, LCSWs are not authorized to determine disability.
- Per the legislative history, SB 1002 also does not authorize LCSWs to act as treating physicians.

SB 1127

- SB 1127 is the most significant legislation from the 2022 session.
- According to the bill's author, Senate President Toni Atkins, "Our firefighters and peace officers put themselves in harm's way each and every day they report to duty. To protect these workers the Legislature established rebuttable presumptions in the workers comp system to streamline certain claims and reduce frictional costs within the system … "
- She adds, "Regrettably, today injured workers continue to experience delays and denials that prevent their claims and access to medical care from moving forward in a timely manner."
- SB 1127 furthers protect employees covered by a statutory presumption.

SB 1127 – Major Provisions

- SB 1127:
  - increases the maximum time from 104 weeks to 240 weeks that specified firefighters and peace officers can access wage replacement disability benefits for cancer work-related injuries;
  - reduces the time period from 90 to 75 days for an employer to deny liability for a workers' compensation claim for specified presumptive injuries;
  - increases the penalty when liability has been unreasonably rejected for claims of injury or illness, as defined in LC 3212 - LC 3213.2, to five times the amount of the benefits unreasonably delayed due to the rejection of liability, up to $50,000.

Increase in Disability Benefits

- SB 1127 adds subsection (d) to LC 4656, which states that "for an employee who suffers from an injury or condition defined in Section 3212.1, aggregate disability payments for a single injury occurring on or after January 1, 2023, causing temporary disability shall not extend for more than 240 compensable weeks."

- Pursuant to LC 3212.1, cancer in specified firefighters and peace officers is presumptively compensable.

- Unlike the other exceptions to the 104-week limit for temporary disability in LC 4656(c) (for example, acute and chronic hepatitis B, acute and chronic hepatitis C, amputations, severe burns, etc.), the 240 compensable weeks available to workers covered by LC 3212.1 are not limited to five years from the date of injury.

- Those employees potentially could receive 240 weeks of disability benefits for a cancer-related injury extending more than five years after the date of injury.

75-Day Investigation Period

- SB 1127 adds subsection (b)(2) to LC 5402.
- LC 5402(b)(1) establishes the 90-day investigation period for most claims.
- LC 5402(b)(2) states, "Notwithstanding paragraph (1), for injuries or illnesses defined in Sections 3212 to 3212.85, inclusive, and Sections 3212.9 to 3213.2, inclusive, if the liability is not rejected within 75 days after the date the claim form is filed pursuant to Section 5401, the injury shall be presumed compensable under this division. The presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 75-day period."
- LC 5402(b)(2) covers the statutory presumptions for publicly employed firefighters, peace officers and first responders.
- It excludes the presumptions for illnesses or deaths related to COVID-19, which have shorter investigation periods.

75-Day Investigation Period

- The 75-day investigation period under LC 5402(b)(2) goes into effect Jan. 1, 2023.
- It doesn't have retroactive application, so it doesn't affect claims that were timely denied within the 90-day investigation period before Jan. 1, 2023.
- LC 5402(b)(2) also doesn't limit its application to dates of injury occurring after that time, and it probably applies to injuries before the effective date.
- That can cause problems for cases within the transition period.
- For example, suppose Jan. 1, 2023 is day 80 to deny a claim. Because the new law goes into effect Jan. 1, 2023, the WCAB could find that the time period to deny has expired.

75-Day Investigation Period

- For injuries covered by LC 5402(b)(2) filed on or after Oct. 3, 2022, which is 90 days before Jan. 1, 2023, the employer should have decision dates by the end of the year.

- For injuries covered by LC 5402(b)(2) filed on or after Oct. 18, 2022, which is 75 days before Jan. 1, 2023, employers should begin using the 75-day investigation period.

Rebutting the Presumption

- The statute states, “The presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 75-day period.”
- That language, however, has been interpreted as barring evidence that **could have been** obtained with the exercise of reasonable diligence within the investigation period. (*SCIF v. WCAB* (1995) 60 CCC 717.)
- Furthermore, there are limits to the type of evidence that may be used to rebut the presumptions in LC 3212 - LC 3213.2.
- It will be very difficult to rebut a presumption if the claim is not timely denied.

Increased Penalty

- SB 1127 increases the penalties for unreasonably rejecting claims covered by a statutory presumption.

- LC 5414.3 is added to the Labor Code. LC 5414.3(a) states, "Notwithstanding Section 5814, when liability has been unreasonably rejected for claims of injury or illness as defined in Sections 3212 to 3213.2, inclusive, the amount of the penalty shall be five times the amount of the benefits unreasonably delayed due to the rejection of liability, but in no case shall the penalty exceed fifty thousand dollars ($50,000).”

- Currently, LC 5814 provides a penalty up to 25% of the amount unreasonably delayed, up to $10,000, so the increase is significant.

- Unlike the other changes, this one will affect most private employers because LC 5414.3 also applies to the presumptions for illnesses or deaths related to COVID-19 in LC 3212.86 - LC 3212.88.

Increased Penalty – Adjudication

- LC 5414.3 defines what constitutes “unreasonably” rejecting a claim.
- It states, “The question of rejection and the reasonableness of the cause shall be determined by the appeals board in accordance with the facts.” The Legislature has left it up to the WCAB to determine whether the rejection of liability was reasonable.
- If the WCAB determines that an employer unreasonably denied a claim, the statute does not give it discretion regarding the amount of the penalty.
- Unlike LC 5814(a), which gives the WCAB discretion to issue a penalty "up to 25 percent" of the amount unreasonably delayed, up to $10,000, LC 5414.3 states that when a covered claim has been unreasonably rejected, the penalty "shall" be five times the amount of the benefits unreasonably delayed, up to $50,000.

Reporting to the Audit Unit

- LC 5414.3(b) states, “Penalties issued pursuant to this section shall be reported to the audit unit within the Division of Workers’ Compensation.”
- The statute doesn’t give the WCAB discretion. If penalties are imposed under LC 5414.3, then they “shall” be reported to the Audit Unit.
- That could subject employers to additional audit penalties.
- It’s unclear whether the Audit Unit will be required to audit every file involving a penalty under LC 5414.3(b).
- SB 1127 requires the DWC to identify and amend its existing data collection processes to include collection of the date on which the claimant is notified of acceptance, denial or conditional denial of liability for a claim for a presumptive injury covered by the bill.

Retroactive Application of Penalties

- LC 5414.3(c) states, "This section shall apply to all injuries, without regard to whether the injury occurs before, on, or after the operative date of this section.“
- Although the statute does not go into effect until Jan. 1, 2023, once in effect, the penalty provisions retroactively apply to all dates of injury.
- Although employers might challenge the constitutionality of retroactive application of the penalty provisions, it’s unlikely that they will prevail.

Retroactive Application of Penalties

- In 2004, as part of SB 899, the Legislature reduced the penalties available under LC 5814.
- In *Green v. WCAB* (2005) 70 CCC 294, the Court of Appeal explained that workers' compensation rights are purely statutory, and stated, "There is no injustice if statutory rights end before final judgment because parties act and litigate in contemplation of possible repeal."
- *Green* found that the Legislature intended retroactive application of SB 899, and therefore, the amended penalty provisions applied to past conduct. It was so, even though the court acknowledged that "these provisions of new section 5814 substantially reduce or in some instances eliminate the right to increased compensation…."
- Because challenges to retroactive application of law have been rejected when they favor defendants, the courts are unlikely to reach a different result when they favor applicants.

What to Do?

- Per CCR 10109, employers have a duty to investigate claims in good faith.
- The law establishes that when an employer deliberately refuses to pay benefits, the only satisfactory excuse to avoid a penalty under LC 5814 is genuine doubt as to liability for them. There is no reason to believe the standard would be different under LC 5414.3.
- SB 1127 forces employers to rethink how they approach injuries or illnesses covered by the statutory presumptions under LC 3212 - LC 3213.2.
- They must be confident that they have a genuine factual, legal or medical basis for denying a claim before doing so.
- Otherwise, the cost of the denial potentially could exceed the cost of accepting the claim.

What to Do?

- Because the changes apply retroactively, parties might want to revisit any previously denied claims.
- Employers, however, don't have much of an incentive to accept claims covered by the statutory presumptions that already have been denied.
- LC 5414.3 does not have a provision like LC 5814(b), which, to avoid larger penalties, would allow employers to self-impose a 10% penalty prior to an employee claiming a penalty under that section.
- So it's likely we will see litigation at the board to establish the parameters of what constitutes an unreasonable denial under LC 5414.3.

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