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State Senate

State Assembly

**Department of
Insurance**

California Primary Election Results

Primary night in California took place this Tuesday, June 5th, moving the state one step closer to the general election in November. While there are still about 2 million votes left to count as of the time of this writing, many of the most important elections have been decided.

The biggest race of the evening was over fairly quickly, with Gavin Newsom clinching the top spot in the primary for Governor with 33.4% of the vote. Republican businessman John Cox came in second with 26.2% of the vote, surprising some who worried that Republicans would be shut out of the large and contentious race. Despite the large amounts of money spent on his campaign by interest groups, former Los Angeles mayor Antonio Villaraigosa came in a distant third with only 13.4%, and the other candidates trailed far behind. The race for U.S. Senate was also over just as quickly, with incumbent Senator Dianne Feinstein sweeping into first place with 43.8%, and State Senator Kevin de Leon taking second with only 11.3%.

Among the statewide elected offices, the results were as follows. For Attorney General, incumbent Xavier Becerra took first place with 45.3% of the vote, while Republican challenger Steven Bailey took second with 25.2%. For Insurance Commissioner, former Insurance Commissioner Steve Poizner who is running with no party preference narrowly took first place with 41.4% of the vote, with Democratic State Senator Ricardo Lara coming in a close second with 40.5%. In the Lieutenant Governor's race, former ambassador Eleni Kounalakis won with 23.6% of the vote, while state Senator Ed Hernandez came in second with 20.6%. For Controller, incumbent Betty Yee took 61.1% of the vote, with Republican challenger Konstantinos Roditis taking 34.8%. For Treasurer, State Board of Equalization member Fiona Ma took first place with 43.4% of the vote with Republican challenger Greg Conlon taking 21.9%.

There were several special elections for state Senate and Assembly seats as well, leading to some changes in the makeup of both houses. Senator Josh Newman of Fullerton was recalled with 59.5% of the vote, and was replaced by former Republican Assembly Member Ling Ling Chang. Newman's removal from office indicates to many a growing unhappiness with the gas tax, his vote for which was the basis for the recall campaign. His replacement with Chang also means that the Democrats have lost their two thirds supermajority in the Senate. In SD 32, Senator Tony Mendoza failed to reclaim the seat he resigned from earlier this year following charges of sexual misconduct, with the top two finishers as Republican Rita Topalian in first

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with 25.3% and Democrat Vanessa Delgado in second with 16.3%. The special election for that seat will be held in August.

Committee Changes

This week, Senate President pro Tempore Toni Atkins' office announced a series of changes to the committee memberships in the Senate. The changes are as follows.

Labor and Industrial Relations

- Senator Ricardo Lara (D-Bell Gardens) will replace Senator Richard Pan (D-Sacramento) as the chair of the Committee on Labor and Industrial Relations

Appropriations

- Senator Anthony Portantino (D-La Cañada Flintridge) will replace Senator Ricardo Lara (D-Bell Gardens) as the chair of the Committee on Appropriations

Health

- Senator Richard Pan (D-Sacramento) will replace Senator Robert Hertzberg (D-Van Nuys) as the chair of the Committee on Health
- Senator Robert Hertzberg (D-Van Nuys) will become a member of the Committee on Health

Education

- Senator Mike McGuire (D-Healdsburg) will fill a vacancy in the Committee on Education

Employer Legislative Community Has Recent Dynamex Operations West, Inc v. Superior Court of Los Angeles California Supreme Court Case On Its Radar

The following is summary background of the April 30, 2018 California Supreme Court [Dynamex Operations West, Inc v. Superior Court of Los Angeles](#) decision.

In an 82-page decision, the California Supreme Court rejected a legal test for determining whether workers should be classified as employees or independent contractors for the purposes of the wage orders adopted by California's Industrial Welfare Commission (IWC) in favor of a worker-friendly standard that may upend the existing independent contractor labor market. In particular, the Court embraced a standard presuming all workers are employees instead of contractors, and placed the burden on any entity classifying an individual as an independent contractor of establishing that such classification is proper under the newly adopted "ABC Test" which is discussed below.

Background

Dynamex is a nationwide same-day courier service that offers on-demand, same-day pickup and delivery services to businesses. Prior to 2004, Dynamex classified its California drivers as employees. Starting in 2004, however, Dynamex converted all of its drivers to independent contractors as a cost savings measure. In January 2005, Plaintiff Charles Lee entered into a written independent contractor agreement with Dynamex to provide delivery services for the company. Three months after leaving his work at Dynamex, Lee filed this lawsuit on his own behalf and on behalf of similarly situated Dynamex drivers, alleging that Dynamex's alleged misclassification of its drivers as independent contractors led to Dynamex's violation of the provisions of IWC Wage Order No. 9, the applicable state wage order governing the transportation industry, as well as various sections of the Labor Code, and, as a result, that Dynamex had engaged in unfair and unlawful business practices under Business and Professions Code Section 17200.

The Supreme Court's Decision

As a threshold matter, the Court framed its decision by broadly characterizing the misclassification of independent contractors as harmful and unfair to workers, honest competitors, and the public as a whole. A worker is an employee if he or she is "employed" by an "employer," and "employ" is defined as: "to exercise control over the wages, hours or working conditions." If this standard is met, the worker is an employee and not an independent contractor.

- The ABC Test

Under the ABC Test in the Court's decision, a worker will be deemed to have been "permitted to work," and thus, an employee for wage order purposes, unless the employer proves:

- (A) That 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 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.

Each of these requirements need to be met in order for the presumption that a worker is an employee to be rebutted, and for a court to recognize that a worker has been properly classified as an independent contractor.

What This Means For California Businesses

The question of whether an individual worker should be classified as an employee or independent contractor has considerable significance for workers, businesses, and the public generally. If a worker is classified as an employee, the employer bears the responsibility of paying Social Security and payroll taxes, unemployment insurance taxes and state

employment taxes, providing workers' compensation insurance, and of course, complying with the labyrinth of state and federal statutes governing the wages, hours, and working conditions of employees.

California Health & Safety & Workers Compensation Commission Meets To Review Workers Compensation System Developments

Yesterday, the California Health and Safety and Workers Compensation Commission met in Oakland, California to review developments involving the workers' compensation system.

I. Division of Workers Compensation Update

The Division of Workers Compensation Administrative Director discussed workers' compensation (WC) trends, including the disproportionate fraud in southern California via post employment cumulative trauma. This is potentially because people are not finding employment or compromising on less preferable positions. Other factors could be provider abuse of the system and quality of care issues. Regulatorily, but not discussed in any detail, are the following pending rulemakings and agency developments.

- The Qualified Medical Examiner Informational Rulemaking addresses billing and recordkeeping practices. This has received a great deal of public comment and will eventually be a formal rule. The qualified medical examiner (QME) community is highly critical of the lack of stakeholder access to regulators writing the rule, and the lack of accommodation on increasing provider rates as these are reported by QME to have been flat since 2006. The number of doctors has fallen by half over the last decade.
- Utilization Regulation: contains formulary timeliness and fastrack provisions. It remains a work in progress.
- The Drug Formulary Advisory Committee consisting of 3 doctors and 3 pharmacists has been functioning well, as it is moving injured workers to exempt drugs, according to the Administrative Director.
- Independent medical review has been operating on a 13 day average decisionmaking turnaround. The expected standard is 30 days. 42% of disputes are pharmaceutical related.

II. Workers Compensation System Wage Loss Study

Today, the California Health and Safety and Workers Compensation Commission (CHSWCC) voted unanimously to issue for public comment a RAND Corporation-commissioned Workers Compensation System Wage Loss Study. The report's key elements include the following.

- 17 million workers in California were covered by the state's WC program, and 534,000 claims were filed for workplace-related injuries and benefits.
- From 2007 to 2012, California's spending on WC medical benefits grew from \$5.2 billion to \$6.8 billion. By 2012, medical spending was 58% of total benefit spending compared with 50% for WC programs in other states.
- Per-claim spending within 12 months of injury on both inpatient hospital stays and outpatient facility services increased significantly for 2007–2010 injuries, but decreased for 2011 and 2012 injuries. The net increase in per-claim spending for 2007–2012 injuries was 17% and 18% for inpatient and outpatient facility services, respectively.
- The number of prescription drugs per user peaked in injury year 2010 but spending continued to increase. Spending per user on prescription drugs in injury year 2012 was 38% higher than for injury year 2007.
- Overall return-to-work outcomes for the first 8 quarters dipped slightly during the recession but rebounded in 2011, so the outcomes are generally unchanged. For example, 90.4% of workers injured in 2007 were employed at Q1 after injury compared with 88.6% of workers injured in 2010 at the height of the financial crisis and 89.4% of workers injured in 2012 after the start of the recovery.
- Between 70% and 80% of claims across injury years are submitted to the WC system for insured claims - the remainder is for claims from the state of California and self-insured public and private entities.
- Average per-claim spending within 12 months of injury was highest for injury year 2010. Per-claim spending for injury year 2012 increased 24% over injury year 2007, or about twice the increase explained by price inflation.
- Per-claim spending on outpatient hospital services and inpatient hospital stays increased substantially through injury year 2010 and then decreased for injury years 2011 and 2012 due to lower service volumes. Data reporting issues may be contributing to the lower service volumes. At the same time, hospital inpatient and outpatient spending per user was substantially higher than that for injury year 2007. This suggests an increase in the intensity of the services. Spending for inpatient services may also have been affected by the pass-through payments for spinal hardware.
- Utilization and spending for laboratory and pathology services increased dramatically over 2007-2012.
- The number of prescription drugs per user peaked in injury year 2010, but spending continued to increase. Drug spending per user in injury year 2012 was 38% higher than for injury year 2007.

III. Supplemental Job Displacement Voucher Program Assessment

A RAND Corporation representative presented the Supplemental Job Displacement Voucher Program Phase I Assessment. The Phase II Assessment will be provided to the CHSWCC Commission at its August 2018 meeting. Phase I findings include the following.

- The percent of partial permanent disabled injured workers with paid Supplemental Job Displacement Benefits (SJDB) increased from 2.38% in 2011 to 5.02% in 2014.
- 47% of SJDB cases have less than the \$6,000 allowance. The average paid per case is \$4,600.
- The average SJDB recipient is 43, making \$634 per week. 43% live in a low English literacy zip code. 30% live in Los Angeles. The state is evenly split north-south by recipient.

Phase II will include: evaluation of worker training legitimacy; and, a 12,600 worker survey of the SJDB program, including an evaluation of services. According to Commissioner Doug Bloch, the most vocal of the panel, there is substantial anecdotal evidence SJDB worker training partners are steering recipients to minimum wage jobs and are too closely tied politically to local government officials.

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