

WORKERS' COMPENSATION COMPLIANCE

Summary of legislative and regulatory changes

September 2021

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California

On Sept. 10, 2021, the California legislature adjourned from the 2021 session. The deadline for Gov. Newsom to sign or veto bills expired on Oct. 10, 2021. Below is a workers' compensation bill enacted during this session.

Assembly Bill 845

[Assembly Bill 845](#) was approved by Gov. Newsom on July 23, 2021. This bill creates a presumption applicable to the members of the retirement systems that the California Public Employees' Pension Reform Act of 2013 (PEPRA) regulates that disability retirements due to, in whole or in part, to a COVID-19-related illness arose out of, or in the course of, the member's employment.

The bill authorizes the presumption to be rebutted by evidence to the contrary. However, unless controverted, the applicable governing board of a public retirement system is required to find in accordance with the presumption.

The bill, modeled after Senate Bill 1159, applies this presumption to members employed in specified firefighter, public safety officer and healthcare job classifications, or their functional equivalents, and to members in other job classifications who test positive for COVID-19 during an outbreak of the disease at their place of employment.

This legislation became effective upon signing until Jan. 1, 2023.

Delaware

Senate Bill 123

On Sept. 30, 2021 Gov. John Carney signed [Senate Bill 123](#), which eliminates from existing law the provision that terminated the benefits paid to some surviving spouses of persons killed in the course and scope of employment who remarry.

This bill modifies the existing benefit payment to allow all surviving spouses of persons killed in the course and scope of employment to receive the same level of death benefits as the surviving spouses of those persons defined as "covered persons" in Section 6601(2), Title 18 of the Delaware Code, in the event that the surviving spouse remarries. Now instead of a two-year, lump sum payout, the survivor benefit payment is revised to 90% of the original, weekly benefit amount for the first 10 years and 75% of the original, weekly benefit each year thereafter for the remainder of their lives.

This legislation became effective upon signing.

Kentucky

Emergency regulation on COVID-19 expedited hearings

On Sept. 27, 2021, the Kentucky Department of Workers' Claims posted a notice of the adoption of [emergency regulation 803 KAR 25:305](#). This emergency administrative regulation establishes procedures to resolve claims for temporary total disability (TTD) benefits by designated members of a class provided for in Executive Order 277, which House Joint Resolution (HJR) 1 extended with modification.

A member of the designated class of employees solely seeking TTD benefits as provided in Executive Order 277 due to alleged occupational exposure to COVID-19 must now file an application seeking TTD benefits and an expedited hearing. Upon receipt:

- The department is required within three business days of receipt of the request to notify the employer and insurance carrier and assign the claim to an administrative law judge.
- The matter must be set for hearing within 10 calendar days following the date of assignment to the administrative law judge.
- Parties must file all proof no later than three calendar days prior to the hearing date.
- The administrative law judge must render a decision no later than two business days after the hearing date.

The expedited hearing is limited to whether an employee was removed from work by a physician due to occupational exposure to COVID-19. If the employee is found to have an occupational exposure to COVID-19, the waiting period is suspended and TTD payments must be payable from the first day the employee is removed from work.

Following are the designated class members allowed to file for this expedited hearing:

- Employees of a healthcare entity.
- Law enforcement personnel.
- Emergency medical services personnel.
- Fire department personnel.
- Corrections officers.
- Military personnel.
- Activated National Guard personnel.
- Domestic violence shelter workers.

- Child advocacy workers.
- Rape crisis center staff.
- Department of Community Based Services workers.
- Grocery workers.
- Postal service workers.
- Childcare workers permitted by the Cabinet for Health and Family Services to provide childcare in a limited duration center during the state of emergency.

A public hearing on this emergency regulation is scheduled for Nov. 23, 2021 at 10 a.m. (EDT) by video teleconference to receive comment regarding the regulation. The hearing may be cancelled if notification of intent to attend the hearing is not received five days prior to the hearing. Written comments may be submitted to the agency until 11:59 p.m. on Nov. 30, 2021. Notice of intent to attend the hearing or written comments are to be sent to:

Dale Hamblin, Jr.
Assistant General Counsel
Department of Workers' Claims
Mayo-Underwood Building, 3rd Floor
500 Mero Street, Frankfort KY, 40601
Fax Number: 502-564-0682
Dale.Hamblin@ky.gov

Unless cancelled, access to the meeting will be available through the following Zoom link:

Join from PC, Mac, Linux, iOS or Android:

<https://us06web.zoom.us/j/82163054538?pwd=ZEIOVUZwcmptZm9VUElEejVlVWk9Fdz09>

Password: 891557

Or telephone dial (for higher quality, dial a number based on your current location): US: 301.715.8592, 312.626.6799, 646.558.8656, 253.215.8782, 346.248.7799 or 720.707.2699.

Meeting ID: 821 6305 4538

Find local AT&T Numbers:

<https://www.teleconference.att.com/servlet/glbAccess?process=1&accessNumber=3017158592&accessCode=>

New Jersey

Assembly Bill 2617/Senate Bill 2998

On Sept. 24, 2021, Governor Phil Murphy signed job preference legislation for employees who have reached maximum medical improvement (MMI) following a work-related injury if they're unable to return to the position at which the employee was previously employed. [Assembly Bill 2617/Senate Bill 2998](#) only requires the employer to provide the hiring preference if the employee can perform the essential duties of an existing, unfilled position.

The bill specifies that employers are not:

- Required to create a new position to accommodate an employee who cannot return to an employee's former position following a work-related injury despite reaching MMI.
- Required to remove another employee from an existing and filled position that would be suitable for the injured employee.

Additionally, it is indicated that this bill must not be construed to impair or affect any right of an individual with a disability to a reasonable accommodation under the Law Against Discrimination.

Employers bound by this legislation are those that employ at least 50 persons, except public works contractors as defined by NJS 34:11-56.50. This law also does not apply to athletes employed by a professional sports team.

This legislation does not provide any guidance regarding the hiring preference or a timeframe for how long this preference remains in effect.

Some anticipate that this bill will conflict with other employment laws and result in increased litigation. Sedgwick is monitoring and will keep you updated.

New York

Multiple amendments to medical treatment guidelines

The New York Workers' Compensation Board (WCB) on Sept. 10, 2021 announced the adoption of multiple amendments to Subdivision (a) of 12 NYCRR 324.2 regarding medical treatment guidelines (MTGs). These amendments are currently scheduled to become effective Nov. 1, 2021.

- [Bulletin Subject Number 046-1442](#) announces the adoption of two new MTGs:
 - Post-traumatic stress disorder and acute stress disorder.
 - Work-related depression and depressive disorders, formerly referred to as major depressive disorders.
- [Bulletin Subject Number 046-1441](#) announces amendments to the following New York MTGs:
 - Mid and low back injury.
 - Neck injury.
 - Knee injury.
 - Shoulder injury.
- [Bulletin Subject Number 046-1443](#) announces amendments to the non-acute pain MTGs.

Subject Number 046-1418, CMS-1500 initiative update

On Sept. 29, 2021, the board issued [Bulletin Subject Number 046-1452](#) to remind payers of a number of requirements related to the initiative to transition to the universal billing form, CMS-1500.

Effective **Oct. 1, 2021** payers are required to partner with at least one board-approved XML submission partner to transmit and accept healthcare provider medical bills electronically. Electronic submission is optional for providers.

Payers must designate the XML submission partner by **Oct. 30, 2021**. A [listing of approved XML submission partners for the CMS-1500 initiative](#) is posted on the XML forms submission section of the board's website and is updated after each entity successfully completes testing and executes an XML submission partner agreement with the board. Payers must keep XML submission partner information accurate and update the online system within three business days of any changes. Sedgwick has designated Data Dimensions (WCEDI) as our XML submission partner.

Electronic medical bills must be accepted and acknowledged within seven business days of transmission. Payers must also electronically submit an EOB/EOR to their XML submission partner upon adjudication of electronic CMS-1500 medical bills. The XML submission partner will forward the EOB/EOR to the healthcare provider.

Effective **Nov. 1, 2021**, payers are required to continue to file all legal and valuation objections with the board using the current board forms, along with a copy of the EOB/EOR to object to payment of a bill.

Section 32 waiver agreements/general release of liability

On Oct. 8, 2021, the New York WCB issued a [bulletin](#) regarding the practice of insisting that claimants execute a separate release of liability, the terms of which are not included in the agreement submitted to the board. This is at odds with the requirement that all the terms and conditions agreed to by the carrier/self-insured employer and the claimant be included in the section 32 waiver agreement submitted to the board.

To address, beginning Dec. 6, 2021, all section 32 waiver agreements submitted to the board for approval must be accompanied by an affirmation or affidavit executed by the person who signs the agreement on behalf of the carrier/self-insured employer, or its designated third-party administrator, affirming under penalty of perjury that:

- The agreement submitted to the board for approval contains all the terms and conditions agreed to by and between the claimant and the carrier/self-insured employer; and
- No separate agreements or contracts have been entered into by the parties that are not reflected in the agreement submitted to the board for approval.

The board acknowledges that a provision in a section 32 waiver agreement whereby the claimant provides a general release to all claims against the carrier/self-insured employer in any forum or jurisdiction is not *per se* invalid. However, because of the disparity in bargaining power and financial resources between individual claimants and insurance carriers/self-insured employers, such terms will be given significant scrutiny by the board.

It's important to work with defense counsel to ensure that a proposed section 32 waiver agreement to be submitted to the board includes the required affidavit and is not:

- Unfair, unconscionable, improper as a matter of law; or
- The result of an intentional misrepresentation of material fact.

West Virginia

Bulletin No. 21-06

On Sept. 7, 2021, the West Virginia Office of the Insurance Commissioner (OIC) issued [Bulletin No. 21.06](#) announcing that effective Jan. 1, 2022, the Permanent Total Disability Review Board (PTDRB) will no longer accept applications from self-insured employers or private carriers to evaluate claimants for permanent total disability benefits.

The PTDRB receives and reviews referral applications related to the determination of permanent total disability benefits from self-insured employers and private carriers for a monetary fee, as well as from the state administered workers' compensation funds. However, due to the dwindling number of applications to the PTDRB, the insurance commissioner has made the decision to discontinue the practice of accepting applications from outside parties.

Effective Jan. 1, 2022, self-insured employers must employ or engage resources including medical professionals to undertake evaluations of applications for permanent total disability benefits. The existing standards must be applied for determining impairment and for determining whether a claimant is eligible for an award of permanent total disability benefits.

Insurance bulletins are issued when the commissioner:

- Renders formal opinions, guidance or expectations on matters or issues;
- Explains how new statutes or rules will be implemented or applied; or
- Advises of the interpretation or application of existing statutes or rules.

The Information contained within this document is intended to provide summary level information on proposed or enacted laws related to workers' compensation. It is not intended to provide guidance on the application of these legal requirements or as an update to your Company's workers' compensation policies. We recommend you consult with Legal Counsel to determine what changes, if any, should be applied to Company Policy.

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