State Specific: Montana

Governor Bullock Sides with Trial Lawyers Over Small Businesses

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On April 20, 2015, the Legislature passed Senate Bill 288, which made it easier for Montana's employers to recoup medical expenses they or their workers' compensation carrier expend on behalf of an injured employee

when that employee recovered a large amount of money in a tort lawsuit. Known as "subrogation," this right of reimbursement exists and works effectively in every other state but Georgia, and plays a key role in helping to hold down one of the largest expenses for small businesses – workers' compensation insurance premiums. The trial lawyers cried foul and, on April 29, 2015, Governor Bullock vetoed the business-friendly Bill.

Governor Bullock has already vetoed 34 bills passed by the legislature. The autopsy on the vetoed bills reveals that they include a bill to revise Montana small business health insurance laws, lower state income taxes, revise energy laws, revise landlord/tenant laws, and to change income tax credits. However, the most devastating stroke of his pen came when Bullock nixed Senate Bill 288, which would have overturned a series of unfortunate Montana Supreme Court rulings which effectively preclude a workers' compensation insurer from exercising a right of subrogation on which all employers and small businesses depend.

Subrogation is a word foreign to even the most savvy politicians and lawyers. In the context of Montana businesses, subrogation is the substitution of the employer into the shoes of its injured employee with respect to a potential lawsuit. When the employee of a small business is injured at work, workers' compensation provides significant wage replacement protection and the payment of unlimited medical expenses – for life. In return for accepting these unlimited, guaranteed benefits, Montana law clearly states that when the injured employee hires a lawyer and sues the person or company that caused the injury, the employer (or its workers' compensation carrier) has the right to be reimbursed out of this tort recovery for any benefits it has paid. The purpose of subrogation is to place the burden for a loss on the party ultimately liable or responsible for it and by whom it should have been discharged, and to relieve entirely the insurer or surety who indemnified the loss and who in equity was not primarily liable for the loss. An additional purpose underlying subrogation is that it returns the excess, duplicative proceeds to the insurer who can then recycle them in the form of lower insurance premiums. In short, subrogation is a key mechanism by which insurance premiums are kept in check and held to a minimum. It is a reality of insurance that benefits small businesses throughout Montana, as the cost of workers' compensation insurance and health insurance continue to spiral out of control.

Montana's § 39-71-414 has for decades provided small businesses with particularly strong subrogation rights when it comes to workers' compensation. Over the years, however, activist judges concerned with the rights of trial lawyers have developed troubling case law, requiring that an injured party be completely compensated for all elements of damages (i.e., be "made whole") before this statutorily-guaranteed subrogation right even arises. This means that an injured employee must recover all lost wages, earning capacity, fringe benefits, pensions, damages for pain and suffering, any related damages, as well as past and future medical costs before an insurer may assert a subrogation claim.

Montana Senate Bill 288 was designed specifically to change this situation. An insurer that participates in an action and pays its proportionate share of costs and fees would be entitled to recover all medical benefits paid. A participating insurer would also be entitled to recover all non-medical compensation and benefits, "unless the injured worker is able to demonstrate damages in excess of the workers' compensation benefits and the third-party recovery combined". Essentially, the Bill loosens the "Made Whole" Doctrine for a carrier with regard to medical benefits. But, for any non-medical payments made, a carrier would still be required to overcome a "made whole" issue.

After his veto of this important Bill, Governor Bullock directed Montana's Commissioner of Labor and Industries and other members of his administration to identify other ways of addressing the effects of Montana's strict "made whole" requirement on workers' compensation premium rates.

Further attempts will be made to address workers' compensation subrogation during Montana's next legislative session in 2017. Your voice will make a difference!

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