

Legislative and Regulatory Update 2021



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What we'll cover



APPROVED BILLS:

- SB 331: General releases
- AB 1511: Cancellation of coverage
- AB 1561: ABC Test exemptions
- SB 606: Cal-OSHA enforcement
- Failed bills
- What to look for in 2022
- Covid sick leave strategies
- Copy service fee proposal



SB 331: “Silenced No More” Act

- Signed into law
- Takes effect 1/1/22
- Bans specific nondisclosure language in general releases



Signed into Law: SB 331

For work comp purposes:

- Comes into play when you do a Compromise and Release with a general release
- The general release often contains a multitude of provisions, including a nondisparagement clause. This typically bars the employee from going to the media about their version of events.
- This bill does not eliminate the nondisclosure/nondisparagement clause, but ...



Signed into Law: SB 331

It does:

- Require concrete language that notes the applicant's right to disclose information about unlawful acts in the workplace. Requires the following sentence:
- “Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful.”
- Add this sentence to your general releases!



Signed into Law: SB 331

What does that mean?

- Means that employees can still disclose factual information on any type of harassment, discrimination, and retaliation, despite your general release with an NDA and settlement.



Signed into Law: SB 331

Why?

- Prior bill from 3 years ago, SB 820, (STAND Together Against Non-Disclosure Act) barred NDA clamps on gender discrimination
- This bill expands that NDA ban to prevent general releases from limiting the employee's ability to disclose information on any type of unlawful harassment, discrimination, and retaliation



Signed into Law: SB 331

What about my general release?

- Can still do general releases with C&Rs
- Can still include voluntary resignations
- Can still NDA disclosure of trade secrets, or things that are clearly untrue



Signed into Law: AB 1511

Impacts timeframes for notices of cancellation of coverage

- Existing law requires carriers to send notice either 10 days, or 30 days, prior to canceling a policy
- This bill expands those by saying that those timeframes should add:
 - 5 days if mailed in the state of CA
 - 10 days if mailed elsewhere in the US
 - 20 days if mailed outside the country



Signed into Law: AB 1511



The 10 days applies when employer has:

- 1) failed to pay premiums
- 2) failed to report payroll or allow carrier to audit payroll or failure to pay additional premium based on payroll audit
- 3) made a material representation
- 4) failed to cooperate with the carrier's claim investigation



Signed into Law: AB 1511

The 30 days applies when employer has:

- 1) failed to comply with federal or state safety orders, or the written recommendations of the carrier's loss control department
- 2) a material change in the policyholder's business that dramatically increases their level of risk



Signed into Law: AB 1511 Takeaways

Takeaways

- If canceling a policy, earlier is better
- If you have canceled a policy and have some claims around the time of cancelation, check where the notice was sent to and add the appropriate extra number of days, which are:
 - 5 days if mailed in CA
 - 10 days if mailed elsewhere in US
 - 20 days if mailed outside US
- It could make the difference on whether coverage existed!



Signed into Law: AB 1561

Makes minor changes to exemptions on who the ABC test in Dynamex applies to. What's the ABC test?

If a worker does not meet all of the following three conditions, then they are an EE for work comp:

- A: Free from the control and direction of the hiring entity in connection with the performance of the work;
- B: Performs work that is outside the usual course of the hiring entity's business;***
- C: Worker is customarily engaged in an independently established trade, occupation, or business.

(* “B” is the factor that transforms most workers into employees.)**



Signed into Law: AB 1561

Makes minor changes to exemptions on who the ABC test in Dynamex applies to. Clarifies that you use the Borello test (aka the “right of control” test) for:

- Claims adjusters
- Data aggregators
- Licensed manicurists until 1/1/2025, if they meet certain conditions (set their own appointments, rate, etc)



Signed into Law: SB 606

Strengthens Cal-OSHA enforcement by:

- For employers with multiple worksites, this bill makes a rebuttal presumption that any OSHA-violations are for all of the worksites (not just the 1)
- Why is that important? They could issue an order for specified safety requirements across all of that employer’s worksites, instead of just the one
- Presenter’s opinion: an enterprise-wide monetary penalty could potentially be larger than if it was just the single worksite



Signed into Law: SB 606

Strengthens Cal-OSHA enforcement by:

- Requiring Cal-OSHA to issue a citation for an egregious violation for each willful and egregious violation. Each instance of this violation would be considered a separate violation for purposes of fines and penalties
- Result? Larger fines and penalties for egregious violations
- This section does not apply to the Department of Corrections and Rehabilitation, the California Correctional Health Care Services, or the State Department of State Hospitals



Signed into Law: SB 606

So what's an egregious violation?

- Employer intentionally made no reasonable effort to eliminate a known violation
- Violations resulted in fatalities, worksite catastrophe (hospitalization of 3 or more employees from an injury), or a large number of sick people
- Persistently high rate of worker injuries or illnesses
- Extensive history of violations
- Intentional disregard of health and safety responsibilities



Signed into Law: SB 606

Strengthens Cal-OSHA enforcement by:

- Authorizing Cal-OSHA to issue a subpoena for requested information if the employer or related employer entity refuses to provide information
- Authorizing Cal-OSHA to request an injunction restraining an employer's operations if Cal-OSHA has grounds to issue a citation
- Expands grounds for Cal-OSHA to seek a temporary restraining order



Takeaways: SB 606

- Cal-OSHA can destroy an employer's business financially and eliminate their ability to operate if the employer intentionally avoids taking action to create a safe workplace
- Seems to be aimed at employers who totally ignore Cal-OSHA Covid rules and regs, resulting in a multitude of cases
- If this happens and the employees can't work or get paid, what do you think they are going to do? (Hint: Probably file for EDD and some will probably file claims. Some may even file S&W claims.)



Signed into Law: AB 654

Clarifies that when there is an outbreak as defined by the state

- Employer must give notice to the local public health agency within 48 hours or 1 business day, whichever is longer
- Outbreak definition under this law: three or more laboratory-confirmed cases of COVID-19 among workers who live in different households within a two-week period
- Exempt from outbreak reporting requirement: community clinics, adult day health centers, community care facilities, and child day care facilities



Signed into Law: Other bills

- SB 823 - This omnibus bill exempts anyone who reports a fraudulent claim from civil liability. Includes carriers, employers, judges, attorneys, as long as they acted in good faith without malice
- AB 1541 - would allow CIGA to issue up to \$1.5 billion in bonds
- AB 845 –allows state employees to get disability retirements if they get Covid during an outbreak at their place of employment



Signed into Law: Other bills

- SB 321 – Require Cal-OSHA to form an advisory committee on privately-funded household domestic service employees, and make a report by 1/1/23
- AB 701 – would force employers of 100 or more at a warehouse to provide each EE with description of each quota



Things to keep an eye on: SB 1159

- That's the 2020 bill that contains three rebuttable Covid presumptions
- Under all three presumptions, last day of work is date of injury
- Presumptions don't cover people solely working from home
- **Guess what? That bill expires on 1/1/23 (13 months from this presentation), unless of course the Legislature decides to renew it**



Things to keep an eye on: Failed bills

2021 saw a number of failed bills. Why do we care about failed bills?

- Because similar versions of these bills tend to resurface, like undead zombies, in the years ahead



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Things to keep an eye on: Failed bills

2021 saw a number of failed bills that would have

- Created a statewide MPN (that language was removed by lawmakers)
- Reduced the decision timeframe from the current 90-day timeframe down to 45 days for most claims (died in committee)
- Called for first responders' presumption claims to have a 30-day decision timeframe (died in committee)
- Hiked the monetary cap on medical treatment during the decision timeframe from \$10,000 up to \$17,000 (died in committee)
- Firefighters get up to 1 year of salary continuation benefits for industrial injuries on/after 1/1/22



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Things to keep an eye on: Failed bills

2021 saw a number of failed bills that would have

- Increased EDD rates significantly that would have meant less money in your paychecks (vetoed)
- Required the med-legal fee schedule to be updated every two years (not enough votes)
- Created a PTSD presumption for firefighters (inactive, held over to 2022)
- Barred apportionment to race, religious creed, color, national origin, gender, marital status, sex, sexual identity, or sexual orientation (vetoed)
- Skin cancer presumption for Depts of Fish and Game and Dept of Parks and Rec (deemed inactive, could return)



Failed bill: Statewide MPN

Why would a statewide MPN be a bad idea?

- If everybody is allowed into a statewide MPN, where is the standard of care? Does it even have one?
- Would create \$314 million in annual costs for defendants by eliminating contractual MPN discounts
- Could destroy continuity of care
- DWC would probably have to create and adequately staff a new department to monitor and administer the statewide MPN



Failed bill: Shortened decision times

Why is shortening the decision timeframe a bad idea?

- Less investigation time for defendants = more denied claims
- This conflicts with the goal of the bill, which was to create more accepted claims
- If anything, increasing the decision timeframe would probably lead to more accepted claims
- Could increase costs for state and local governments



What probably lies ahead

2022 will probably see the following proposals from the Legislature **if Covid persists**:

- Renewal of SB 1159 presumptions if Covid persists
- Strengthening of Cal-OSHA, and harsher fines and penalties for employers who take a lax approach to Covid precautions
- Proposals for vaccination legislation for employers and in general
- Proposals regarding employer testing for Covid



What probably lies ahead

2022 will probably see the following proposals:

- More anti-apportionment bills
- Bills proposing increases to fee schedules, ie payments to doctors
- Increased penalties for wrongful denials of presumption claims (currently \$10,000, but could go up to \$25,000) fee schedules
- A creative proposal to try and help applicants get outside MPNs
- Perhaps more action from the DWC on the Interpreters Fee Schedule



What could lie ahead

2022 could see more cases with AOE/COE issues like:

- Employees working from home
- Vaccine reactions
- Employer and gov't mandated Covid testing



What lies ahead: Beware 2023

- During a 2021 Assembly Insurance Committee meeting, the Committee's Chair Tom Daly (D-Anaheim) reportedly hinted that if Newsom wins, there could be significant work comp reform legislation
- "We will be living with workers' comp reform in the coming months and years," Daly said
- Newsom just won the 2021 recall election pretty handily, so odds are he could win the 2022 general election



CA's COVID Sick Leave Bill Expired

- SB 95 Expired 9/30/21. This means that the state's mandate for supplemental paid sick leave (SPSL) expired
- No replacement legislation on the horizon
- What does that mean?



COVID Sick Leave

- Cal-OSHA Regs say: if someone has a industrial exposure, then the ER should continue to pay them while they are out sick
- Local gov'ts have Covid sick leave too regardless of type of exposure, including:
 - LA City
 - LA County
 - Long Beach City
 - City of Oakland
 - San Mateo County (unincorp Areas)



COVID Sick Leave Analysis

Work exposure to Covid?

- Employer picks up sick leave under the Cal-OSHA regs
- If that exposure turns into a work comp claim, the carrier can pick up TTD while the employee is out



COVID Sick Leave Analysis

But what if the Covid exposure is not work-related?

- Check and see if your local gov't has a sick pay regulation
- If yes: ER should pay the sick leave
- If no: ER doesn't have to pay the sick leave



COVID Sick Leave Analysis

- No sick leave? EEs still have other options, including:
- State-mandated 3 days of sick leave,
- Exhaust sick time, PTO, or vacation
- Request EDD



COVID Sick Leave Analysis

- More Questions? Ask Us. These Are Highly Fact-Specific.
- Also, Possible That Additional Legislation Arrives That Reinstates the COVID Sick Pay for All of California, Especially if Cases Spike Again.
- Hotlink:
<https://bradfordbarthel.com/expiration-of-covid-sick-leave-law-creates-confusion/>



CWCI Covid Update

- CWCI reported that Covid claims dropped sharply in October
- CWCI had projected 3,621 for October 2021
- That's down 56% from the 8,197 claims projected for August 2021
- Source: https://www.cwci.org/press_release.html?id=864



CWCI Covid Update

CWCI data shows that the

- Central Valley has had the highest proportion of Covid claims since February 2021, geographic area
- San Diego, for an urban area, has surprisingly always had a low amount of Covid claims
- 168,477 Covid-19 claims have been reported since the start of the pandemic
- Source: https://www.cwci.org/press_release.html?id=864



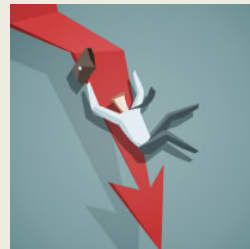
WCIRB:

Total Written Premium Down

Carriers wrote \$600 million less premium in 1st Quarter 2021 compared to 1st Quarter 2020.

1st Quarter 2021: \$3.6 Billion

1st Quarter 2020: \$4.2 Billion



Cause: Fewer businesses, smaller workforce



Shifting Gears: Copy Service

DWC Copy Service Price Schedule proposal (still just a proposal)

- Would increase the standard rate for subpoenaed records of 500 pages or less from \$180 to \$225
- Copy service bills to be paid within 30 days by the claims administrator. If the subpoena company's bill isn't paid in that timeframe, then the unpaid balance would increase by 25% bills to be paid within 30 days by the claims administrator. If the subpoena company's bill isn't paid in that timeframe, then the unpaid balance would increase by 25%.



Copy Service Proposal

DWC Copy Service Price Schedule proposal (still just a proposal)

- copy service cannot get paid for services that were provided within 30 days of requesting records on behalf of an applicant from an employer, administrator, or carrier for the employer/administrator/carrier's records
- 30 days is intended to create a timeframe to meet and confer



Copy Service Proposal

DWC Copy Service Price Schedule proposal meet and confer requirements

- If a notice of intent to copy records from a employer, administrator, or carrier
- And the defendant objects
- The parties must meet and confer to discuss which records are relevant to the claim



Copy Service Proposal: Meet and Confer

Is that meet and confer good or bad?

- Probably good, as it will ensure that bad actor copy services can't just sidestep the defense attorneys
- (Have had some who never serve me with a subpoena and bill later, despite my having issued a notice of representation and clearly being a party of record)



Status of Copy Service Proposal

- Had a hearing on 8/30/21 with differing opinions and technical difficulties
- In order to get approved, has to submit the proposal to the Office of Administrative Law (but doesn't appear to have done so)
- Probably going to revise them and put them up for public comment again



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