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State Senate

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Insurance**

Last Sunday, September 30th was the last day for Governor Jerry Brown to sign, veto or let bills become law without his signature. This next week Norwood Associates will be distributing to our clients via both hardcopy and electronic version its annual Year End Legislative Report which will cover the 2017-2018 bill results. Look for it in the mail or your inbox, if for any reason you do not receive a copy please let us know and we will email you a version right away. In addition, we will also be publishing summaries of bills signed or vetoed by the Governor by subject matter in *This Week In Sacramento* over the next few weeks. For this week, we are providing our team's analysis and overview of the 2018 Legislative session below. We hope you enjoy it!

A Busy 2018 Legislative Session

The 2018 California legislative session resulted in a little over 1,200 new bills being sent to Governor Jerry Brown for consideration. The Governor signed 1,016 of these bills into law and vetoed 201, a veto rate of 16.5%, slightly higher this year than the Governor's record historically. 2018 was an extremely busy year with a number of high-profile subject areas attracting numerous pieces of legislation. Among the key focus areas for the Legislature this session were: fire insurance and utility related bills, privacy and net neutrality, sexual harassment/#MeToo legislation, and climate change. Of course, anti-business labor bills, which included a number relating to sexual harassment and anti-arbitration, played a significant role as well.

California On Fire

In 2017, California experienced the largest and most destructive wildfire season in its history. Nearly 9,000 wildfires tore through the state, burning 1.2 million acres of land, destroying more than 10,800 structures – more than the previous 9 years combined – and killing at least 46 people. In addition, mudslides following and resulting from the Thomas fire in Santa Barbara County destroyed or damaged more than 400 homes and killed at least another 21. Insured fire losses for 2017 have reached an estimated \$15 billion.

The 2017 fires and record losses in urban areas like Santa Rosa occurred at a time when the construction industry had already been struggling to keep up with new housing starts. Reconstruction delays have resulted due to the massive need for debris removal, permitting demand, and lack of contractors and materials. These factors have dramatically increased the costs to rebuild, guaranteeing that many, if not most, homeowners in such disasters find

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themselves underinsured, even with extended replacement cost coverage. Many customers that did not purchase extended replacement cost coverage will likely be challenged to come up with sufficient funds to rebuild at all in these areas. The growing wildfire risk statewide has exacerbated the underinsurance problem for homeowners who may not realize their community could go up in flames, which occurred in parts of Santa Rosa.

In an effort to be relevant, many legislators from fire prone districts introduced bills focused on homeowners and fire insurance to assist their constituents. All told almost 30 bills were introduced this session on the topic of wildfires and/or homeowners insurance, particularly in the areas of underinsurance, availability of coverage, and timeframes for resolving claims. Fortunately, most of these bills were introduced early in the legislative session which provided the industry time to work with the authors, consultants, and the committee chairs to develop compromise proposals. In the end, 10 key bills addressed homeowners insurance modifications that provide consumers with more flexibility when they are victims of wildfires. Virtually all of these bills were significantly amended from their introduced versions, the result of hard work by the industry trade associations to work out alternatives to very challenging bills. For instance, the introduced versions of these bills would have required insurers to pay policy limits on all claims, provide victims of wildfires with 150% extended replacement coverage, even if they did not purchase such coverage, require insurers to provide annual estimates of the replacement cost for covered homes, hold insurance companies liable if the coverage proved inadequate, and extend timeframes for additional living expenses and to rebuild their homes.

The early introduction of individual homeowners insurance bills proved critical to insurance interests as, late in the session, the Governor and Legislature changed the focus on wildfires to the issue of the liability of investor owned utilities like Pacific Gas & Electric (PG&E) and Southern California Edison. Because investor owned utilities are given easement rights on private property, the courts have held them liable under the theory of Inverse Condemnation for any damages resulting from their equipment being the cause or partial cause of a wildfire. In 2017, the Department of Forestry and Fire Protection (CalFire) found PG&E liable for their equipment being the cause of 11 of the 16 major fires, creating a potential liability for the company of more than \$12 billion. In response, the utilities and their labor union counterparts undertook a vigorous lobbying and media effort to convince the Governor and Legislature to modify Inverse Condemnation law to limit their liability. This created a direct challenge to the ability of insurance companies, cities and counties, and fire victims to bring civil actions against the utilities or enter into subrogation agreements to recover the costs for fire damages caused by the negligence of the utilities in maintaining their electrical grid or properly cutting back trees and brush from their electrical lines. As such, insurer interests undertook their own campaign in opposition to changing the Inverse Condemnation laws, spending hundreds of thousands of dollars this session on increased lobbying, media, public relations and grassroots efforts. These efforts were ultimately joined with similar lobbying campaigns sponsored by cities and counties, commercial rate payers, and wildfire victims represented by the trial bar. Politics does make strange bedfellows!

In early August, the Governor proposed language designed to modify Inverse Condemnation and legislative leadership appointed a two-house conference committee consisting of 5 members of each house to review wildfire issues, including examining what more the state could do to prevent or reduce the risk and severity of wildfires and possible changes in the liability rules for

the investor owned utilities. The Wildfire Conference Committee held 6 hearings before packed committee rooms consisting of lobbyists, representatives of public and private utilities, clean energy groups, cities and counties, victims groups, insurance companies, rate payer organizations, industrial rate payers, labor organizations, fire chiefs, and state agencies including CalFire and the California Public Utilities Commission (PUC) to mention only a few. Although a substantial amount of the committee's time was taken discussing the Governor's proposal to alter Inverse Condemnation, the committee took testimony from CalFire, utilities, the PUC, and others on what steps the state could take to reduce the risk of wildfires, harden the electrical grid, improve emergency response and communications, and provide state firefighters with the equipment and funds needed to properly fight wildfires.

The night before the end of session, the conference committee did garner 6 of the 10 votes necessary to pass a fire response package in the form of SB 901 by Senator Bill Dodd (Dem-Napa). That legislation provided \$1 billion dollars over 5 years to thin forests and reduce the fire load in urban interface areas; the bill provided additional guidance to the PUC on when to allow utilities to pass costs of fire damage on to rate payers as opposed to shareholders; allows for securitization of losses by investor owned utilities from wildfires in 2017, as well as establishes programs to streamline the process for landowners to clear their land of excess vegetation or thin forest property.

2018 Wildfires

The two main wildfires so far in 2018, the Carr and Mendocino Complex wildfires, have between them already resulted in over \$845 million of insurance claims (10,000 filed). According to CalFire, these wildfires burnt through late July and August in California, resulting in 1,549 homes being damaged or destroyed. The two fires are among the most destructive in California wildfire history. The Carr fire sits at 7th largest, while Mendocino Complex is the largest. The Carr fire alone could result in \$1 billion in insurance industry losses, creating further pressures on homeowners insurance premiums and availability of coverage as insurers and reinsurers react to the growing risk of wildfires in California.

PUC Fire maps developed by the California Public Utilities Commission, show 34% of California in high fire zones and over 30% are in extremely high fire zones. The growing lack of homeowners insurance availability and increase in cost of homeowners insurance premiums is sure to inspire legislators to introduce additional legislation in the property insurance field next year. This is a dangerous prospect because there are those out there that seek simple solutions that are very disruptive to the marketplace. These include, but are not limited to, prescriptive underwriting, mandated coverage, and additional restrictions on rates charged by insurers and the ability of insurers to non-renew or cancel coverage.

Sexual Harassment / #MeToo Movement

As one might expect, the Legislature's response to the national #MeToo movement prompted the introduction of numerous bills relating to the topic of sexual harassment. Some 30 bills dealing with the issue were introduced ranging from restrictions or prohibitions on arbitration or nondisclosure agreements, mandatory training for company employees, to creating shared

responsibility for employers for civil liability resulting from sexual abuse, even that involving a contractor of the employer.

To highlight the most potentially costly legislation from a litigation standpoint, SB 1300 (Jackson, Dem-Santa Barbara) and AB 3081 (Gonzalez-Fletcher, Dem-San Diego) lead the pack. SB 1300 amends the anti-harassment provisions of the Fair Employment and Housing Act to expand potential employer liability to all forms of harassment by nonemployees, prohibits most non-disparagement agreements and releases of claims, and limits the payment of prevailing defendant attorney's fees. AB 3081 was the only measure that could not be amended down to the point where it would be removed from the influential California Chamber of Commerce Job Killer list. This is an expansive, far-reaching workplace harassment and discrimination measure. It goes beyond sexual harassment allegations, as it applies to all forms of employee alleged harassment. Specifically, it places additional, often duplicative, sexual harassment protections and training requirements in the Labor Code, which are already protected under the Fair Employment and Housing Act exposing employers to additional liability including Private Attorneys General Act claims. This is where the danger of litigation against employers is buried in the bill. Additionally, the bill mandates leave of absence protections for employees and their "family members," asserting sexual harassment violations without mandating the same notice requirement that applies to other similar types of leave. The bill also expands labor contractor joint liability for sexual harassment, which is inappropriate considering the inability to objectively verify and ensure that a contractor's workers do not engage in such activity.

Privacy & Net Neutrality

Californians seem to have a love/hate relationship with privacy. On one hand, social media devotees regularly give away much of their relevant personal information seemingly without reservation. On the other hand, consumers complain about pop up advertisements tailored to their likes per their visits to various websites and product offerings that underwrite the free internet.

Starting with online privacy, the Assembly and Senate passed, without opposition in either body, and the Governor signed, AB 375 (Chau, Dem-Arcadia), which provides a consumer the right to request deletion of personal information, as well as request a business that sells the consumer's information to disclose the categories of information that it collects and the identity of any 3rd parties to which the information was sold or disclosed. This bill was so poorly drafted and unimplementable that the Legislature passed unanimously a technical clean-up bill that delays implementation of AB 375 until mid-2020, so the far reaching provisions of this legislation, which fundamentally undermines how the internet has been free for the last 20 years, can be implemented without tanking e-commerce. However, as the bill is being analyzed by businesses and their attorneys' numerous questions and new issues are coming to light under the category of unintended consequences. Key among these concerns is the bill appears to apply to employment situations and workers' compensation, not just the relationship between business and consumers.

AB 375 is the product of a deal between an online privacy initiative proponent, San Francisco real estate developer Alastair Mactaggart, and legislative leadership. The initiative contained severe penalties for data breach, including extreme litigation exposure to businesses. Of great concern was the initiative's prohibition on the disclosure or sale of consumer data to 3rd parties, should a

consumer engage this option. After extensive meetings, negotiations and proposals that at one point had industry groups crying foul, final amendments went public the morning of June 25, leaving opponents to decide whether to back legislation or spend tens of millions of dollars campaigning against the initiative in the fall. The industry did not like the bill, but it liked the initiative even less, which forced them to make the tough decision.

Ultimately, the industry chose to address the privacy issue legislatively as amending statute would only require a majority vote, while amending the initiative would take two-thirds and potentially going back to the ballot. The agreement needed to pass both houses and be signed by Governor Jerry Brown by June 28, the deadline for initiative proponents to place measures on the November ballot, and that scenario came to fruition in an unprecedented turn of events. AB 375 becomes law July 1, 2020 (as amended by SB 1121).

A substantive legislative battle is in the planning phase, organized by the state Chamber of Commerce for the next legislative session. The substance of the AB 375 provision changes to be sought by an enormous business coalition will be more apparent this fall. Suffice to say this will likely be a major area of legislative activity in 2019.

When federal regulators voted late last year to roll back net neutrality protections, Democratic legislative leaders pledged to preserve open access to the internet in California. Now, SB 822 (Wiener, Dem-San Francisco), passed by the Assembly and Senate on a largely party line vote, is a proxy battle in the larger national fight to reshape the internet. Effective January 1, 2019, the legislation establishes the strongest net neutrality rules in the nation. SB 822 prevents internet service providers from blocking or slowing down websites and video streams, or charging websites fees for faster speeds. The bill bars broadband and wireless companies from selling faster delivery of some data, slowing speeds for certain content, or favoring selected websites over others. Calls in support of the legislation intensified after news broke that Santa Clara County firefighters reported being hindered by inadequate internet service as they helped battle the Mendocino Complex fire in July.

Over the past year, the powerful technology industry has expended millions to defeat the state's net neutrality efforts, while supporters have responded in kind with aggressive public advocacy campaigns. California is one of 29 states that have since considered net neutrality protections in the last year. Major telecommunications companies and broadband servicers explained to legislators that the bill reaches far beyond the scope of the rolled back federal regulations. SB 822 is sure to be challenged in court by the communications industry because of language in the Federal regulation specifically pre-empting state action in this subject matter.

Labor Bills & Dynamex

Trial lawyers and labor unions introduced over 100 employment bills of concern to employers in 2018. Issues in these measures covered lactation accommodation, women membership on board of directors, pay equity, second-chance hiring, and immigration-related notification, the first two of which are worthy of greater discussion.

In 2018, there were two significant lactation-accommodation bills introduced. One makes California's lactation-accommodation law consistent with federal law on the requirement that a lactation space cannot be a bathroom. The other bill is much more detailed where employers

would need to comply with a number of very specific requirements beyond simply providing time off and a location to express milk. The other newsworthy measure that has made headlines is a bill to require women membership on corporate boards of directors. SB 826 (Jackson, Dem-Santa Barbara) requires publicly held companies to have female representation on their boards. The Chamber conveyed to legislators that the internal affairs doctrine dictates that the laws of the state where the company is incorporated apply for these issues, not the law of where the principal executive offices are located, such as California. Such confusion and ambiguity could lead to costly fines as proposed under the bill and potential litigation, but the bill still passed party lines with multiple members from both parties abstaining.

Dynamex Operations West v. California Superior Court. Any anti-business activity in the Legislature pales in comparison to this court decision by the California Supreme Court. Dynamex establishes a presumption that individuals hired by businesses are employees as opposed to independent contractors. The decision states that a worker is properly considered an independent contractor only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such 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 for the hiring entity.

Since this is a California Supreme Court Decision, the only real option for those negatively affected is to appeal to the Legislature for change or a delay in implementation. At the behest of organized labor, both the Assembly and Senate Leadership rejected efforts in 2018 to delay implementation of the court's decision. However, a legislative debate over delaying implementation of this decision and/or consideration of various exemptions is expected to be a top priority for the Chamber and a number of other employer organizations for 2019.

The Dynamex coalition (independent.co), largely led by gig economy participants such as Uber and Lyft but made up of nearly every sector of the economy, has already met with every legislator on committees of jurisdiction, leadership, and plans to continue grassroots meetings in district offices for the remainder of this year. Expect a full public relations campaign and rallies at the State Capitol to build pressure on legislators to act on this issue in 2019. The primary objection to Dynamex is that one size does not fit all. The new ABC Test replaces decades of case law without the benefit of a legislative/public policy debate on the positives and negatives of its application to various industries.

Climate Change, Renewable Energy & Gas Tax

In another area of import, the Legislature approved, and the Governor signed reauthorization of the greenhouse gas emission cap-and-trade program. This massive government program requires industry to pay to emit carbon via the purchase of credits. The revenue generated is spread across all legislators' districts for programs that are supposed to be environmentally germane, but as anyone who knows California, "germane" is liberally interpreted.

While experts in the field privately question the practicality, the Governor approved the ambitious goal of relying entirely on zero-emission energy sources for its electricity by the year 2045. The Governor acknowledged; "It will not be easy. It will not be immediate." The bill

requires that 50% of California's electricity be powered by renewable resources by 2025 and 60% by 2030. Previously, California had mandated 50% renewable electricity by 2030. Electric utilities are at about 32%, currently.

Another key issue for mention is enactment of the Governor's gas tax bill. This bill is the target of recall by Republicans, the success of which will be determined by the November midterm election. The gas tax increase is required to be used for infrastructure refurbishment, modernization, and development. It raises the state excise tax on gasoline by 12 cents per gallon, a 40% increase.

The Election Year & Looking Forward to 2019

2018 is a general election year in which a new Governor will be selected. The frontrunner, Democratic Lieutenant Governor Gavin Newsom, and Republican businessman, Jon Cox, are the two options, the former of which is widely considered the favorite (currently 12% lead). The state will also elect a new Insurance Commissioner, which may prove a closer match. State Senator Ricardo Lara (Dem-Bell Gardens) is running against Independent former Insurance Commissioner Steve Poizner. Poizner garnered 4% more votes than Lara in the primary election but it remains to be seen if a candidate for statewide office running as an Independent can overcome what is expected to be a strong Democratic voter turnout in November.

The Senate top leader, Senator Toni Atkins (Dem-San Diego), will return as Senate President pro Tempore next year and the same is expected for the Speaker of the Assembly, Anthony Rendon (Dem-Lakewood). The main issue to keep an eye on is composition of the chambers, specifically whether one or both achieve two-thirds majority. Obviously, a supermajority is of particular importance because this is the vote threshold to increase taxes.

There are several open seats in the Assembly for 2019 and a few open seats in the Senate as well. Some political pundits are predicting Democrats will regain two-thirds majority in both houses. There may be as many as 57-59 Democrats in the Assembly, which will make it that much more difficult to defeat anti-business friendly legislation. Combined with a new, more liberal leaning governor in the horseshoe, California will not have a backstop for bad legislation.

Priority issues for the next legislative session will become clearer over the Fall. However, there will likely be multiple bills that concern the insurance marketplace, including potentially more measures concerning wildfire and homeowners coverage. Cannabis is a new, emerging market that will continue to be the focus of bills to lay the groundwork for regulation. This year there was substantial legislative activity around universal healthcare coverage with the goal of closing the 6.5% uninsured gap in the state, but there was no impactful measure approved. 2019 will no doubt see a major debate on single payor health care as that issue continues to be pushed by the powerful nurses association, organized labor and various consumer groups and supported by the leading candidate for Governor. As with every year, there will be many labor and workforce bills sponsored by unions and plaintiffs lawyers, and very likely others that concern workers' compensation. However, the workers' compensation marketplace is healthy, as is just about every other line of insurance with the exception of high health plan premiums, so major movement on this front requires a wait and see approach. Taxes and water conservation legislation are also perennial topics, the latter of which was the subject of a bill sponsored and signed by the Governor this year targeted at establishing statewide efficiency standards. Lastly,

as discussed above, more work is expected in the field of the state's new privacy law, net neutrality, and Dynamex.

In summary, the 2018 Legislative session was very challenging. Both the number and scope of the bills discussed above and their impact on the private sector were greater in 2018 than the previous year. The organizational demise of the Moderate Democratic Caucus seems to have played a major role in the results of this legislative session as the Mod Caucus lost key members to resignations and was not organized to engage on many issues this session. With the expectation that Democrats will regain a super majority in both houses of the Legislature in 2019, stopping unwarranted anti-business bills will be even more challenging. The California business climate consistently ranks as one of the most burdensome, overregulated, high tax economies in which to conduct business in the nation. It is not a stretch to believe the employer community will confront a more challenging legislature next year and will have to work harder to obtain manageable amendments to challenging legislation. The prospect of outright defeating adverse bills does not look particularly positive in what is expected to be the coming legislative environment.

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