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Workers' Compensation Insights

COVID-19 and the Grand Bargain in California

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CALIFORNIA LEGISLATURE LOOKING AT COVID-19 PRESUMPTIONS

Policy and Cost Issues Abound

The most urgent debate in the workers' compensation insular universe is how to address losses arising out of and in the course of employment from exposure and infection from the COVID-19 virus. This debate is playing out in legislative and regulatory actions throughout the United States, primarily in the context of health care professionals and first responders who routinely run the risk of exposure to and contracting COVID-19. Proposals from labor organizations, however, would extend such presumptions to a wider range of employment.

The hyperbole during this time of crisis from everyone from claims administrators to InsureTech "thought leaders" is both deafening and disheartening. This is not a transformational moment for the workers' compensation system. It is a warning signal that the benefits from technology that have been slow to develop should play a far more beneficial role in the immediate future. This should have been the case in 2020 but for bureaucratic inertia in both the public and private sectors that has stifled innovation for well over a decade. There is finally an urgent, but not "disruptive" need to address such relatively simple issues as telehealth, telemental health, paperless payments to injured workers, blockchain uses for dispute resolution and auditable claims administration, and further development of interoperable systems to allow real time authorization of medical treatment requests. But that means everyone in the workers' compensation environment needs to ditch the bifocals and find a few people with vision.

First, however, there needs to be a discussion about the role of workers' compensation in the COVID-19 pandemic. This leads us to two states, New York, and California. Earlier this year, a proposal was floated in New York to create a conclusive presumption of compensability for COVID-19 exposure for a wide range of employments. Per claims administrator Sedgwick, in its *Workers' compensation coverage* news page dated March 31:

> "New York state legislators have requested a provision to be included in state budget legislation that would mandate that the exposure to the COVID-19 virus is an occupational disease and as such is compensable under New York State workers' compensation law. The following occupations would have the benefit of the presumption: healthcare providers, transportation workers, food service workers, retail employees, education employees, hospitality employees, public utility employees and any business defined as essential by Governor Cuomo's executive orders."

The Business Council of New York State had a similar assessment:

> "The Business Council strongly opposes any addition (sic) language in the state budget that would amend the Workers' Compensation Law to create an occupational disease presumption for people who have contracted COVID-19. Not only does such a provision completely ignore both the common law and statutory concept of causation of injury, its effect will – based on initial assessments by the Comp Insurance Rating Board – be the bankrupting of commercial workers' compensation carriers, the State Insurance Fund and self-insured employers."

The Council is referring to a document by the New York Compensation Insurance Rating Board (NYCIRB). The Board was asked to estimate the costs of a legislative proposal which would create a presumption that exposure to COVID-19 is an occupations disease. Per the NYCIRB letter:

> "The proposal creates a presumption in law that exposure to the COVID-19 virus is an occupational disease and as such is compensable under New York State Workers' Compensation Law. The categories of workers identified in the proposal that are eligible to make a claim based upon exposure is broad and encompasses much, if not all, of the State's public and private sector workforce. Further, by predicating compensability upon exposure instead of illness, the proposal makes most, if not all workers, eligible for benefits without testing positive for the illness."

For more on categories of essential employment affected by Governor Cuomo's March 20 "New York State of Pause" Order see: https://www.governor.ny.gov/news/governor-cuomo-issues-guidance-essential-services-under-new-york-state-pause-executive-order

Without going into the details of their methodology, which the Board acknowledges is based on the moment of time, and thus rate of transmission of COVID-19, when the analysis was prepared, the estimated costs of this legislation would be $31 billion. As noted by the Board, "By way of comparison, current annual losses in the State's workers' compensation system, including both the insured market and self-insureds, is approximately $8.7B."

The NYCIRB document focuses on three components critical to the policy and cost analyses of COVID-19 presumptions. The first is to which classifications of employment do the presumptions apply. The second is the "injury" that is presumed compensable. It is important to note that the Board's estimate used as its assumption of injured workers the number of New York workers who would *contract* COVID-19:

> "Governor Cuomo estimated that between 40% and 80% of New York State residents will contract the COVID-19 virus. For the purpose of this analysis, we assumed that 60% of New York State workers – the midpoint of Governor Cuomo's range – will contract the COVID-19 virus."

It appears that the Board's analysis, therefore, is the cost to the workers' compensation system of workers who contract COVID-19. No effort was made to determine what benefits would be paid to a worker who has exposure without testing positive for illness. There is no mention in the Board's analysis or by those commenting on the proposal of whether its provisions would be retroactive to the date Governor Cuomo issued his emergency order, March 7, 2020.

It is also important to note that of the 9.5 million workers forming the universe of employment in New York for purposes of the Board's analysis, 1.6 million were healthcare workers.

The Board does *not* count those workers as part of its analysis because, "…the COVID-19 virus would likely qualify as an occupational disease for health care sector workers under current law."

Finally, as is the case during this debate, the New York proposal calls for a conclusive presumption.

The NYCIRB document, as one might imagine, has received extremely broad distribution across states attempting to deal with the presumption issue either by legislation or regulation. This is definitely the case in California. On April 8, Assembly Insurance Committee Chair Tom Daly (D-Anaheim) requested of

the Workers' Compensation Insurance Rating Bureau of California (WCIRB) to, "…conduct a cost-analysis of adopting a broad presumption of compensability for front-line employees, both publicly and privately employed, who are *subject to exposure* to COVID-19."

The request goes on to state,

> "The COVID-19 pandemic poses serious challenges to the workers' compensation system. Front line workers who are providing crucial services to the public face increased risks of contracting the disease. The law governing whether or not these workers who may contract the virus have a right to workers compensation benefits is unclear. As a result, in California and elsewhere, discussions are taking place calling for a presumption to be adopted to ensure these workers obtain workers' compensation benefits.
>
> I'm asking the WCIRB to conduct a study similar to what New York recently conducted to determine the costs to California employers, both public and private, of adopting a COVID-19 presumption.
>
> For purposes of your analysis, I would like the WCIRB to assume the proposal is for a conclusive presumption that provides a) contracting the disease or b) being subject to a physician-ordered quarantine would trigger compensation for health care workers, firefighters, EMS and rescue employees, front line law enforcement officers, and essential critical infrastructure (ECI) employees."

As to the reference to "discussions are taking place calling for a presumption to be adopted," the most oft-cited document in that discussion is the March 27 letter from the California Labor Federation to Governor Gavin Newsom and legislative leadership outlining a series of actions it wants policymakers to adopt to protect workers from the physical and economic harm presented by this pandemic. The specific requests on workers' compensation include:

> "Workers on the frontlines of the COVID-19 pandemic put their lives at risk just doing their jobs. If they are infected with COVID-19, the workers' compensation system must quickly provide medical and indemnity benefits – such workers should not have to fight denials and delays while fighting for their lives. The state should mandate a presumption that contracting COVID-19 or *exposure to and physician ordered quarantine* due to COVID-19 is conclusively determined to arise out of and in the course of employment for all health care workers, firefighters, EMS and rescue personnel, front line law enforcement officers, and ECI workers for the period of this crisis."

The Labor Federation letter also calls for a conclusive presumption that post-traumatic stress disorder (PTSD) arises out of and in the course of employment for workers providing direct patient care. The letter suggests this conclusive presumption is not limited to care of patients infected by COVID-19 and that this presumption would last longer than the state of emergency ordered by Governor Newsom on March 4 and is ongoing. This also assumes that the "period of this crisis" commenced on March 4.

Comparing the New York and California proposals is important in order to gain a sense as to the cost to the workers' compensation system of a conclusive presumption that exposure to COVID-19 is an injury arising out of and in the course of employment.

Who Is Covered

Given the breadth of employments covered under the New York analysis, and the scope of the designation of "essential critical infrastructure" businesses, it is reasonable to assume the scope of employment affected by the presumption would be as large in California as it is in New York.

For more on categories of essential employment affected by Governor Newsom's March 19 "Stay-at-Home" Order see: https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf

Risk of Exposure. This would seem to make sense, since the concept is that there will be a heightened risk of exposure and infection for those who, "…come into contact with the public and have a risk of exposure," as stated in the Labor Federation letter. This comment assumes that all workers subject to the conclusive presumption come into contact with the public and have a risk of exposure. That is simply incorrect. The essential critical infrastructure advisory list maintained by the Cybersecurity and Infrastructure Security Agency (CISA) of the Department of Homeland Security, while developed to assist state, tribal, and local governments to respond to the COVID-19 crisis, serves a slightly different purpose:

> "The advisory list identifies workers who conduct a range of operations and services that are typically essential to continued critical infrastructure viability, including staffing operations centers, maintaining and repairing critical infrastructure, operating call centers, working construction, and performing operational functions, among others. It also includes workers who support crucial supply chains and enable functions for critical infrastructure. The industries they support represent, but are not limited to, medical and healthcare, telecommunications, information technology systems, defense, food and agriculture, transportation and logistics, energy, water and wastewater, law enforcement, and public works."

Thus, the ECI designation is not a commentary on risk as defined by greater exposure to the public, whether in a health care setting or in a commercial context. To have that discussion – which is likely not relevant to the discussions in Albany or Sacramento or Washington, D.C. – one needs to look at a different document prepared by a different agency – the Occupational Safety and Health Administration (OSHA). OSHA published a *Guidance on Preparing Workplaces for COVID-19*. Under any set of definitions, however, various health care workers are considered to be at very high or high risk of exposure to known or expected sources of COVID-19.

(See: https://www.osha.gov/Publications/OSHA3990.pdf)

Per OSHA, medium risks exist, "(i)n areas where there is ongoing community transmission, workers in this category may have contact with the general public (e.g., schools, high-population-density work environments, some high-volume retail settings)."

Finally, again per OSHA, "(l)ower exposure risk (caution) jobs are those that do not require contact with people known to be, or suspected of being, infected with SARS-CoV-2 nor frequent close contact with (i.e., within 6 feet of) the general public. Workers in this category have minimal occupational contact with the public and other coworkers."

For example, someone working from home in the information technology sector, part of the ECI, would be a lower exposure risk per OSHA, would probably have no greater risk than the general public, and yet

would have a conclusive presumption that if the worker contacted COVID-19 it would be a workplace injury.

And yet, there are workers in ECI jobs whose risk of contracting COVID-19 can be very high, high, medium, or lower. Under the California proposal, any worker contracting COVID-19 in an essential critical infrastructure job would be presumptively entitled to workers' compensation benefits. This would include workers with *no* exposure to the public in the workplace. How can that be? The most recent statistics from the California Department of Public Health shed some light on this scenario.

Reporting COVID-19 and Conclusive Presumptions. There is a question of what constitutes a "physician ordered quarantine" as referenced in the letter from Assemblymember Daly to the WCIRB.

A quarantine, as defined by the California Department of Public Health (CDPH), "…refers to the separation of people who have been exposed to an infectious agent and therefore may become infectious. Quarantine is medically very effective in protecting the public from disease."

COVID-19 is a communicable disease, or an "infectious agent" per the CDPH. The provisions dealing with physician obligations regarding communicable diseases are found in Health and Safety Code §§ 120100 et seq. Health and Safety Code § 120500 states:

> "All physicians, nurses, clergymen, attendants, owners, proprietors, managers, employees, and persons living with, or visiting any sick person, in any hotel, lodginghouse, house, building, office, structure, or other place where any person is ill of any infectious, contagious, or communicable disease, shall promptly report that fact to the health officer, together with the name of the person, if known, the place where he or she is confined, and the nature of the disease, if known."

It is the health officer, not a treating physician, who orders the quarantine. For example, see: http://publichealth.lacounty.gov/media/Coronavirus/HOO_Coronavirus_Blanket_Quarantine_04.01.20_Final.pdf

Thus, Los Angeles County has in place a blanket quarantine ordered by the Health Officer of that county, who is a medical doctor. See: Health and Safety Code §§ 120215, 120220.

Sacramento County, however, no longer has a blanket quarantine. Note that the County states: "These new (mitigation) measures will include ending 14-day quarantines *simply based on contact exposure* and applies to the general public, as well as health care workers and first responders." The County also states, "If a person does not have symptoms, they do not need to quarantine."

See: https://www.saccounty.net/COVID-19/Pages/MitigationStrategyFAQs.aspx

Under the criteria of the Labor Federation request, therefore, it would appear that Sacramento County workers would not be entitled to a presumption. There are other counties who have lifted the 14 day quarantine for contact exposure as well.

Per the CDPH, as of April 8 California has 299 health care workers who acquired COVID-19 in a health care setting, 462 health care workers who have been exposed via travel, close contacts, or community transmission, and 890 health care workers whose specific exposure source has not been reported.

Arguably, the 299 workers in the CDPH data who acquired COVID-19 in a health care setting would clearly fall into the presumption. The question is what about the 890 health care workers whose specific

exposure source cannot be determined? It would seem that they, too, would be entitled to the conclusive presumption. In such cases, this is the very issue proponents of the presumption would seek to avoid – a prolonged debate over compensability while the worker is not getting the care and other benefits s/he needs.

Then there is the question of the 462 health care workers who have an identified non-employment exposure. On the one hand, it could be argued that it would be misrepresentation to file a claim form when the worker knew the exposure did not arise out of or in the course of employment. On the other, if the proposal says there is a conclusive presumption that the exposure arose out of and in the course of employment solely because of the status of the worker and a physician-ordered quarantine, then does it matter if the worker knows where the exposure likely arose?

Note the article published by the Centers for Disease Control and Prevention (CDC), *Characteristics of Health Care Personnel with COVID-19 — United States, February 12–April 9, 2020*. MMWR Morbidity and Mortality Weekly Rep. ePub: 14 April 2020. See: http://dx.doi.org/10.15585/mmwr.mm6915e6 :

> "Among 1,423 HCP patients who reported contact with a laboratory-confirmed COVID-19 patient in either health care, household, or community settings, 780 (55%) reported having such contact only in a health care setting within the 14 days before their illness onset; 384 (27%) reported contact only in a household setting; 187 (13%) reported contact only in a community setting; 72 (5%) reported contact in more than one of these settings."

This analysis will apply to all employments covered by the presumption. In other words, lower risk of exposure employees will be entitled to the presumption *if* they live in a county where there is a quarantine order. Higher risk of exposure employees who do not live in a county where there is a quarantine order will not be entitled to the presumption. That would seem to be an inappropriate outcome.

More important, the reporting requirements in the Health and Safety Code are intended to give county health officers the tools necessary to fight the spread of communicable diseases within their jurisdictions. This, as is the case with workers' compensation, is an exercise of the police power of the state. The idea of a conclusive presumption of compensability covering such a wide range of employment must be weighed again the potential that such a presumption will cause non-occupational exposures to go unreported, thus frustrating the goals of containing and eradicating communicable diseases.

Retroactive application. The Labor Federation letter suggests that the presumption they are urging would be retroactive to March 4, the declaration of the state of emergency by Governor Newsom. That may not be the appropriate date, which arguably should be the date a county ordered self-quarantine. This date would vary by county.

Regardless of the date, if the conclusive presumption is retroactive then the costs associated with this proposal to the workers' compensation system would increase considerably, as noted *post*. This would also potentially mean that workers who were furloughed or laid off could claim benefits even if they are not working at the present time. All that would be required is a showing that while employed the person was subject to a quarantine order. This at a time when Insurance Commissioner Ricardo Lara is ordering workers' compensation insurers to refund premium because of the drop in payrolls in many businesses

caused by the pandemic. That premium was calculated before the potential losses from a conclusive presumption of occupational exposure to or contraction of COVID-19 would be enacted.

Multiple applications. The Labor Federation request, and the request from Assemblymember Daly, apply to contracting COVID-19 *or* exposure to and physician ordered quarantine due to COVID-19. In the latter case, workers' compensation benefits would be provided to a worker who has exposure to COVID-19, is under a quarantine, but does not necessarily contract the disease. If the worker, particularly in a very high or high risk category of employment as designated by OSHA, goes back to work, and has *another* exposure, then there would be a new injury and a new claim for benefits. This can go on without limitation, at least during the time the state of emergency is in place.

Conflicts With Existing Benefit Plans. According to CalHR, for employees of the State of California:

> "If an employee is subject to quarantine or self-monitoring from a local public health department, they will be provided Administrative Time Off (ATO) and telework will be considered, consistent with department policy. All requests for ATO must follow the department request and approval process. However, an employee who chooses to travel after knowing the risks and becomes subject to quarantine will not be provided ATO and the employee should contact their department's human resources office regarding leave options."

This would appear to meet the objectives of advocates of a presumption without requiring a quarantine to be considered an "injury" for workers' compensation purposes. It would be of interest to see what additional groups of public or private employees have similar provisions. Such benefits should limit the scope of a workers' compensation conclusive presumption.

For another example, see: https://sfdhr.org/sites/default/files/documents/COVID-19/COVID-19-Compensation-Plan.pdf. The City and County of San Francisco has developed a policy to provide sick leave benefits coordinated with the federal Families First Coronavirus Response Act (FFCRA) as described in https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave .

To be clear, this is not advocating that there should be some consideration of whether workers' compensation or other benefits should be the primary or secondary source or funds for a worker exposed to or who has contracted COVID-19. Contracting COVID-19 in the course of employment should be compensable. There is no debate over that. The effect of a conclusive presumption, however, is to make workers' compensation primary in all cases falling within the presumption. As will be noted, this creates constitutional issues.

If the workers' compensation system is going to be extended to provide medical and wage loss benefits when there is an exposure to or contraction of COVID-19 from a source not in the workplace – a premise fraught with constitutional issues – then it should be to advance a policy that has not already been addressed, appropriately, in employee benefit programs at the local, state, and federal levels.

Analysis

What is a conclusive presumption? To place all of this in context, as cited in Batya F. Smernoff, *California's Conclusive Presumption of Paternity and the Expansion of Unwed Fathers' Rights*, 26 Golden Gate U. L. Rev. (1996), p. 337, footnote 2:

> "A conclusive presumption bars all factual evidence to disprove the existence of the presumed fact. A conclusive presumption '[e]xists when an ultimate fact is presumed to be true upon proof of another fact, and no evidence, no matter how persuasive, can rebut it.' Black's Law Dictionary 434 (6th ed. 1991)."
>
> See: http://digitalcommons.law.ggu.edu/ggulrev/vol26/iss2/4

Or, "A conclusive presumption is in actuality a substantive rule of law and cannot be said to be unconstitutional unless it transcends such a power of the Legislature." In re Marriage of B. (1981), 177 Cal.Rptr. 429.

There are conclusive presumptions within the workers' compensation system. For example, Labor Code § 3501 states:

> "(a) A child under the age of 18 years, or a child of any age found by any trier of fact, whether contractual, administrative, regulatory, or judicial, to be physically or mentally incapacitated from earning, shall be conclusively presumed to be wholly dependent for support upon a deceased employee-parent with whom that child is living at the time of injury resulting in death of the parent or for whose maintenance the parent was legally liable at the time of injury resulting in death of the parent.
>
> (b) A spouse to whom a deceased employee is married at the time of death shall be conclusively presumed to be wholly dependent for support upon the deceased employee if the surviving spouse earned thirty thousand dollars ($30,000) or less in the twelve months immediately preceding the death."

Labor Code § 4664(b) also contains a conclusive presumption, albeit one that demonstrates the importance of careful drafting as well. This subdivision states, " If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof."

Well, this did not make much sense, since a presumption affecting the burden of proof is generally considered one of two rebuttable presumptions under the Evidence Code. In any event, this was sorted out to the satisfaction of the workers' compensation community in Kopping v. Workers' Comp. Appeals Bd. (2006), 48 Cal.Rptr.3d 618.

Given the plenary power of the Legislature to create a workers' compensation system under Article XIV, § 4 of the California constitution, the argument will be made that if the Legislature creates a conclusive presumption without condition, it will compel compensation on proof of the fact that the applicant was in an employment to which the presumption applied regardless of the existence of proof that demonstrates otherwise. The cause of the condition is irrelevant.

But the "plenary authority" is not absolute. In Commercial Cas. Ins. Co. v. Indus. Acc. Com. (1930), 295 P. 11 (Cal. 1930) the California Supreme Court stated:

> "In this connection respondent calls to our attention the particular language of the Constitution which is in part as follows: 'The legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create and enforce a complete system of workmen's compensation by appropriate legislation.' Had the

> language of the section of the Constitution stopped with the above quotation therefrom, we would be inclined to agree with the contention of the respondent. But the above quoted words of the section are immediately followed by the additional words, 'and in that behalf to create and enforce a liability on the part of any or all persons *to compensate any or all of their workmen for injury or disability, and their dependents for death incurred or sustained by said workmen in the course of their employment*, irrespective of the fault of any party'. The above provision of this section of the Constitution, both that quoted and relied upon by the respondent and the latter part thereof which we have quoted, must be read together, as the two parts form but one complete sentence. *As so read, we think that the intent of the framers thereof is clear and unambiguous, and that they intended by this amendment of the Constitution to limit the power of the legislature in enacting a Workmen's Compensation Act to provide for the compensation by the employers of their own employees, and that any legislation which exceeds these limits is beyond the power of the legislature, and, therefore, void.*" (emphasis added)

See also, Six Flags, Inc. v. Workers' Comp. Appeals Bd. (2006), 51 Cal.Rptr.3d 377.

In other words, it is inescapable from the empirical studies already done by the CDPH and CDC that health care workers in particular are identifying non-occupational causes for exposure to or contraction of COVID-19. The effect of a *conclusive* presumption that the exposure or infection is occupational solely based on the employment of the worker is to extend the workers' compensation system to non-occupational benefits, an extension that challenges the constitutionality of such a proposal.

Need for a Conclusive Presumption. In San Francisco v. Industrial Accident Commission (1920), 183 Cal. 273, the California Supreme Court held that a hospital worker's death caused by the Spanish Influenza was compensable. According to the Court, the worker, a steward named Ernest F. Slattery, was fund by the Commission to have contracted the influenza in the course of employment because,

> "…his exposure because of his work was far greater than that of the average person, and that among the nurses in the hospitals of the city, a class exposed in much the same degree as Slattery, the proportion who contracted the disease ran from fifty to eighty-five per cent, as against ten per cent for the community in general. The preponderance of the medical testimony also was to the effect that Slattery contracted the disease as a result of his peculiar exposure to it incidental to his employment."

This opinion is important because it serves as a reminder that the New York Board's cost estimate did *not* take into account the cost of the presumption to those employments it considered already covered by the workers' compensation system. This should also be the case in California, but as we know in other circumstances, not all employers consider it necessary to pay benefits under the workers' compensation system unless ordered to by a workers' compensation judge. The idea that there will be denials of COVID-19 claims by frontline health care workers by blithely stating "we think there was community exposure" is an affront to the system and, ultimately, provokes the Legislature into enactments that should be unnecessary. And yet, published reports throughout the State show this is now happening even in the healthcare environment.

Case law demonstrates that for very high and high risk classifications of employment, the workers' compensation system should be providing benefits. To the extent there are denials of compensability, they should be tied to a documented acknowledgement of an exposure other than at work. CDPH and

CDC data suggests that, given the public health imperative of identifying the source of exposure, this should be the quantum of proof necessary to rebut a *rebuttable* presumption for these workers.

Exposure as Injury. Labor Code § 3208.1 states,

> "An injury may be either: (a) "specific," occurring as the result of one incident or exposure which causes disability or need for medical treatment; or (b) "cumulative," occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment. The date of a cumulative injury shall be the date determined under Section 5412."

Per the Labor Federation request, it is difficult to understand how the *exposure* to COVID-19 is an "injury" as defined in Labor Code § 3208.1. The injury, it would seem, occurs once the worker contracts COVID-19. While the date of injury may relate back to the date of a physician-ordered quarantine, absent the worker contracting COVID-19 this would seem to be another potentially constitutionally infirm extension of workers' compensation benefits beyond what was contemplated by the authors of the Insurance and Safety Act of 1917 and by the people of the State of California when they approved Proposition 23 in 1928.

In other words, if there is a conclusive presumption that a specified class of workers have a compensable exposure to COVID-19, does that not mean the employer is responsible for all aspects of those workers' lives regardless of what conditions are maintained for a safe workplace?

Labor Code Provisions Implicated by Retroactivity. If the decision to enact an unconditional conclusive presumption of the scope suggested by the Labor Federation is made retroactive either to January 1, or March 4 or March 19 or some other date depending on the county of the injured worker, there is more to consider than a large number of new claims in the workers'' compensation system.

In a March 26 presentation to the Board of Covered California, a policy/actuarial brief entitled *The Potential National Health Cost Impacts to Consumers, Employers and Insurers Due to the Coronavirus (COVID-19)* estimated, "…one-year projected costs in the national commercial market range from $34 billion to $251 billion." Note that this is a national, not California, estimation, and is for an entire year.

What a retroactive presumption of compensability does in the California workers' compensation system is to provide that from the effective date of the presumption until, arguably, the effective date of the law, health insurers will have a lien against employers for health care payments made prior to the presumption becoming law. [See: Labor Code § 4903.5(b)]

It would also be fair to assume that unemployment compensation disability benefits could also be recovered by the Employment Development Department (EDD) per Labor Code § 4903(g). How this will interact with federal programs augmenting unemployment benefits is unknown.

Per Labor Code § 5412, "The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment."

Conclusion

The various problems associated with a COVID-19 presumption for health care workers and ECI employees are primarily, but not exclusively, associated with the creation of a *conclusive* presumption. To the extent the proposal redefines injury to include exposure, the effect is to expand the scope of the workers' compensation system beyond that intended by the people who ratified it. A similar conclusion may be reached by declaring a COVID-19 infection is work-related even when there is proof it is not.

The proposal, whether in New York or California, fails to take into consideration the equally important public health requirements for accurate reporting of exposures in order to trace the progress of a communicable disease. It also fails to take into account, at least in California, the considerable variances in the orders of county health officers regarding quarantine and isolation.

The issue of retroactivity also raises the specter of whether the proposal has as one purpose a cost-shift from healthcare plans to workers' compensation. Any cost analysis must take into account not only the liens created for healthcare plans by a retroactive conclusive presumption, but also the cost savings going forward for healthcare plans by not have to cover COVID-19 for potentially large numbers of the workforce.

There are ways to address the problems proponents of a conclusive presumption seek to address without the many unintended and potentially unconstitutional consequences of what has been requested to date. While time is of the essence, in the remaining weeks before the Legislature returns a there is still an opportunity

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