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State Senate

State Assembly

**Department of
Insurance**

Secretary of State

Governor Jerry Brown Vetoes 5 Workers' Compensation Related Bills

Last weekend, Governor Jerry Brown vetoed five workers' compensation measures. The first of which is [AB 479](#) (Gonzalez-Fletcher, Dem-San Diego) – Breast Cancer Workers Compensation Coverage. Current law requires apportionment of permanent disability to be based on causation, and a physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury is required to address the issue of causation of the permanent disability. The physician is required to make an apportionment determination by finding the approximate percentage of permanent disability that was caused by the direct result of injury arising out of and occurring in the course of employment. This bill requires, if an employee sustains an injury arising out of and in the course of employment resulting in breast cancer, specified impairments are to be considered, including the presence or absence of the organ, skin disfigurement, and pain when assessing disability.

Proponents contend AB 479 addresses gender bias in workers' compensation by precluding physicians from using "child-bearing age" as a determining factor when calculating an employee's permanent disability rating. This bill did not meet a great deal of legislator opposition, evidenced by the early, nearly unanimous, no opposition vote by each legislative chamber. Assembly Vote: 79-0; Senate Vote: 37-0.

In Governor Brown's veto message, he stated that this bill requires 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 the Governor vetoed, all by the same author as AB 479: AB 570 in 2017, AB 1643 in 2016, and AB 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 results 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, the Governor explains.

Because the Governor believes policy questions about the adequacy of the state's workers' compensation system are best addressed through empirically based research and analysis, he is directing the Department of Industrial Relations - Division of Workers Compensation (DWC), in consultation with the Commission on Health and Safety and Workers' Compensation, to contract with an independent research organization to undertake an evidenced based evaluation of the issue.

Official Legislative Information

Specifically, the evaluation must address whether the standards for determining impairment due to occupational injury or illness accurately reflect the level of impairment caused by industrial cancer. The research must also include a study of the differences between the fifth and sixth editions of the American Medical Association Guides with respect to determining impairment resulting from industrial cancer; and, consider whether the standards for determining impairment resulting from industrial cancer exhibit bias based on immutable characteristics such as gender, race, or ethnicity. The Governor will direct DWC to report on these areas by March 1, 2020 in order to inform the Legislature and key stakeholders on how best to address the important issues raised by this bill.

The second vetoed bill is [AB 553](#) (Daly, Dem-Anaheim) – Workers’ Compensation Return-to-Work Program. Current law funds the return-to-work program with \$120 million per year derived from the Workers Compensation Administration Revolving Fund. Current law also requires the DWC to determine eligibility for payments and the amount of payments. This bill requires DWC to have the program distribute the \$120 million annually to eligible workers and requires commencing with the end of the 2017 calendar year, that any remaining program funds available after the above-described supplemental payments are distributed pro rata to those eligible workers, subject to a \$25,000 limit per calendar year.

The Department of Finance, the only registered opposition, filed comments stating AB 553 results in costs to the General Fund not consistent with the current budget. The Department also notes concerns with making changes to the Return to Work Supplemental Program which took effect in 2015 and may not be fully utilized. More time is needed to evaluate the program before making changes to its funding allocations. In addition, the allocation of additional benefits on a pro-rata basis bears no relationship to a worker’s actual loss of earnings, which is inconsistent with the purpose of the program. The Assembly vote was 56-22 and the Senate vote was 26-12.

In the Governor’s veto message, he explained that the Return-to-Work Program began in 2015 and is relatively new. The Governor expressed concern this measure proposes sweeping revisions that are premature. The Program’s funds will likely be spent in full in the coming fiscal year, and took the position that it is best to see the progress of that effort before making additional changes.

The third vetoed measure is [AB 1697](#) (Insurance Committee) – DWC Fraud Division. Current law creates the Fraud Division, within the Department of Insurance, to administer provisions related to insurance fraud. Current law requires the Insurance Commissioner to ensure that the Fraud Division aggressively pursues all reported incidents of probable workers’ compensation fraud. This bill requires the DWC Administrative Director to establish an antifraud support unit. The bill sets forth the duties of the unit, including coordinating and advancing antifraud activities for the Division and serving as the point of contact between the DWC and other agencies and entities engaged in antifraud activities. The Assembly Insurance Committee pursued this bill in order to formalize the DWC’s recently created anti-fraud analytics unit, and to provide direction for the unit’s functions and goals. The Assembly passed the bill 80-0 and the Senate vote was 39-0.

In the Governor’s veto message, he said the work required by this measure is already underway. Additionally, the bill requires the Department to reveal sensitive details about its enforcement practices. This will compromise the state’s efforts to combat workers’ compensation fraud.

The fourth veto is [AB 2496](#) (Gonzalez-Fletcher, Dem-San Diego) – Janitorial Employee Status. Current law creates a rebuttable presumption that a worker performing services for which a license is required is an employee rather than an independent contractor. Current law provides criteria to determine whether the worker is an employee or an independent contractor. This bill provides that an employer of a janitor be subject to the rebuttable presumption provisions that its workers are employees rather than independent contractors.

For employers who utilize independent contractors, this allows a business to use these services for specific tasks. The employer trades control over the working conditions for being released from many of the primary obligations of being an employer, including paying overtime, remitting payroll taxes, securing workers' compensation coverage, and ensuring a healthy and safe work environment. As in the Supreme Court case *Dynamex Operations West v. California Superior Court*, AB 2496 creates a three prong test for who is and is not an independent contractor in the janitorial industry. The most substantive prong requires independent contractors that only work for a single employer to be classified as an employee. The Assembly vote was 57-7 and the Senate vote was 28-4.

The Governor vetoed the bill because it establishes in statute the presumption that persons who perform services for janitorial employers are employees rather than independent contractors. In *Dynamex*, the California Supreme Court established a new test to determine whether a worker is classified as an employee or an independent contractor. The Governor explains that the Administration and Legislature are still reviewing this decision and any statutory changes to such tests are premature.

The last bill the Governor vetoed is [SB 899](#) (Pan, Dem-Sacramento) – Workers' Compensation Disability Determination. Current law requires a physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury to address the issue of causation of the permanent disability. This bill prohibits a physician from using race, gender, or national origin in determining the percentage of permanent disability that was caused by other factors before and subsequent to the industrial injury. The bill is in response to the *City of Jackson v. Workers Compensation Appeals Board* decision that a qualified medical examiner can apportion injured worker's permanent disability award "because a condition has a correlation to the genetics of African American males." The Assembly vote was 80-0 and the Senate vote was 37-0.

The Governor vetoed the bill for many of the same reasons he returned a similar measure in 2011 – AB 1155 (Alejo). The Governor found the bill unnecessary, as it does 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.

Governor Brown Signs 3 Workers' Compensation Bills

This week, Governor Jerry Brown signed the following workers' compensation measures.

[AB 1749](#) (Daly, Dem-Anaheim) Off-Duty Peace Officer Workers' Compensation

This measure provides that whenever any peace officer is injured, dies, or is disabled 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 within or out of the state, or protection or preservation of life or property within or out of the state, or the preservation of the peace anywhere in this state, but is not at the time acting under the immediate direction of his employer, he or his dependents are to be accorded by his employer all of the same benefits the peace officer or his dependents would have received had that peace officer been acting under the immediate direction of his employer.

To the degree that the injury involved apprehending an individual or protecting life or property, this bill extends to all injuries that occur outside of California. But this will not just be mass shootings and terror attacks, this would include all manner of injuries in all manner of situations and in all manner of locations. This bill passed the Assembly 80-0 and the Senate 39-0.

AB 2046 (Daly, Dem-Anaheim) – Workers’ Compensation Insurance Fraud Reporting

This bill authorizes the Workers’ Compensation Fraud Commission to augment, rather than offset, its annual assessment with unused funds from prior years subject to appropriation by the Legislature. The measure requires governmental agencies to share information relating to workers’ compensation fraud, upon request, to other agencies for purposes of investigation and prosecution unless it violates federal law or compromises an investigation.

The State Auditor noted that some fraud went uninvestigated due to a lack of information sharing by insurers and agencies. State law requires insurers to refer to the Department of Insurance and district attorneys’ offices any claims that show reasonable evidence of fraud, but insurers vary significantly in the number of fraud referrals they submit. Low referral rates may indicate that insurers are failing to refer suspected fraud. The Assembly passed the bill 79-0 and the Senate approved it 39-0.

SB 1086 (Atkins, Dem-San Diego) Workers’ Compensation Statute of Limitations

Current law specifies the time period within which various proceedings may be commenced under provisions of law relating to workers’ compensation. A proceeding to collect death benefits is required to be commenced within one year from several circumstances, including from the date of death if it occurs within one year from the date of injury. Current law for deceased peace officers and active firefighting members, extends until January 1, 2019, the time period to commence proceedings to collect death benefits, if the proceedings are brought by a person who was a dependent on the date of death, from 240 weeks from the date of injury to no later than 420 weeks from the date of injury, not to exceed one year after the date of death for certain injuries. This bill deletes the January 1, 2019 date of repeal operation of the above-referenced extension indefinitely.

The purpose of the bill is to delete a sunset clause that was adopted in order to allow time for a fiscal impact study to be completed by the California Health and Safety and Workers Compensation Commission. At the time the extended statute of limitations was signed into law, concerns were expressed mostly by local governments that the costs of the bill could run into the hundreds of millions of dollars. While data from that study have not yet been released, it has been reported that only 2 cancer claims have been filed that would have been barred by the prior shorter statute of limitations. Thus, the author argues that there is no cost basis to argue against the fairness of

taking care of the dependents of fallen safety officers. The Assembly passed the bill 80-0 and the Senate 39-0.

Governor Signs Public Healthcare Option Analysis Measure; And, A 2nd To Outlaw Short-Term Health Plans

Governor Jerry Brown signed [**AB 2472**](#) (Wood, Dem-Santa Rosa) – Public Healthcare Option Analysis several days ago. Current state law establishes the California Health Benefit Exchange, also known as Covered California. This bill requires Covered California to prepare an analysis and evaluation, known as a feasibility analysis, to determine the feasibility of a public health insurance plan option to increase competition and choice for healthcare consumers.

Among areas for the analysis to consider are the structure, financing, and governance of a public healthcare option, as well as whether it is possible to implement. For proponents, such as Health Access California, this is a vehicle to keep the dialogue on the subject at the forefront in light of legislative leadership's decision to table other legislation which would have created single payer health coverage. The bill passed the Assembly 62-16 and was approved by the Senate 27-10.

Also signed into law is [**SB 910**](#) (Hernandez, Dem-Alhambra) – Short-Term Limited Duration Health Insurance. Current law requires an individual health insurance policy to include, at a minimum, coverage for essential health benefits. These healthcare coverage market reforms in the individual market do not apply to short-term limited duration health insurance policies offered by a health insurer. This bill, commencing January 1, 2019, prohibits a health insurer from issuing, selling, renewing, or offering a short-term limited duration health insurance policy.

Short-term plans are less expensive, but do not need to cover all the benefits required under the Affordable Care Act, such as preventive care, essential health benefits, and protections for people with pre-existing conditions. An estimated 10,000 people in California are currently enrolled in such plans. The United States Department of Health and Human Services (HHS) recently finalized a rule extending the amount of time consumers can be on short-term plans from three months to almost 12 months, after which they can be renewed for up to three years. However, the HHS rule allows states to regulate the sale of such plans on their own terms. California had long capped the amount of time consumers could be on short-term plans to six months; the Obama Administration limited it even further, to three months.

The Assembly passed SB 910 by a vote of 51-21 and the Senate voted 27-9.

Analysis Finds Determining Cause Of Wildfires Has About 66% Success Rate

California officials quickly determined an arsonist started last month's huge wildfire southeast of Los Angeles, and that two weeks earlier sparks from a vehicle produced a deadly wildfire in the far northern part of the state. But causes for many of California's worst blazes of the past decade remain a mystery.

The Associated Press reviewed state data on the 10 largest wildfires and 10 most destructive in terms of homes and buildings burned for each year dating to 2008. Lightning was the most

common cause, accounting for about a quarter of those fires, followed by incidents involving power lines.

However, investigators could not determine a cause for about a third of those fires. The National Interagency Fire Center informs that finding the trigger aids criminal prosecutions and helps determine liability. It also guides campaigns to change behavior, like avoiding mowing on hot afternoons when fire threat is high. And it leads to safety enhancements, like sleeves on power lines, which came about when it was determined that falling tree branches and birds cause sparks when they hit unprotected electrical wires. It is estimated human activity – from untended campfires to sparks from vehicles – causes more than 80% of all wildfires in the United States, according to the Center.

So far in 2018, wildfires have scorched more than 2,000 square miles (5,180 square kilometers) in California. More than 2,000 homes and buildings have been destroyed, and at least 11 people killed.

The Mendocino Complex Fire that burned for nearly two months, killing one firefighter and destroying more than 150 homes, is the largest ever recorded in the state at 720 square miles (1,865 square kilometers), an area more than twice the size of New York City. No cause has been determined yet, nor has one been pinpointed for the Ferguson Fire, which prompted the closure of much of Yosemite National Park.

The Holy Fire, southeast of Los Angeles, was quickly determined to be arson. Authorities say the suspect was motivated by a feud with his neighbors in the Cleveland National Forest. The fire prompted evacuation orders for 20,000 people and nearly burned through the community of Lake Elsinore.

Arson was pegged as the cause for only five of California's most destructive or largest fires of the last decade, according to state records, though officials say the true number likely is much higher. That is because for arson to be the cause, no other possibility can exist. So, for example, even if investigators believe an arsonist was responsible for a fire next to a rail line, they may leave the cause undetermined because they cannot rule out a spark from a passing train.

Three times as much acreage has burned so far this year in California as last year, which produced the Tubbs Fire that was the most destructive in recorded state history and the Thomas Fire that, until this year, was the largest ever. And the most dangerous months for California wildfires are still to come.

The Carr Fire, the deadliest so far this year with eight fatalities, started in July with a spark from a vehicle. Whipped by winds, the flames exploded into Redding, the largest city in far Northern California. More than 1,000 homes were destroyed. The driver immediately reported the fire so there was no mystery about how it started. Such quick confirmation is unusual.

Gavin Newsom Still Leads Governor's Race, But Polls Show Some Tightening

California's November 6 General Election for governor has tightened, but frontrunners Lieutenant Governor Gavin Newsom still holds a double-digit leads according to a poll by the Public Policy Institute of California (PPIC). Republican businessman John Cox has, however, reduced Lieutenant Governor Newsom's lead some, trailing now by 12% points among likely voters, 51% to

39%. That is a shift from Newsom's 55% to 31% margin in the Institute's July survey. In the governor's race, Republican businessman John Cox is now backed by 85% of Republicans and is only slightly behind Newsom among independent voters, where the Democrat leads 42% to 37%.

This poll comes with plenty of caveats, starting with the timing of the survey, said the PPIC. The PPIC Chief Executive Officer informs that this is poll taken after Labor Day to get a sense of where the state is before the campaign begins to heat up, warning that the numbers could change dramatically after the candidates begin their statewide television and radio campaigns.

As of June 30, Newsom had \$11 million in the bank, compared with \$1.4 million for Cox. That translates into a potentially huge advantage in the TV ads that play an outsized role in statewide California campaigns. Cox's description of himself as a businessman and independent politician who sees a lot of problems in California resonated with Republicans and Republican-leaning independents alike, the PPIC evaluates, and has enabled him to distance himself from President Donald Trump somewhat.

While about half the likely voters believe the November election is more important than past midterms, that number includes 64% of Democrats, compared with 48% of Republicans and 42% of independents. That enthusiasm gap is probably the most important takeaway from the poll, the PPIC found.

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