Date of Hearing: August 11, 2020

ASSEMBLY COMMITTEE ON INSURANCE
Tom Daly, Chair
SB 1159 (Hill) – As Amended August 3, 2020

SENATE VOTE: 28-11

SUBJECT: Workers' compensation: COVID-19: critical workers

SUMMARY: Codifies the Governor's Executive Order (N-62-20) that created a rebuttable presumption that "essential employees" who contracted COVID-19 were infected on the job, and establishes the scope and terms of a similar presumption for infected employees outside of the Executive Order. Specifically, **this bill**:

1) Codifies the terms and conditions of Executive Order N-62-20, which expired in July.

2) Adopts a rebuttable presumption that a peace officer, firefighter, specified frontline employee, and certain health care employees, as defined, who contract COVID-19 were infected with the virus via a workplace exposure.

3) Specifies that "all employees" may have the benefit of a presumption that contracting the COVID-19 disease was due to a workplace exposure if:

   a) The employer has more than 5 employees;

   b) The employer, if the employer has 100 or fewer employees, had 5 or more employees at a work location who contract the disease; or

   c) The employer, if the employer has more than 100 employees, more than 5% of the employees at a particular work site contracted the disease.

4) Provides that all of the normal workers' compensation benefits are available to these employees who become presumptively eligible for workers' compensation benefits.

5) Specifies that the law that grants the Division of Workers' Compensation a remainder beneficiary status for death benefits in the event there are no dependents does not apply in these circumstances.

6) Establishes criteria to determine whether an employee within the class of employees eligible for the presumption was potentially exposed, and thereby eligible for the presumption.

7) Provides that any employee who might benefit from the presumption of compensability must first exhaust any special COVID-19 "time off" benefits provided by federal law before the workers' compensation benefits attach.

EXISTING LAW:

1) Establishes a workers' compensation system that provides benefits to an employee who suffers from an injury or illness that arises out of and in the course of employment, irrespective of fault. This system requires all employers to insure payment of benefits by

either securing the consent of the Department of Industrial Relations to self-insure or purchasing an insurance policy against liability from an insurance company duly authorized by the state.

2) Creates a series of disputable presumptions of an occupational injury for peace and safety officers for the purposes of the workers' compensation system. These presumptions include:

   - Heart disease
   - Hernias
   - Pneumonia
   - Cancer
   - Meningitis
   - Tuberculosis
   - Bio-chemical illness

3) The compensation awarded for these injuries must include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by the workers compensation law.

4) Provides, until January 1, 2025, a disputable presumption that a diagnosis of Post-Traumatic Stress Disorder (PTSD) for specified peace officers and firefighters is an occupational injury, running for up to 5 years. The benefit includes full hospital, surgical, medical treatment, disability indemnity, and death benefits, but only applies to peace officers who have served at least 6 months.

5) Provides that, in the case of a contagious agent, an employee may obtain workers' compensation benefits if the employee can establish that their exposure was greater than that of the general population.

FISCAL EFFECT: Undetermined. The bill currently proposes a broader application of COVID-19 presumptions than the bill as analyzed by the Senate Appropriations Committee.

COMMENTS:

1) *Purpose*. According to the author, in the past several months, more Americans have died of COVID-19 than died during the Vietnam War, a war that lasted 20 years. While much media attention has been on the economic challenges of this pandemic, the scale of human suffering is unprecedented and difficult to overstate.

   This bill will extend a COVID-19 rebuttable presumption to BOTH public and private sector workers. SB 1159 is very much a work in progress: we have a long way to go to hammer out the technical issues, and that includes working with the Governor and interested stakeholders to codify his recent executive order. While the Governor's Executive Order was temporary, COVID-19 will be with us beyond that date.

2) *Contagious diseases*. Existing law has developed on the basis of localized infectious exposures. In general, if an employee can establish that their exposure at work was greater than the exposure of the average non-worker, then a claim would be valid. Historically, this has allowed generalized denials for infectious diseases in localized exposed areas. COVID-

19 is truly a "novel" virus, and its widespread pandemic nature has resulted in challenges to how infectious diseases have historically been handled in the workers' compensation system.

As a result of the Governor's "shelter-in" order, anyone who was not an "essential employee" was by definition NOT exposed more than the general population, and any "essential employee" was exposed more than the general population, because these employees were out in the community due to work obligations. This formed the basis of the Governor's EO.

On a go-forward basis, it becomes more complicated as most people are both going to work, and engaging in the usual activities of daily life (albeit with crucial differences such as social distancing and wearing face masks.) Thus, it becomes more complicated to sort through who should, and who should not, obtain the benefits of a presumption that the source of contracting the virus was via a workplace exposure.

3) *Presumptions generally*. Presumptions have never been intended to create work related injuries when, in fact, the injuries in question are not work related. Rather, presumptions of compensability have been adopted, some many decades ago, to reflect unique circumstances where injuries or illnesses appear to logically be work related, but it is difficult for the employee to prove it is work related. There has clearly been some slippage over time from a rigorous application of this rationale, but it remains the underlying premise of presuming injuries or illnesses to be work related.

   The issue raised by employers – both public employers who employ peace officers and firefighters, and private employers who employ health care workers and others who may come within the bill's provisions – is that there is no evidence that COVID-19 claims are being denied when there has been a legitimate workplace exposure. These employers point out that it is not their role to be a public health service, and in fact, with the economy crashing under the strictures of COVID-19 public health mandates, it may be inappropriate to further burden employers with costs that are not, in fact, employment-related. In this regard, they point to data that shows substantial acceptance of claims where there are positive COVID-19 tests, and the employee was exposed as a result of employment.

4) *Rebutting a presumption*. In general, employers argue that it is virtually impossible to rebut a presumption, because it requires proving a negative. Because the COVID-19 situation is truly novel, the rules governing what proof may be required by the courts to rebut a presumption are difficult to predict, but in general, based on the law governing presumptions previously adopted, the employer would have to "prove" that the employee affirmatively did NOT become infected on the job. In light of the extensive community exposure California has experienced, this is probably an impossible task. Thus, even the most conscientious employer can argue that the presumption is, in reality, conclusive.

   At least one state that has adopted a presumption -- Illinois -- has included language in the bill that specifies how the presumption may be rebutted. The Illinois statute expressly allows the presumption to be rebutted by evidence of a tangible non-work exposure, or by evidence that the place of employment was governed OSHA-compliant rules that are actively enforced, including social distancing, face masks, sanitizing procedures, or other protective measures. *The Committee may wish to consider adopting language that allows an employer to rebut the presumption if it can prove a tangible non-employment exposure, or that it*

complied with applicable CalOSHA Statewide Industry Guidance on COVID-19 standards, or other criteria that identifies a safe workplace.

5) *Quarantine issues*. Many employees across job types have been directed to "self-quarantine" or mandatory quarantine on the basis that they may have been exposed, and the employer does not wish to risk further exposure to other employees during the non-symptomatic incubation period. Many or most of these employees ultimately do not test positive for COVID-19, yet have missed work time. The issue is whether these employees should use accrued sick time, remain in quarantine uncompensated, or whether paid administrative leave should apply. The bill does not address this scenario, as it requires either a positive test or physician diagnosis to trigger benefits. *The Committee may wish to consider whether an employee required to self-quarantine should be entitled to paid leave without debiting accrued sick time.*

6) *The "5 and 5%" rule*. As noted above, it is difficult in the context of a pandemic such as we are now experiencing to know for sure where any individual contracted the disease. Certainly, health care providers treating COVID-19 patients who contract the disease present a compelling case. As to other, less obvious employment settings, it poses a challenge to make that determination. The bill proposes a methodology that suggests that infection-free, or low-infection workforces likely do not have employees infected on the job, but high infection-rate workplaces suggest the infections may well have been workplace-related. The goal of this rule is to reward employers that maintain safe work environments, and hold employers responsible if they do not.

   This rule has been challenged by both employer and employee advocates as unworkable. Both sides argue that infection rates are too random to use this mechanism to determine who does, and who does not, obtain the benefit of a presumption.

   Employers note the difficulty in defining what counts as a work location, how one accounts for random employee behavior outside of work, among other issues. Employee representatives argue that many workplace exposures can occur in higher risk work sites even if an employer is attempting to provide safe conditions.

   The Committee may wish to delete the "5 and 5%" provisions from the bill, in favor of continuing to work with the Governor and stakeholders on defining the scope of job classifications that ought to be included along with peace officers, firefighter, EMTs and health care workers.

REGISTERED SUPPORT / OPPOSITION:

Support

None received

Opposition

Acclamation Insurance Management Services
Advanced Medical Technology Association
African American Farmers of California
Agricultural Council of California

Allied Managed Care Incorporated
American Pistachio Growers
American Property Casualty Insurance Association
American Staffing Association
Association of California Healthcare Districts
Association of California School Administrators
Association of California Water Agencies
Association of Claims Professionals
Auto Care Association
BETA Healthcare Group
Breckpoint
California Alliance of Self-Insured Groups, Inc.
California Association of Health Facilities
California Association of Joint Powers Authorities
California Association of School Business Officials
California Association of Winegrape Growers
California Beer & Beverage Distributors
California Building Industry Association
California Cattlemen's Association
California Chamber of Commerce
California Citrus Mutual
California Coalition on Workers' Compensation
California Construction and Industrial Materials Association
California Cotton Ginners and Growers Association
California Farm Bureau Federation
California Farm Labor Contractors Association
California Forestry Association
California Fresh Fruit Association
California Grocers Association
California Hospital Association
California Land Title Association
California League of Food Producers
California Manufacturers & Technology Association
California Municipal Utilities Association
California Pool and Spa Association
California Restaurant Association
California Retailers Association
California Rice Commission
California Schools JPA
California Self Storage Association
California Special Districts Association
California Staffing Professionals
California State Association of Counties
California Strawberry Commission
California Travel Association
CAWA – Representing the Automotive Parts Industry
CompAlliance
Exclusive Risk Management Authority of California
Family Business Association of California

Far West Equipment Dealers Association
Grower Shipper Association of Central California
Independent Insurance Agents & Brokers of California
Lake Elsinore Unified School District
League of California Cities
Los Angeles Area Chamber of Commerce
Michael Sullivan & Associates, LLC.
Milk Producers Council
Monterey County
National Association of Mutual Insurance Companies
National Federation of Independent Business
Nisei Farmers League
Personal Insurance Federation of California
Public Risk Innovation, Solutions, and Management
Rural County Representatives of California
Self-Insurance Risk Management Authority I
Special District Risk Management Authority
The Council of Insurance Agents and Brokers
United Ag
United Hospital Association
Urban Counties of California
West San Gabriel JPA California Association of Winegrape Growers
Western Agricultural Processors Association
Western Growers Association
Western Insurance Agents Association
Western Occupational & Environmental Medical Association
Western Plant Health
Western United Dairies

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