

MEMORANDUM

To: TCJL Business Liability Task Force

Date: November 28, 2022

Re: Update on Bill Filing

As you undoubtedly know, the first two weeks of the bill filing period have no precedent in the number of bills filed so far (north of 1,000) or in the overwhelmingly anti-business tenor of so many of them. We are already seeing significant manifestations of the type of legislation we have feared during the interim: new private causes of action, weakening the workers' compensation system, extensions of the SB 8 model to other social causes, state interference in the employer-employee relationship, and limitations on the ability of businesses to conduct their affairs as they see fit. Clearly, we face very substantial challenges in the coming session on an array of matters.

This update intends to illustrate the scope of the problem without at this point going into great detail about the bills themselves. You will begin receiving our weekly tracking list this Friday, which will include short summaries of bills we have identified as relevant to our concerns. It is important that you review these weekly reports if possible. Judging by the current volume of adverse proposals, we risk being overwhelmed even before the session convenes. It will be necessary to prioritize so that we can allocate adequate resources where we need them the most, and your input will be vital to this task.

Now to the overview:

New Causes of Action with Particular Business Exposure

We would draw your attention to HB 645 and HB 709. The former creates a no-injury cause of action, statutory punitive damages of \$100,000, and recovery of mandatory costs and attorney's fees against a business or financial institution that uses so-called "value-based criteria" to "discriminate" against an individual unless it discloses its criteria to the potential customer. Presumably, this disclosure option is designed to force any such criteria out into the open for the purpose of further targeting business. The latter is aimed at financial institutions that use similar value-based criteria in the extension of credit at the risk of incurring civil penalties of \$100,000 for a first violation and \$250,000 for each violation after that, enforceable by the attorney general. Both bills specifically target ESG policies, but also a lot more than that. We can expect more bills along this line as the session approaches.

Workers' Compensation

At least three bills, HB 90, HB 471, HB 790, continue the trend of privileging one class of injured workers over others. HB 471 expands benefits for first responders and broadens the scope of compensable injuries. HB 790 likewise has special provisions for privileged classes, but

it also applies generally to all workers' compensation policies (including self-insureds) in limiting a carrier's right to contest compensability and creating an adversarial relationship between the carrier and the injured worker earlier in the process. It also makes carriers liable for medical expenses even if there is a bona fide dispute over compensability that the administrative process later determines in favor of the injured employee. This is the door through which the workers' compensation plaintiff's bar will re-enter the system. Another problematic bill is HB 679, which blocks an owner or contractor from requiring a person to have a specified experience rating in order to bid on a contract.

State Interference in the Employer-Employee Relationship

Businesses are going to be caught between GOP proposals to punish them for providing certain health care benefits to their employees and Democratic efforts to protect their right to do so (see HB 27 as an example of the latter). Other bills, such as HB 81, HB 138, and SB 177, return to the scene of COVID liability and expose businesses and health care providers to expanded liability for workplace policies regarding vaccinations. A particularly negative version of this type of legislation can be found in HB 787, which makes businesses ineligible for a state or local tax incentive of any kind (including cancelling existing incentives) if they pay for all or any part of an employee's cost of obtaining a legal abortion. This kind of thing will go hand-in-hand with SB 8, as an SB 8 lawsuit can expose such a business and thus bring the state down on it.

There are other troubling proposals that target health care providers for performing certain kinds of treatments, including gender dysphoria and anything related to abortion (see HB 41, HB 42, and HB 776). Some of these bills further define "child abuse" to include treating or consenting to treatment for gender dysphoria, which sweeps parents and family members into the state's net as well. Another proposal, HB 319, creates a private cause of action (with damages, costs, and attorney's fees) on behalf of a person who declines to participate in a health care service for reasons of conscience (which the bill defines broadly). Given the scope of the definition of "conscience," this bill would seem to open the door to refusal to treat just about anyone if some conscience-based objection can be made.

All of the bills discussed here, save HB 27, have been introduced by GOP members from different points on the conservative spectrum. We must be prepared for the eventuality that these and similar bills will receive serious consideration and be the object of intense political pressure on state leadership and the members.