

Workers' Compensation Law

The newsletter of the Illinois State Bar Association's Section on Workers' Compensation Law

Employers face new liabilities for latent injury cases under bill awaiting governor's signature

BY DANIEL L. KELLEY

Illinois Senate Bill 1596 has been approved by the Illinois General Assembly and upon signing by the Governor will allow employees to file civil actions against employers for latent injuries, such as asbestos-related illnesses. Currently, those claims must be sought solely within the state's workers' compensation system.

A bill awaiting approval from the Illinois governor seeks to create an exception to the state's workers' compensation system by now allowing civil actions against Illinois employers in latent injury cases, such as asbestos-related diseases, which often do not develop until decades after a claimed exposure to asbestos.

The current Occupational Diseases Act limits the time period for an employee to bring an action against an employer to twenty-five years for filing a claim and a three-year statute of repose. Proposed Illinois Senate Bill 1596 creates an exception to these limitations by amending the Illinois Worker's Compensation Act and Occupational Diseases Act.

The proposed bill states an employee, employee's heirs, and any person having the standing to bring a civil action at law would now have the "nonwaivable right" to bring a civil action against any employer. The bill passed the Illinois House of Representatives

(70-40) and Illinois Senate (41-16), and has been sent to Governor J.B. Pritzker for consideration.

Opponents to the bill believe it will expose Illinois employers to unlimited liabilities through uncapped awards and punitive damages, and double attorney fees for clients from 20 percent under the workers' compensation system to forty percent in the civil system.

The bill would overturn an Illinois Supreme Court decision holding the exclusive remedy of Illinois employees suffering from latent injuries, such as mesothelioma, was within the state's Worker's Compensation Act and Occupational Diseases Act.

The Court's holding in *Folta* restricted the plaintiff from seeking a remedy against their employer outside of the Illinois worker's compensation system. However, the court noted the plaintiff could still seek remedy from third parties other than the employer, such as the other fourteen named defendant manufacturers of asbestos-related products.

Similar decisions have been found in the state supreme courts of Iowa, Kansas, and Arkansas. However, the Pennsylvania Supreme Court found that state's legislature did not intend its Worker's Compensation

Act to bar such claims.

Since the current statutes impose liability without fault upon the employer in exchange for prohibiting common law suits by employees against the employer, the Illinois Supreme Court has described the current exclusive remedy provision as "part of the *quid pro quo* in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts.»

The bill has garnered the support of unions, plaintiffs' counsel representing clients affected by asbestos-related diseases, and the Illinois Trial Lawyers Association. Groups opposing the change include the Illinois Chamber of Commerce, Illinois Association of Defense Trial Counsel, business groups representing insurance companies, and others.

The Illinois Chamber of Commerce President Todd Maisch sent a letter to Gov. Pritzker outlining the group's opposition to the proposed measure. Illinois employers will face new exposures to liability, including unlimited awards and punitive damages that were previously barred, according to the letter. Employers may also be uninsured as business liability policies

exclude workers' compensation claims and workers' compensation policies exclude civil claims against the employer.

The Illinois Association of Defense Trial Counsel also opposes the proposal. "Reasonable legislators could debate the merits of extending the length of the twenty-five year repose period under current law," Association President Bradley Nahrstadt stated in a letter to Gov. Pritzker. "Instead, this bill seeks to place recovery for such injury in the civil tort system, where the

worker relinquishes the advantage of strict liability of the employer, and as a practical matter, doubles the attorneys' fees that will be paid by the injured worker from 20 percent under current law in the workers' compensation system to the typical 40 percent for attorneys in the civil system."

The Illinois Department of Central Management Services estimates the proposed legislation would result in a cost increase of about \$250,000 annually for the state.

Editor's note: As of April 4, 2019 the Governor has yet to sign the bill into law. ■

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1. *Folta v. Ferro Engineering*, 2015 IL 118070 (2015).
 2. *Ganske v. Spahn & Rose Lumber Co.*, 580 N.W.2d 812 (Iowa 1998); *Tomlinson v. Owens-Corning Fiberglas Corp.*, 244 Kan. 506, 770 P.2d 833 (Kan. 1989); *Hendrix v. Alcoa, Inc.*, 2016 Ark. 453, 506 S.W.3d 230.
 3. *Tooev v. AK Steel Corp.*, 623 Pa. 60, 81 A.3d 851 (Penn. 2013).
 4. *Meerbrey v. Marshall Field & Co.*, 139 Ill. 2d 455, 462 (1990).