Impact and Implications
of SB 1596

ILLINOIS CHAMBER OF COMMERCE

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WC Exclusive Remedy Provision

* **Under the IWCA (820 ILCS 305/1 et seq.) and the Workers' Occupational Diseases Act (820 ILCS 310/1 et seq.) employees are not permitted to bring civil lawsuits against their employers for work-related injuries or diseases because workers' compensation benefits are deemed to be the exclusive remedy for such ailments. 820 ILCS 305/5(a); 820 ILCS 310/5(a).**

Statutes of Repose

* Both the IWCA and IWODA also provide limitations periods in which the employee can file for workers' compensation benefits.
* The IWODA provides that, "[i]n cases of disability caused by exposure to . . . Asbestos, unless application for compensation is filed with the Commission within 25 years after the employee was so exposed, the right to file such application shall be barred." 820 ILCS 310/6(c).
* Same issue for IWCA. 820 ILCS 305/6(d).
* If "death occurs within 25 years from the last exposure to . . . Asbestos, application for compensation must be filed within 3 years of death . . ." 820 ILCS 310/6(c).

Folta v. Ferro Engineering

* In *Folta,* the Illinois Supreme Court held that the exclusive remedy provision barred employees from bringing civil lawsuits against their employers, even when their occupational diseases were not diagnosed until after the 25-year period in which they could bring a workers' compensation claim had expired. 2015 IL 118070.
* Hence, SB1596 is a direct response by Illinois lawmakers to eliminate the perceived injustice by amending the exclusivity remedy provision to allow employees whose workers' compensation claims for occupational diseases or injuries are barred by the applicable statute of repose to bring civil suits against their employers.

New Statutory Provision

* Sec. 1.1 Permitted Civil Actions.
* Subsection (a) of Section 5 and Section 11 do not apply to any injury or death resulting from an occupational disease as to which the recovery of compensation benefits under this Act would be precluded due to the operation of any period of repose or repose provision. As to any such occupational disease, the employee, the employee's heirs, and any person having standing under the law to bring a civil action at law, including an action for wrongful death and an action pursuant to Section 27-6 of the Probate Act of 1975, has the nonwaivable right to bring such an action against any employer or employers. (P.A. 101-6 eff. 5-17-19)

SB 1596's Limited Application

* Enacted to revive certain asbestos-related lawsuits that were previously barred by the IWCA's exclusive remedy provision.
* Simple choice-of-law principles dictate that the law in force at the time the employee was working for the employer will apply.
* The legislature did not expressly designate in the statute a retroactive application, so courts should presume that it was intended to apply prospectively only.
* Hence, the *Folta* decision and the exclusive remedy provision in effect prior to SB 1596 should remain controlling law for all pre-2019 occupational asbestos exposures.

SB 1596's Limited Application Continued

* The statute should apply prospective only.
* *However, the plaintiffs' bar clearly intends to sue employers for latent exposure and injuries immediately, for exposures that occurred well before the passage of SB 1596.*
* Nonetheless, Illinois case law prevents the legislature from taking away vested defenses in legal actions.
* One of those vested defenses to occupation disease claims is that the exposure occurred prior to SB 1596.

Legislature Cannot Take Away Employers' Established Defense

* The Illinois Supreme Court previously refused to allow the legislature to strip away a vested defense. *Doe v. Diocese of Dallas*, 234 Ill.2d 393 (2009).
* Involved a civil childhood sexual abuse claim that was time barred by SOL. However, it was brought pursuant to an amended SOL that provided longer SOL.
* The court reviewed whether the new SOL could be applied retroactively to revive a claim that was time-barred.
* Distinct from SB1596, that legislature intended retroactive application of the new SOL.
* That court held that retroactive application was unconstitutional and violated the defendant's due process rights under the Illinois Constitution.

Retroactive Application vs. SOL Continued

* Once a SOL has expired, the defendant has a vested right to invoke the SOL defense.
* The legislature cannot defeat that vested right without offending due process.
* Retroactivity is generally disfavored in the law in accordance with "fundamental notions of justice" that have been recognized throughout history.
* "Retrospective laws are, as a rule, of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law." H. Broom, Legal Maxims 24 (8th ed. 1911).

Retroactive Application vs. SOL Continued

* Retroactive legislation "presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions. *E. Enteres v. Apfel*, 524 U.S. 498, 532 (1998).

Prior to SB 1596

* Previously, all occupational injuries and diseases were subject to the exclusive remedy provision, and employers were not subject to civil damages for those injuries or diseases.
* Knowing this, employers generally did not purchase insurance that would cover civil damage claims brought by their employees.
* Employee wages and benefits were negotiated at a given level with that established insurance cost structure in mind.

Retroactive Application Leaves Employers "exposed"

* To retroactively impose civil liability would completely upset these settled wages and benefits transactions.
* Employers would have no way to offset their increased liability exposure for past coverage periods.
* Unfair to employers who had no opportunity to adjust prior benefits/wages to reflect such liability.
* Retroactive application would violate the Illinois Constitution.

Possible Insurance Avenues

* What insurance policy might cover this exposure?
  * The employee exclusion in an employer's CGL policy will preclude coverage.
  * The exposure could be covered under the 1(b) Section of the WC/EL coverage and potentially, an umbrella policy.
  * However, as significant as latent exposures are, and the general levels of this type of insurance, policy limits are likely insufficient to cover the exposures.

SB 1596's Impact

* While the law is unconstitutional if applied retroactively, the plaintiff's bar will push this issue to litigation.
* Unconstitutional due to special legislation argument?
* Companies that are subject to latent or asbestos-related disease claims should expect lawsuits.
* The plaintiff's bar will likely use this new law to procure settlements until the law's constitutionality is decided by the Supremes.

Statute of Repose: 25 Years or Only 2 Years?

* Section 6 of Occupational Disease Act offers 25 year statute of repose for asbestosis claim, making future claims seemingly far off if new statute is applied prospectively.
* However, please note Section 1 of the Occupational Disease Act provides a very *short 2 year window from the last date of exposure* to file a claim for virtually every other employment related disease.

What Happened to the 25 year Statute of Repose???

* 820 ILCS 310/1(f) No compensation shall be payable for or on account of any occupational disease *unless disablement, as herein defined, occurs within two years after the last day of the last exposure to the hazards of the disease*, except in cases of occupational disease caused by berylliosis or by the inhalation of silica dust or asbestos dust and, in such cases, within 3 years after the last day of the last exposure to the hazards of such disease and except in the case of occupational disease caused by exposure to radiological materials or equipment, and in such case, within 25 years after the last day of last exposure to the hazards of such disease.

"Latent Occupational Disease" Sure to be Liberally Construed by Plaintiff's Bar!!

* There are any number of generic disease out there which arguably qualifies as a "latent" condition.
* There is no body of case law as of yet to determine the parameters of this new Statute.
* We can be sure the Plaintiff Bar will argue that if it's not specifically excluded . . . it's included!

Possible Civil Liability For any Number of Ailments

* Pulmonary fibrosis
* Reactive Airway Disease
* Unspecified asthma
* Acute bronchopulmonary aspergillosis (ABPA) - Aspergillosis is an infection caused by Aspergillus, a common mold (a type of fungus) that lives indoors and outdoors.

Defense of SB 1596's Claims

* The earlier the better.
* Upon filing, defense counsel should immediately file dispositive motions arguing that the law if applied retroactively is unconstitutional.
* Upon receiving a decision from the Circuit Court, it is likely the case will be appealed directly to the Supremes for a decision. Illinois Supreme Court R. 302(a).

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