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What's New In Our Industry Florida

I. Legislative

A. Introduction

The following bills having workers' compensation implications have been pre-filed for consideration by the 2021 Legislative Session. Their status will be from time to time reported. Although some of the bills may not have direct workers' compensation implications, it is felt that the workers' compensation industry will in some way be affected especially in regards to medical treatments that are being provided. These indirect effects on workers' compensation will be labeled medical with subtitles on the types of medical treatments provided and miscellaneous bills indirectly affecting workers' compensation. By way of background, approximately 70% of total benefits paid in the workers' compensation system relate to medical care. One can only imagine what effect some of the bills filed will have on the enormity of medical expenses on the total medical payout. The Legislative Session is set to begin on March 2, 2021, with committee meetings scheduled up to that time.

B. Overview of Reviewing Bills Filed Having Direct and Indirect Application To Workers' Compensation

1. Direct Application to Workers' Compensation
2. Indirect Application to Workers' Compensation – Medical
3. Indirect Application to Workers' Compensation – Miscellaneous

C. Direct Application to Workers' Compensation

Senate Bill 820, Companion Bill HB 1183 related to the Employee Leasing (PEO) industry ensuring that leased employees are properly insured by the carrier for the leasing company if the client company fails to secure and maintain separate workers' compensation coverage on such individuals. A person is considered an employee of the PEO upon the earliest of the following:

- a. The hiring of the leased employee by the client company;
- b. The commencement of work for the client company by such person;

- c. The hiring of such person directly by the employee leasing company. The failure of the client company to report a leased employee to a PEO is not a basis for the denial of workers' compensation benefits.

The bill also clarifies procedures for collecting appropriate premiums from client companies and reporting losses.

Senate Bill 846, Companion Bill HB 561 relates to the recovery of past medical expenses in personal injury and wrongful death actions. The bill adds workers' compensation to the definition of "health care coverage." In attempting to recover past medical expenses where "health care coverage" has been paid (workers' compensation), the actual paid amount can be claimed. Where past medical expenses are unpaid, the amount recoverable is limited to evidence of the amount necessary to satisfy the charge for the medical procedures provided. The bill establishes procedures for determining how to establish the amount necessary to satisfy such charges. In determining the amount necessary to satisfy such a charge, reference is made to the provisions of the Workers' Compensation Statute.

Senate Bill 742, Companion Bill HB 815. In the determination and filing of rates payable for workers' compensation and employer liability insurance coverages, past loss experience and prospective loss experience within and without the state are factors to be considered. If such data is missing due to the insolvency of an insurer, prior reported data and all other relevant information may be used to assess the impact on rates.

Senate Bill 72, Companion Bill HB 7. These bills provide for employer immunity from civil causes of action for Covid related claims. Civil immunity is granted to companies that have made a good faith effort to substantially comply with authoritative or government-issued health standards for protection against Covid. If a good faith effort was made, the defendant company is immune from civil liability. If there was no good faith effort, there can be a basis for such a claim if at least gross negligence is proven by clear and convincing evidence. A civil cause of action for a Covid related claim must be filed or commenced within one year after the cause of action accrues. **On February 16, 2021, HB 7 was heard by the House Judiciary Committee and was reported favorable with 14 yeas and 7 nays. HB 7 will now go to the House floor for consideration. As of the date of this newsletter, there has been a second reading of the bill on the House floor. This bill provides for retroactive applicability.**

Senate Bill 1224, Companion Bill HB 1171. Amends the definition of "First Responders" for entitlement to workers' compensation benefits to include 911 public safety telecommunicators as defined in §401.465, F.S. The term also includes volunteers for such positions engaged by the state or a local government. Provides additional retirement benefits to such persons.

Senate Bill 74. Much like restricted immunity for causes of action against employers for Covid claims, civil immunity is granted to healthcare providers for allegations that the provider failed to follow health standards of care for patients diagnosed with Covid. Claims filed under Chapter 440 are exempted.

House Bill 963(withdrawn prior to introduction). Similar Bill HB 949, Companion Bill SB1422 referred to Government and Accountability, Judicial, Appropriations. Amends §112.181 to add an “infectious disease” to the list of medical conditions that are presumptively related to an individual’s employment as being in line of duty. Such presumption arises if the worker certifies that he or she was not exposed to a person outside of the scope of his or her employment to any person known to have the infectious disease. An “infectious disease” is defined as any condition or impairment of health caused by a disease that has been declared a public health emergency in accordance with §381.00315 HB 949.

House Bill 1209 requires the Insurance Risk Management Trust Fund for the State of Florida to fund cancer entitlement for firefighters as an alternative to pursuing workers’ compensation benefits under Chapter 440, Florida Statutes. This is a separate account for the payment of workers’ compensation benefits.

Senate Bill 1458 relates to employee leasing companies where the client company is a subcontractor. If there is a contract between a subcontractor as the client company in an employee leasing company arrangement, and workers’ compensation insurance is provided by an employee leasing company to the leased employee’s company, such an individual is deemed to be an employee of the leasing company for workers’ compensation insurance unless the subcontractor has secured additional workers’ compensation coverage applicable to the employee. If additional coverage is obtained by the subcontractor for employees not subject to the employee leasing arrangement, compensation coverage is applicable upon the earliest of the hiring of the person not covered by the leasing arrangement, the commencements of work by such a person or the hiring of the person directly by the employee leasing company.

For purposes of licensing under §468.525, F.S., if the client company is a subcontractor, compliance with the licensing requirements of this section is not met unless the subcontractor has secured additional workers’ compensation insurance for non-leased employees or unless the contractual arrangement provides that a person is deemed an employee by the employee leasing company.

The new language in the bill does not in any way modify the client company’s obligation as a subcontractor to maintain separate workers’ compensation insurance coverages for all employees unless the employee leasing company and its carrier agree to provide such coverage directly to the client company. If there is a situation where there is an employee leasing arrangement with a subcontractor, if the subcontractor does not obtain workers’ compensation coverage for non-leased employees, a person is deemed an employee of the employee leasing company for purposes of workers’ compensation insurance: a) At the earliest date of any hiring of such person by the client company; b) The commencement of work for such persons for the client company, and c) The hiring of persons directly by the employee leasing company.

House Bill 1293 creates the “Litigation Financing Consumer Protection Act.” Specifically excludes workers’ compensation from the definition of “Litigation Financing.”

D. Indirect Application to Workers' Compensation – Medical

1. Telehealth

Senate Bill 660 allows telehealth providers to use telehealth to prescribe controlled substances. See subsequent discussion on data collected by the Division showing amounts paid for telemedicine.

Senate Bill 864 allows for the provision of telehealth services through audio only telephone calls. Deletes from statutory provisions that the ultimate authority over the diagnosis and care of a patient is a health care professional licensed in this state.

2. Physician Assistants

House Bill 431, Companion Senate Bill 894 authorizes physician assistants to practice medicine in collaboration with physicians and other health care practitioners. This bill will allow for physician assistants to determine the date of MMI as defined in Section 440.02, Florida Statutes. Physician assistants will be able to prescribe physical, occupational and special therapy orders and durable medical equipment. The bill establishes new training and certification requirements for physician assistant's licensure. An autonomous practice by a physician assistant in certain medical specialties including primary care practices will be permitted. Autonomous physician assistants may directly bill and recover payments from insurance companies and may be permitted to prescribe and dispense medications.

3. Massage Therapy

Senate Bill 352, Companion House Bill 245. This bill would provide that the unregulated practice of massage therapy poses a danger to the public. Massage therapy is a therapeutic health care practice and includes over-the-counter topical agents or a topical agent prescribed by a health care practitioner and includes massage therapy assessments for compensation. Massage therapy assessments also include the determination of the cause of the need for massage therapy treatments.

4. Pharmacy

Senate Bill 390 allows for market conduct examinations of pharmacy benefit managers. Current law allows for market conduct examinations by carriers as defined in Section 440.02, Florida Statutes. The examination shall be for the purpose of determining compliance with the provisions of Chapter 440. Restrictions are placed on how the audit is to be performed. A new provision provides appellate review rights to a pharmacy if there is a disagreement with the results of the audit.

5. Psychologists

House Bill 687. Allows for a "prescribing psychologist" to prescribe drugs customarily used in the diagnosis and treatment of individual psychiatric disorders. Establishes criteria for certifying psychologist to prescribe such medications.

6. Chiropractic Medicine

Senate Bill 1460. A bill related to chiropractic physicians who have completed a board approved 36 hour training course may prescribe medical oxygen and "articles of natural origin" and

“legend drugs.” Continuing education may be completed in an online format. Pharmacists may dispense articles of natural origin pursuant to an order from a chiropractic physician.

E. Indirect Application to Workers’ Compensation – Miscellaneous

House Bill 343, Companion Senate Bill 710 Recreational marijuana is permitted for persons 21 years of age or older. Such marijuana may be delivered by one person over 21 years of age without consideration to another person 21 years or older. For definition purposes, marijuana is described as marijuana products that contain a total of 2000 mg. or less of tetrahydrocannabinol and a quantity of 2.5 ounces or less of marijuana for smoking. A person 21 years of age or older may possess marijuana that contains a total of 2000 mg. or less of tetrahydrocannabinol or 4.0 ounces or less in a form for smoking. This bill would have retroactive effect where an individual was convicted of possession of cannabis before January 1, 2022. Procedures are created for expungement of prior record/conviction of cannabis with exceptions. If orders of expungement have been entered, the individual may lawfully deny or fail to acknowledge arrests and convictions covered by the expunged orders. Exceptions are provided for. The individual that obtained an expungement order cannot be deemed to have given a false statement for reasons of his/her failure to acknowledge an expunged criminal history record.

In regards to medical marijuana treatment centers that allows for physicians to prescribe medical marijuana for less than three 70-day supply limits or less than six 35-day supply limits of marijuana in a form for smoking. Exceptions are provided for. This bill adopts new standards for qualifying as a Medical Marijuana Treatment Center including the transportation, storage, delivery of marijuana, growing marijuana and dispensing and processing of medical marijuana products.

House Bill 335. Employers cannot take adverse personnel actions against an employee who is a qualified patient using medical marijuana. However, if the employer establishes by a preponderance of the evidence that the lawful use of medical marijuana is impairing the employee’s ability to perform his or her job responsibilities, such adverse personnel actions can be taken. Impaired ability to perform job responsibilities occur if the employee displays specific “articulable symptoms” while working which decreases or lessens the performance of his or her job tasks. This bill establishes procedures for adverse employment actions. Unlawful adverse employment actions may properly be the subject of civil causes of action that must be filed within 180 days after an alleged violation. Damages would include compensation for lost wages, benefits and remuneration plus attorney’s fees and costs. This law would not prohibit an employer from taking adverse personnel actions against an employee for the possession or use of a controlled substance during normal business hours or require the employer to commit any act that would cause the employer to violate a federal law or that would cause an employer to lose a federal contract or federal funding; require a government medical assistance program or private health insurer to reimburse a person for costs associated with the use of medical marijuana or require an employer to modify the job or working conditions of a person who engages in the use of medical marijuana based on the reasonable business purposes of the employer. The employer must attempt to make reasonable accommodations for medical needs of an employee who engages in the use of medical marijuana unless the employer can demonstrate that the accommodation would pose a threat or harm or danger to person or property or create undue

hardship on the employer or prohibit the employee from fulfilling his/her job responsibilities. A law enforcement agency could adopt policies and procedures that preclude an employee from engaging in the use of medical marijuana.

House Bill 971 amends §501.173 related to Cybersecurity. Any investigations by the Department of Legal Affairs or law enforcement agencies of data privacy violations is considered confidential and is exempt from public records requirements for production. Provides for exceptions to the confidentiality of investigations including the use of such information in notifying the public who the department feels is a victim of a data breach or where there is improper use or disposal of customer records. Provides for continued confidentiality once an investigation ceases to be active. This confidentiality provision is subject to the Open Government Sunset Review Act in accordance with §119.15, F.S., and stands repealed on October 2, 2027 unless reviewed and saved from repeal through enactment by the Legislature.

House Bill 969 relates to Consumer Data Privacy. This bill is a comprehensive amendment for protecting data by industry. Similar to the California statute, many argue that there are many unintended consequences and extra-ordinary expenses associated with this legislation, especially for small companies. There is some question as to whether this comprehensive regulatory oversight will be approved. There is a Virginia model for increased oversight tightening Cybersecurity requirements which some feel more appropriate.

II. Judiciary

A significant new case, possibly to be heard by the Florida Supreme Court, is *Davis v. Sheridan Healthcare, Inc., et al*, 281 So. 3d 1259 (Fla. 2nd DCA 2019). It has particular application to the continuing controversies surrounding the payment of medical/pharmaceutical bills. The question in this case was whether the provider could collect any unpaid bills from the injured worker directly.

The plaintiff in this case was a workers' compensation recipient. Bills from providers for medical care and pharmaceuticals were not paid under the Workers' Compensation Act and multiple providers sought recovery directly from the injured worker, utilizing the services of a collection agency. Under the Workers' Compensation Act, as a matter of law, the injured worker is not responsible for paying medical costs related to a workplace injury except in limited situations not applicable in this case. Under the Florida Consumer Collections Practices Act (FCCPA), a civil cause of action is created against a person who attempts to assert a claim or enforce a debt when such person knows that the debt is not legitimate or asserts the existence of some legal right when such person knows that the right does not exist. In addition, a cause of action is created where false information is provided to a collection agency about the legitimacy of a claim. In this case, the Plaintiff injured worker alleged that the Defendant medical providers knew that the plaintiff was not responsible for paying the bills sought to be paid in view of the prohibitions of the Workers' Compensation Act and failed to provide the collections agency of this fact. Accordingly, there was a violation of the FCCPA.

Pursuant to the Florida Workers' Compensation Act, exclusive jurisdiction to decide any matters related to reimbursement of medical care is vested in the Department of Financial Services. The lower court determined that because of this exclusive jurisdiction granted to the Department, the circuit court did not have jurisdiction to determine if there was a violation of the FCCPA. On appeal, the lower court's ruling of no jurisdiction was reversed.

The appellate court determined that this litigation was not a situation where the parties were disputing the amount owed on a medical bill or who owes it. In that scenario jurisdiction "may very well be within the exclusive jurisdiction of the Department of Financial Services. In contrast, this dispute centers on whether . . . (the Defendants) debt collection practices were fraudulent, a question the FCCPA directly addresses."

The appellate court not only reversed the lower court's ruling of no jurisdiction but also certified to the Florida Supreme Court the question:

"Does §440.13(11)(c) of the Workers' Compensation Law preclude circuit court jurisdiction over claims under §559.77(1) of the Florida Consumer Collection Practices Act."