

# Legislative Update: 2022 Work Comp Bills

By John Kamin, Esq.

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# What we'll cover



## APPROVED BILLS:

- SB 1127: Presumptions, decision timeframes, penalties
  - **Future reform topics?**
- AB 1751: Extends Covid presumptions
- AB 152: Covid sick pay bill
  - **Covid sick leave strategies**

## ALSO COVERING:

- Failed bills
- Rules update: QME evaluation dates and deadlines, telehealth
- Pandemic changes to our industry



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# SB 1127: Presumptions, Penalties

- Signed into law
- Takes effect 1/1/23
- Reduced decision timeframe for first responder presumptions from 90 to 75 days
- Increased penalty for unreasonable denial to \$50,000
- TD increase



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## SB 1127: The Reduced Decision Deadline of 75 Days

- Applies to the standard first responder presumptions, including hernia, heart, tuberculosis, pneumonia, etc
- This reduced decision deadline does not apply to the Covid-19 presumptions. Why? The Covid-19 presumptions already have reduced decision timeframes of either 30 or 45 days



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## SB 1127: Increased Penalty Provision

- Applies to the standard first responder presumptions, including hernia, heart, tuberculosis, pneumonia, **and the Covid-19 presumptions** etc
- This is easy to miss if one only reads part of the statute. But if you read LC 5414.3 closely, you'll see that it does include the Covid-19 presumptions. That includes the outbreak presumption = not just first responders.
- Takeaway: Make sure that your Covid-19 denials are backed by a good reason



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## SB 1127: Increased TTD for First Responders on Cancer Claims

- Increased TTD for up to 240 weeks for police and firefighters who have cancer claims



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## SB 1127: A Sign of the Times

- Indicative of legislative reforms to come
- Sea change of major legislative reform about every 10 years
- 2023 marks 10 years since SB 863, and 18 years since SB 899
- Gov. Newsom just won re-election again, and Chair of the Assembly Insurance Committee has hinted at change to come after these elections – including the reforms mentioned in this bill. Could this bill be indicative of reduced decision timeframe and higher penalties for all claims?



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## Future Reform Topics?

- Could be wide-ranging, but last reform failed to address creation of a new interpreter fee schedule
- Last few years have seen fee schedules, such as MLFS increase
- MPNs will probably be targeted, are targeted every year
- Anti-apportionment measures
- More anti-fraud measures



## Future Reform Topics?

- Limiting CT claims
- More stringent audit penalties
- SJDB voucher system seems to have some fraud problems
- Increased protections for hotel workers seems like a trendy topic
- More presumptions, presumptions for everyone!



## Speaking of Presumptions: AB 1751

- Extends the Covid-19 presumptions sunset date to 1/1/24
- This includes the three presumptions we've previously reported on, including:
  - Outbreak presumption (4 positive tests in 14 days, or 4% of worksite employees having positive tests in 14 days if more than 100 employees)
  - First responder presumption for Covid-19 (nurses, doctors, EMTs, firefighters, etc)
  - Gov's presumption (applies to DOIs pre-7/6/20)



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## From the Covid Desk



- We anticipate a busy winter with more infections, especially the “holiday rush”
- Holiday rush – uptick in claims last week of the year as people celebrate and get together
- Makes for a busy January as employers, carriers, and TPAs rush to handle Covid-presumption claims (in 2022 adjusters at multiple carriers mentioned double-digit or triple-digit increases in Covid caseloads)
- Holiday rush coincides with confusion about Covid sick pay



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## AB 152: Covid Sick Pay

- Extended Covid sick pay provision for all employees – even if nonindustrial – until 12/31/22
- This is the extension of SB 114, which split Covid sick pay for nonindustrial exposures (or taking care of a sick relative) into two 40 hour blocks (first 40 hours without restriction, second 40 hours requires a positive test)
- Also allowed Covid sick pay for employees (or taking relatives) to get vaccinated



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## Covid Sick Pay: What About 2023?

- That “40 hours” and “40 hours” provision will expire on 12/31/22
- Maybe Gov. Newsom and lawmakers renew it in February 2023 and make it retroactive to 1/1/23 (they did that same thing last year)



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## Covid Sick Pay: What About 2023?

- If a work-related exposure to Covid:
  - Cal-OSHA mandate full pay “as if the employee is still there” also expires on 12/31/22.
  - Cal-OSHA meets on 12/15/22, anticipate they may extend the Covid emergency temporary standards into 2023. Not on their 11/17/22 docket however.
- Local gov'ts have Covid sick leave too regardless of type of exposure, including many cities and counties



## Covid Sick Pay: What About 2023?

- Takeaway: While these state, Cal-OSHA, and local jurisdictions all seem aimed at mandating Covid then threatening to expire at random times, our bottom line guidance is that ERs voluntarily pay Covid sick pay. Why?
  - Fewer claims
  - Happier employees
  - Fast return to work for most anyways



## Covid Sick Pay: What About 2023?

- To play Devil's Advocate, let's say all of these expire on 1/1/23. Then what?
- Employees still can:
  - State-mandated 3 days of sick leave (some counties have stronger sick leave provisions)
  - Exhaust sick time, PTO, or vacation
  - Request EDD



## From the Covid Desk

- The sick leave stuff is confusing, and there are times of year we're checking every week to see how it's changed
- The presumptions can be confusing too
- If you have a question, or want consults on Covid claims, feel free to email us at [covid@bradfordbarthel.com](mailto:covid@bradfordbarthel.com), where we have a team of experts who can quickly help you navigate this complicated area



## SB 1242: Fraud Reporting



- Requires insurers to report suspected fraud within 60 days of occurring
- Requires brokers and agents to report suspected fraudulent claims to Fraud Division's Consumer Fraud Reporting Portal
- Protects brokers and agents from civil liability for reporting fraud
- Requires brokers, agents, and adjusters to take one hour of continuing education credits for insurance fraud



## Fraud Reminders



- While some fraud cases involve an elaborate conspiracy, most fraud requires a:
  - Material misrepresentation of fact to get work comp benefits
  - An outright lie to get work comp benefits
- The easier it is proven, the more interested the DA or Dep't of Insurance will be
- They're more interested in the easily-proven lie than they are the amount of money spent on a claim
- The more lies, the more interest



## AB 1681: More Fraud

- Allows Insurance Commissioner, deputies to meet with insurers and employers to discuss fraud
- Provides more civil protections against meeting participants (as long as participants aren't themselves fraudulent or have evidence of malice)



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## SB 1002: MPN Social Workers

- Allows MPNs to list social workers in their MPNs
- Social workers = cannot determine PD
- Reasoning: to expedite mental health services
- If more comprehensive care is needed, the social worker can refer to a psychologist/psychiatrist
- Takes effect 1/1/23



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## AB 2188: Cannabis Discrimination

- Bars employers from discriminating against employees who use marijuana away from the workplace
- What it means: if someone is not intoxicated at work, but tests positive for trace amounts, can't discipline them for the trace amounts
- Exempt from this law: construction, building trades
- Takes effect 1/1/23



## AB 2188: Cannabis Discrimination

- Doesn't impact intoxication defense, because intoxication defense requires proof of intoxication at work
- To put it another way, this bill doesn't allow employees to show up for work intoxicated
- If they do, employers can discipline them



## Intoxication Defense

- If an employee does show up for work intoxicated under any drug or substance or alcohol, get employer witnesses ready to testify about signs of intoxication
- Get surveillance video from that day
- Send for a drug/alcohol test too, but you'll need more than just a positive test



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## SB 1162: Payroll Reporting



Existing law requires Ers with 100+ employees to:

- Report pay data to state Civil Rights Dept for existing employee pay data
- Disclose pay scale to job applicants upon reasonable request



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# SB 1162: Payroll Reporting

New law SB 1162:

- Requires ERs with 100+ employees to report to the state pay scales in job postings, which means:
  - Job categories
  - Pay data for each category
  - Median and mean hourly rate for each combination of race, ethnicity, and sex within each job category
  - Also must keep wage history during employment, and up to 3 years after



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# SB 1162: Payroll Reporting

New law SB 1162:

- Requires ERs with 15+ employees to:
  - Disclose pay scales in job postings
  - If requested by EE, must disclose



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## SB 1162: Payroll Reporting

- Reporting deadline is 5/10/23 for 2022 pay data
- Failure to comply has fines/penalties of \$100/EE, later up to \$200/EE if repeated failures
- Bill is aimed at identifying the outliers, classes that are paid less than others
- Aggrieved employees (who asked about pay, but were not answered) can file a complaint with the Labor Commissioner or in Superior Court
- Takes effect 1/1/23



## AB 1643: Heat Effects

- State to create advisory committee to write a report that evaluates impact of heat on workers, businesses, and the economy
- Committee must be created by 7/1/23
- Report due 1/1/26





## AB 2848: DWC Must Look at UR

- Requires DWC to analyze UR and provision of medical care during first 30 days after a claim
- Expands field of claims from 1/1/17-1/1/21
- DWC was supposed to hire an outside consultant to analyze that data under prior legislation
- Report due: 7/1/23



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## SB 216: HVAC Needs Comp

- Requires all concrete, heating, air conditioning, HVAC, asbestos, and tree service contractors to carry work comp insurance
- Even if zero employees



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## SB 216: HVAC Needs Comp

- Why? As we all know, many contractors of all sorts pretend to have no employees, but then additional scrutiny shows they regularly use “helpers”
- What do these industries have in common? Their lines of work often involve working at varying heights above the ground, increased risk of falls



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## VETOED BILLS: AB 334

- Would have expanded presumption that skin cancer is industrial
- Existing presumption = lifeguards
- Would have expanded presumption to:
  - Dept of Fish and Wildlife
  - Dept of Parks and Rec



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## VETOED BILLS: SB 284

- Would have expanded PTSD presumption that PTSD is industrial
- Existing presumption = most firefighters and peace officers
- Would have expanded presumption to:
  - More firefighters
  - Security officers from state and federal departments



## Alphabet Soup: QME P's and Q's

- Before pandemic, per CCR 46.2, party with the right to schedule had right to schedule:
  - Initial eval within 60 days
  - Party with right to schedule could waive and sked within 90 days
- Covid extended those by 30 days. So:
  - Initial eval within 90 days
  - Party with right to schedule could waive and sked within 120 days
- Guess what? Those extensions expired on 1/1/22. (Many QMEs and practitioners still don't know this)



## Plot Twist: QME P's and Q's

- Plot twist: While the first set of 60-90 days is the current law, the DWC had a hearing yesterday (Tues., 11/15) to hear comments on switching it back to the 90-120
- We will keep an eye on it: DWC can either submit for approval with Office of Admin Law, or choose to go back to the drawing board
- <https://www.dir.ca.gov/DIRNews/2022/2022-77.html>



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## Post-Pandemic Rundown

- Question: What changes to work comp have we seen in the post-pandemic world of work comp that could influence upcoming legislation?



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## Post-Pandemic Rundown: Changes

- Change #1: Employers got unprecedented access to health information
- Who would have imagined that the state would mandate that all employers know about how all employees tested for a particular virus?
- Cal-OSHA wanted ERs to know
- Lawmakers wanted ERs to know (SB 1159 presumptions)



## Post-Pandemic Rundown: Changes

- Change #2: Culture change: ERs eager to send that sick employee home and pay them!
- Pre-pandemic: Working while sick, worked
- Post-pandemic: Don't want sick employees infecting their coworkers, and many don't like looking like the bad guy who made a sick person work through it
- Peer pressure: Nobody wants to be near the coughing coworker



## Post-Pandemic Rundown: Changes

- Change #3: Working from home has its pros and cons
- Pros: Happier employees, perhaps less overhead, less demand for pricey leases of commercial space
- Cons: Unwitnessed injuries, sketchy CT claims make disputing causation even more difficult



## Post-Pandemic Rundown: Changes

- Change #4: See's Candies case
- Fact pattern: EE allegedly gets Covid from work, brings it home, gives it to spouse, spouse dies from Covid
- CA Supreme Court: EE can sue employer in Superior Court for negligence
- Another way to say it: Derivative injuries lawsuits get more leeway, but still tough to prove
- Have to wait and see, as ruling was only on a demurrer



## Post-Pandemic Rundown: Changes

- Change #5: Unpredictable doctors
- Doctors have unpredictable opinions on Covid
- Liberal doctors dispute industrial causation
- Conservative doctors take liberal approach to industrial causation
- Some doctors: don't know what to do, are guessing
- (Solution: guide them with as many facts as possible)



## Post-Pandemic Rundown: Changes

- Change #6: Strong factual investigations normalized
- Previously, EEs would be resistant to a million questions about their personal life, travel, parties
- Now, answering questions about nonindustrial exposures to Covid are par for the course



## Post-Pandemic Rundown: Changes

- Change #7: Personal space, plastic barricades, masks
- Trip to your local ER and hospitals still have mask requirements
- Grocery stores have plastic barriers, which some workers think is silly, does keep customers from invading their personal space
- As Bluey would call it – nobody likes a “space invader,” a la the Seinfeld “close talker”
- All these things = do make us all a little safer



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## Post-Pandemic Rundown: Changes

- Change #8: Presumptions galore!
- It seems that each and every state looked at new Covid presumptions
- Reawakened interest in presumptions



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## Post-Pandemic Rundown: Changes

- Change #9: Unreliable tests are the norm
- PCR tests = still far more reliable than antigen/rapid tests, rapid tests far more likely false negative Days 1-5
- Why do we use rapid tests then?
- Nobody likes waiting three days for a lab
- Some industries (health care nurses) can't afford to wait three days due to staffing issues



## Post-Pandemic Rundown: Changes

- Change #10: AWWs went up, as did employee demand!
- Underemployment was a huge problem
- ERs paid more to keep their prized employees
- As a result, WCIRB recently reported that AWWs increased during the pandemic, meaning higher TTD rates
- That plus inflation may warrant interest in higher PD rates in future legislation





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