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April 19, 2021

## **What's New In Our Industry**

### **Florida**

#### **I. Legislative**

##### **A. Introduction**

The following bills having workers' compensation implications have been filed in the 2021 Florida 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 referenced 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 began on March 2, 2021.

##### **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**

**CS Senate Bill 1390 – Corporate Investment Tax Credit** – This bill allows for eligible projects that create or develop intellectual property to qualify for the Capital Investment Tax Credit against the Corporate income tax, the sale and use tax, or a stated combination of the two taxes. If a project creates intellectual property, 20% of the project's eligible capital costs if the capital costs of one or more projects is in aggregate of at least \$50 million per year for 3 consecutive years. A qualifying business that establishes a "strategic priority project," and an intellectual property project that demonstrates the potential for measurable value to the state is eligible for the tax credit

equal to 20% of the capital cost if the capital costs are at least \$75 million. “Capital costs” will include payments made for workers’ compensation premiums payable or workers’ compensation benefits paid.

**CSHB 987, Similar Bill SB 1080 – Tobacco and Nicotine Products** – Provides revised penalty standards for the sale and use of tobacco and nicotine products with penalties for violations. If community service is ordered, a person that participates in such service shall be considered an employee of the state for the purpose of paying workers’ compensation benefits for the duration of such service.

**Senate Bill 1596, Similar Bills HB 1245, 1247 - Florida Family and Medical Leave Act.** The bill would provide family and medical paid leave to employees following the birth, adoption, or foster care placement of a new child. The benefits payable are intended to bond employees with their minor children during the first 12 months after any birth, adoption or foster care placement. During the period of leave, there would be no loss of benefits or rights arising out of a person’s employment. The bill allows for the employee taking the leave to return to work in his former position if available and provides provisions for the re-hire of such employee if such jobs are not available. The benefits payable under the Florida Act would run concurrently with family medical leave benefits under the federal statute.

**Senate Bill 1724 - Multiple Changes to Workers’ Compensation Act.** This bill defines the need for “specificity” in Petitions for Benefits which includes computing the exact amount payable for each benefit claimed to have been denied. Allows for dismissal of claims lacking specificity, such dismissal being without prejudice. Under the workers’ compensation statute, there is immunity from civil liability for damage claims by one employee against another employee with workers’ compensation being the exclusive way to obtain compensation for damages. There are exceptions to this rule that would allow for civil damages to be assessed against a co-employee one of which is known as the “unrelated works” exception to the workers’ compensation exclusive remedy. Under the present law, an injured employee could sue another employee if the employees are performing “unrelated works.” This exception to workers’ compensation immunity would not allow for one employee to sue another employee even if the two employees were engaged in unrelated works. As a condition to filing a Petition for Benefits wherein a claimant is represented by an attorney, the claimant must sign a statement that he or she is required to pay attorney fees except in certain situations as provided for under the workers’ compensation law. Even if fees are payable by the employer/carrier, the statement signed by the employee/claimant must provide that the claimant might still be required to pay more attorney fees. Benefits cannot be claimed unless this required statement is signed. If permanent benefits are claimed, the petition must state the specific date of maximum medical improvement. There is a rebuttable presumption that the average weekly wage and the compensation rate calculated by the employer/carrier is correct. Prior to filing a Petition for Benefits, a good faith effort to resolve the issues must be made with a certification being a part of the petition that such efforts have been made. The petition must describe efforts as to the good faith attempts at resolution. The JCC has the jurisdiction to determine if there was a good faith effort and dismiss the petition or impose sanctions to ensure compliance. 15 days before a hearing, the claimant’s attorney must allocate hours spent on each claim for benefits where multiple benefits are claimed. Attorney fees are not payable if benefits claimed in a petition are paid within 45 days after a petition is filed. (The current statute states the

time period to be 30 days.) Describes the time period in which petitions are deemed to have been filed.

**Senate Bill 820, Companion Bill HB 1183 - Employee Leasing (PEO).** This bill relates to the 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 - Recovery of Medical Expenses in Third Party Actions.** This bill 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 by workers' compensation, the actual paid amount by workers' compensation 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. There will possibly be amounts payable in excess of what is provided for in the Workers' Compensation Act based on "usual and customary" charges paid by the provider.

**CS Senate Bill 742, Companion Bill CS HB 815 - Rates Payable for Workers' Compensation Coverage.** 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. Amends §627.072, Florida Statutes.

**House Bill 7, Companion/Similar Bill SB 72 - Civil Liability of Business, Educational Institutions, Religious Institutions, Governmental Entities, Healthcare Providers and other covered entities for Covid Claims.** These bills provide for named entities' 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. **Amendments filed but denied. The bill passed the House.**

**CS Senate Bill 72, Companion Bill HB7 – Civil Liability of Employers for Covid claims, Companion Bill to HB 7.** See description of Bill summary HB 7 above. Amendments filed. SB 72 passed the Senate with amendments. On March 25, 2021, SB72 was read a third time on the House floor and passed with 83 yeas and 31 nays. SB 72 will now go to the Governor. The bill becomes effective upon becoming a law. Bill engrossed. **Governor approved. CS/SB 72. Chapter No. 2021.001.**

**Senate Bill 1224, Companion Bill HB 1171- First Responders.** 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 state or a local government. Provides additional retirement benefits to such persons.

**Senate Bill 74, Similar Bill HB 7005, SB 72 – Covid Claims Against Health Care Providers.** 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. CS for SC HB 7005 placed on calendar of House for second reading. SB 72 placed on special order calendar and passed. Engrossed text filed. House in Messages; placed on special order calendar. Approved by House. Sent to Governor for approval. Laws of Fla., Chapter Number 2021-01.

**House Bill 949, Companion Bill SB 1422, Identical Bill SB 1314 - Communicable and Infectious Disease.** 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 referred to Government Operations Subcommittee; Professions and Public Health Subcommittee; Appropriations Committee; State Affairs Committee.

**House Bill 1209 - Cancer Entitlements for Firefighters** 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 from the payment of workers’ compensation benefits. Amendments filed.

**Senate Bill 1458, Identical Bill HB 1305 – Employee Leasing** 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. **CSHB 1305** – Proposed amendments filed. “Remove everything after the enacting clause.” Bill pending in Insurance and Banking Committee. Allows employee leasing companies to insure employees of subcontractors. Coverage is provided for employees of subcontractor (client company) when employee of client company/subcontractor commences work for the client company or is hired directly by the leasing company. Employees are considered employees of leasing company. Allows for termination of leasing arrangement.

**House Bill 1293- Litigation Financing Consumer Protection Act.** Specifically excludes workers’ compensation from the definition of “Litigation Financing.” Similar to SB 1750.

**HB 1617 – Covid.** Creates §440.095. A person who suffers a condition or impairment of health that is contracted during a state of emergency related to Covid-19 is presumed to have suffered a compensable injury arising out of and in the course and scope of employment unless the contrary is shown by competent evidence. To be entitled to such presumption, the employee must verify by written affidavit that to the best of his or her knowledge and belief, he or she was not exposed to Covid-19 outside of the course and scope of his or her employment. An employer may not take any retaliatory personnel action against an employee because the employee reasonably refuses to report to his or her assigned physical place of employment during state of emergency related to Covid-19 if: 1) he or she tested positive for Covid-19; 2) the employee was quarantined due to Covid-19; 3) the employee experienced Covid-19 symptoms. Nothing prevents the employer from terminating an employee from employment if the employee is absent from work due to Covid-19 related issues for more than 21 consecutive days or 21 days within a 90-day period. This subsection does not interfere with an employee’s rights under the Federal Family and Medical Leave Act. Any person employed by a healthcare provider or who is an emergency medical technician or paramedic, law enforcement officer, firefighter or any employee required by his or employer to physically be present at an educational institution is presumed to have contracted a diagnosed Covid-19 condition on the job. Provides for paid sick leave for persons under certain situations to be paid sick leave for Covid-19 conditions. Expands family and medical benefits for employees in certain instances. Exempts small employers with less than 50 employees from providing expanded benefits payable.

**SB 366 – Apprenticeship and Pre-Apprenticeship Training Program.** For job training programs created for persons 16 years of age or older who enters into an approved apprenticeship contract for special learning through work experience. Persons participating in such programs are considered employees of the state for the payment of workers’ compensation benefits and are entitled to medical benefits only.

**HB 7005 (formerly PCB HH51) – Health Care Providers.** – This bill provides heightened liability protection to health care providers in medical negligence causes of action by patients arising under existing laws. The bill is intended to govern medical malpractice causes of action related to Covid claims.

**SB 1738, Companion Bill HB 1345 – Pharmaceutical Products Containing Cannabis.** Excludes from Schedule 1 drugs cannabis if it is contained within FDA approved pharmaceutical product.

## **D. Indirect Application to Workers' Compensation – Medical**

### **1. Telehealth**

**Senate Bill 660, Identical Bill CSHB 247** allows telehealth providers to use telehealth to prescribe controlled substances. See discussion by Division in previous newsletters on data collected by the Division showing amounts paid for telemedicine. CSHB 247 provides that telehealth providers cannot prescribe a controlled substance listed in Schedule II of subsection 893.03, F.S. Present law precludes telehealth providers from prescribing any controlled substance. CSHB 247 placed on House Calendar to consider.

**Senate Bill 660** deletes prohibition on prescribing controlled substances through telehealth.

**Senate Bill 864** deletes prohibition on prescribing controlled substances through telehealth and 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. Revises the definition of the term “telehealth” – allows for audio only telephone calls within definition of telehealth license to provide telehealth services not required if there is consultation with a health care provider who has authority over the diagnosis and care of a patient. Committee Substitute filed.

**SB 700** authorizes telehealth providers to prescribe specified controlled substances through telehealth under certain circumstances. Authorizes registered pharmacy technicians to compound and dispense medicinal drugs under certain circumstances. Exempts certain registered specified prohibitions providing additional long-acting medications that a pharmacist may administer under certain circumstances.

### **2. Autonomous Physician Assistants**

**CS/CS House Bill 431, Companion CS Senate Bill 894, HB 1299** authorizes physician assistants to practice medicine and be paid for services performed if the same service would have been covered or performed by a physician. PAs are allowed to bill for such services and receive direct payment, procure medicinal drugs and medical services unless such drug is listed on a drug formulary, provide evaluations for workers' compensation claims, order physical therapy and other similar treatment. Provides for Physician Assistant licensure. The purpose of the bill change is to allow PAs to practice medicine in collaboration with physicians. Eliminates any limitations on the number of physician assistants a physician can supervise. 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. **CS/CSHB431** House Committee Substitute filed. Passed. In Senate Messages.

**HB 1299**. Compare to bills above. Additional language as related to Drug Free Workplace Program. §440.102 allows for autonomous physician assistant to obtain and test for drugs.

### **3. Massage Therapy**

**CS Senate Bill 352, Companion House Bill 245.** Amends current law to define a “massage therapist” to include a person who performs massage therapy, including massage therapy assessments, for compensation. Such assessments include the determination of the course of massage therapy treatment. HB245 placed on Special Order calendar 3/31/21. Read third time. Passed House. Received in Senate.

### **4. Pharmacy**

**SC/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. Committee Substitute.

**See SB 700** described under Telehealth.

### **5. Psychologists**

**House Bill 687, Identical Bill SB 160** - 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.

### **7. Chiropractic Medicine**

**Senate Bill 1460, Companion Bill HB 1489; Compare SB 1676.** 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.

**Compare House Bill 335, House Bill 1411, SB 1820, SB 1738 - Medical Marijuana.** 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- Cybersecurity** 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.

**CS/CS House Bill 969, Compare HB 971, SB 1734 - Cybersecurity** - Relates to Consumer Data Privacy. Consumers whose personal information is the subject of a data breach may bring a cause of action against the business where the breach occurred and the bill creates a new cause of action that could result in class action lawsuits. This bill is a comprehensive amendment for protecting data retained by industry. Similar to a 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. **SB 1734** – Consumers have the right to direct



certain businesses not to sell personal information. Consumers have the right to submit a verified request for businesses to delete or correct personal information. Both SB1734 and HB969 proceeding through various committees of both houses. **SB 1734** scheduled to go on the Senate floor for consideration. Amendments filed.