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May 15, 2015

Honorable Kevin de León
Room 205, State Capitol

**RETURN-TO-WORK PROGRAM - #1509224**

Dear Senator De León:

The return-to-work program, which is designed to provide supplemental benefits for workers whose permanent disability benefits are disproportionately low in comparison to their earnings loss, is administered by the Director of Industrial Relations.[1] The program is statutorily required to be funded by $120 million annually derived from non-General Funds of the Workers' Compensation Administration Revolving Fund, and those moneys are required to remain available for use by the return-to-work program without respect to the fiscal year.[2] You have asked us to discuss the duties of the Department of Industrial Relations with regard to deriving those funds and with regard to the use of those funds where the funds exceed the program costs for the year.

As an initial matter, the California Constitution vests the Legislature with plenary power to create a workers' compensation system.[3] Acting under that authority, the Legislature has enacted Labor Code, divisions 4 (§ 3200 et seq.) and 4.5 (§ 6100 et seq.),[4] establishing the state's workers' compensation system under which an employer is liable for compensation provided by that system for injuries received by an employee arising out of and in the course of employment.[5] These statutes are generally implemented and enforced by the Division of Workers' Compensation within the Department of Industrial Relations (hereafter the department).[6]

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[1] Lab. Code, §§ 20, 139.48.

[2] Lab. Code, § 139.48.

[3] Cal. Const., art. XIV, § 4.

[4] All further section references are to the Labor Code, unless otherwise specified.

[5] § 3600.

[6] §§ 110 & 124, subd. (a); see also §§ 19, 3205.

Section 139.48 establishes the return-to-work program (hereafter the program) within the department, providing as follows:

> "139.48. (a) There is in the department a return-to-work program administered by the director, *funded by one hundred twenty million dollars ($120,000,000) annually derived from non-General Funds of the Workers' Compensation Administration Revolving Fund,* for the purpose of making supplemental payments to workers whose permanent disability benefits are disproportionately low in comparison to their earnings loss. *Moneys shall remain available for use by the return-to-work program without respect to the fiscal year.*
>
> "(b) Eligibility for payments and the amount of payments shall be determined by regulations adopted by the director, based on findings from studies conducted by the director in consultation with the Commission on Health and Safety and Workers' Compensation. Determinations of the director shall be subject to review at the trial level of the appeals board upon the same grounds as prescribed for petitions for reconsideration.
>
> "(c) This section shall apply only to injuries sustained on or after January 1, 2013." (Emphasis added.)

Thus, the program is administered by the Director of Industrial Relations (hereafter the director),[7] who is required to adopt regulations determining eligibility for payments and the amount of payments. The program is funded by $120 million annually derived from non-General Funds of the Workers' Compensation Administration Revolving Fund (hereafter the Fund), and these moneys are required to remain available for use by the program without respect to the fiscal year. However, the program applies only to injuries sustained on or after January 1, 2013.

As an initial matter, you have asked us to construe the requirement that the program be funded by $120 million annually derived from the Fund. Specifically, you have asked whether this provision required the director to derive $120 million to fund the program in the years 2013 and 2014, respectively. When statutory language is unambiguous, a court will presume that the Legislature meant what it said, and the plain meaning of the statute controls. (*In re W.B., Jr.* (2012) 55 Cal.4th 30, 52.) Section 139.48 sets forth an explicit requirement that the program be funded by $120 million annually derived from specified moneys in the Fund. "Annually" is generally defined as "occurring, appearing, made, done, or acted upon every year or once a year."[8] Furthermore, the requirement became operative on January 1, 2013,[9] and there is no exception from the requirement for either the 2013 or the

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[7] See § 20.

[8] Webster's 3d New Internat. Dict. (2015) p. 88.

[9] See Stats. 2012, ch. 363.

2014 year.[10] Thus, under the plain meaning of the statute, the director was required to derive $120 million from the Fund for the program for each of the 2013 and 2014 years.

Turning to the implementation of this requirement, you have asked us to assume, for purposes of this opinion, that the department's description of program eligibility requirements and of its administration of the program is accurate. To this end, we have been informed by the department that it has allocated $120 million for the program each year commencing on January 1, 2013, and that $120 million was thus allocated to the program in both 2013 and 2014, respectively. However, we are further informed by the department that the process to make a permanent disability determination, which is necessary in order for a claimant to be eligible under the program, takes approximately two years. Thus, according to the department, because section 139.48 applies its provisions only to injuries that occur on or after January 1, 2013, the earliest that a person could be deemed eligible for the program, and thus a payment from the program could be made, is in the year 2015. As such, according to the department, there were no program costs for the years 2013 and 2014.

Next you have asked us, assuming that there were no program costs in the years 2013 and 2014, to address whether section 139.48 required the department to preserve unspent moneys from those years for use by the program in future years. As stated above, section 139.48 requires that moneys allocated to the program remain available for use by the program without regard to fiscal year. Thus, based upon the plain language of that statute, it would appear that the unspent funds derived in 2013 and 2014 must remain available for use by the program in subsequent years. However, in addition to looking at the plain meaning of a statute, the words of a statute should be construed in their statutory context. (*In re Lucas* (2012) 53 Cal.4th 839, 849.) Furthermore, it is a principle of statutory construction that courts "'must assume that when passing a statute the Legislature is aware of existing related laws and intends to maintain a consistent body of rules. [Citations.]'" (*Vieira Enterprises, Inc. v. City of East Palo Alto* (2012) 208 Cal.App.4th 584, 604.)

Here, the existing statutory scheme at the time the relevant provisions were enacted contains specific provisions that govern the funding source for the program. In this respect, the source of funding for the program is non-General Fund moneys from the Fund, which is established in section 62.5. This section reads, in pertinent part, as follows:

> "62.5. (a) (1) The Workers' Compensation Administration Revolving Fund is hereby created as a special account in the State Treasury. *Money in the fund may be expended by the department, upon appropriation by the Legislature, for all of the following purposes, and may not be used or borrowed for any other purpose:*
>
> "(A) For the administration of the workers' compensation program set forth in this division and Division 4 (commencing with Section 3200), other

[10] It is a principal of statutory construction that a court will not read into a statute a limitation that is not there. (*People v. Clark* (2011) 201 Cal.App.4th 235, 248-249.)

than the activities financed pursuant to paragraph (2) of subdivision (a) of Section 3702.5.

"*(B) For the Return-to-Work Program set forth in Section 139.48.*

"[¶] ... [¶]

"(2) The fund shall consist of surcharges made pursuant to paragraph (1) of subdivision (f).

"[¶] ... [¶]

"(f) (1) Separate surcharges shall be levied by the director upon all employers, as defined in Section 3300, for purposes of deposit in the Workers' Compensation Administration Revolving Fund, the Uninsured Employers Benefits Trust Fund, the Subsequent Injuries Benefits Trust Fund, and the Occupational Safety and Health Fund. The total amount of the surcharges shall be allocated between self-insured employers and insured employers in proportion to payroll respectively paid in the most recent year for which payroll information is available. The director shall adopt reasonable regulations governing the manner of collection of the surcharges. The regulations shall require the surcharges to be paid by self-insurers to be expressed as a percentage of indemnity paid during the most recent year for which information is available, and the surcharges to be paid by insured employers to be expressed as a percentage of premium. In no event shall the surcharges paid by insured employers be considered a premium for computation of a gross premium tax or agents' commission. *In no event shall the total amount of the surcharges paid by insured and self-insured employers exceed the amounts reasonably necessary to carry out the purposes of this section.*" (Emphasis added.)

Therefore, pursuant to both sections 62.5, subdivision (a)(1)(B), and 139.48, the program is funded with non-General Fund moneys from the Fund. In turn, the Fund consists of surcharges levied by the director upon employers, which are prohibited from exceeding the amounts reasonably necessary to carry out the purposes of the section. Section 62.5, subdivision (f)(1) also requires the director to adopt regulations governing the manner of collection of the surcharges.

Pursuant to this regulatory authority, the director has adopted regulations relating to the Fund and the associated surcharges. (Cal. Code Regs., tit. 8, §§ 15600-15611.) These regulations, among other things, provide for the calculations that are made for purposes of determining the insured and self-insured employer surcharges that are deposited into the Fund. (Cal. Code Regs., tit. 8, § 15603.) The regulations also require that, in the event of an unexpended surplus in the Fund balance for a fiscal year, the balance shall be carried forward and credited to the subsequent year's surcharges. (Cal. Code Regs., tit. 8, § 15604.) Thus, any surplus moneys in the Fund that are not necessary to fund the programs designated in section 62.5 must be used to offset the next year's surcharges imposed by the director.

Turning to how a court would construe the language of section 139.48 with regard to unexpended funds allocated to the program that exceed the program costs for that fiscal

year, section 139.48 requires that the funds derived pursuant to that section remain available for use by the program without respect to the fiscal year. As described above, when read in isolation, the language appears to require unspent funds to remain available for use by the program until they are expended, thus prohibiting them from being used for any other purpose. This construction would require unexpended funds, such as those that were derived in the years 2013 and 2014, to remain available for use by the program in future years regardless of the costs of the program in the years in which the moneys are derived, presumably resulting in the current availability of $360 million for the program as a result of 2013 and 2014 funding.[11] Under this construction, the language in section 139.48 would be read as an exception to the prohibition in section 62.5 against surcharges exceeding the costs of administering the program.[12]

However, arguably, a court could adopt an alternative reading of section 139.48 in light of the entire statutory scheme. Examining the statutory scheme relevant to the use of moneys in the Fund, section 62.5, subdivision (f)(1) prohibits the total amount of the surcharges paid by insured and self-insured employers from exceeding the amounts reasonably necessary to carry out the purposes of that section. Hence, the regulation implementing this prohibition requires any unexpended surplus in the Fund to be credited against the subsequent year's surcharge. (Cal. Code Regs., tit. 8, § 15604.) In other words, any moneys that are deposited into the Fund and derived for the program in any particular year but that are not necessary to fund the program must be used to offset surcharges imposed on the employers in the subsequent year. Thus, moneys that were unnecessary to fund the program in the 2013 and 2014 years would be unexpended surplus that would be required to be credited to the subsequent year's surcharges in order to ensure that those surcharges do not exceed the cost of funding the program in each particular year. Under this construction, section 139.48 would be conformed with the statutory scheme. Accordingly, the language in section 139.48 requiring funds derived for the program to remain available for use by the program without respect to the fiscal year would be read to require moneys derived in a particular fiscal year to be used to fund any costs of the program that were attributable to that fiscal year or to a previous fiscal year, but not to be maintained for future program costs.[13]

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[11] This amount includes the $120 million derived in 2015.

[12] The constitutionality of the use of surcharges in the Fund for this purpose under article XIII A, section 3 of the California Constitution is beyond the scope of this opinion.

[13] For example, let us suppose that in 2016, as required by section 139.48, the sum of $120 million is derived for purposes of the program. In addition to being authorized to use this sum for claims that are made in 2016, the department could use these moneys for claims that were made in 2015, if, for example, there were insufficient funds available in 2015 to pay the entirety of the claims. The department contends that without the language allowing for use of the funds "without respect to the fiscal year," the department would not have the authority to pay these prior year claims in the manner described.

Where statutory language is susceptible to more than one construction, courts give great weight to "'contemporaneous administrative construction of a statute by an administrative agency charged with its enforcement and interpretation. [Citation.]'" (*First Bank v. East West Bank* (2011) 199 Cal.App.4th 1309, 1315.) As stated above, we have been informed by the department that it has adopted the second construction of section 139.48. And the department, pursuant to its broad statutory mandate to determine eligibility, has concluded that a claimant cannot be deemed permanently disabled for purposes of the program until at least two years after an injury occurs. Given that the statute explicitly applies only to injuries occurring on or after January 1, 2013, based upon this eligibility criterion the department contends that no claimant can be deemed permanently disabled, and thus eligible for payment under the program, until at least January 1, 2015. Thus, the department contends that moneys in the Fund allocated to the program for the 2013 and 2014 years were unexpended surplus that were required to be credited against the subsequent year's surcharges. The department asserts that, pursuant to this mandate, it credited the amounts allocated to the program for the 2013 and 2014 years against the subsequent years' surcharges and, thus, that those moneys are not available for expenditure on future program costs.

We think that, in light of the broad discretion given to the department by the authorizing statutes to determine eligibility for payments and the amount of payments, which is limited only in that it must be based on findings from certain studies, a court would likely defer to the department with regard to its interpretation of eligibility criteria for the program. Given this deference and the fact that the statutory provisions are reasonably susceptible to more than one interpretation, we further think that a court could reasonably adopt the department's construction of sections 62.5 and 139.48 with regard to the use of surplus funds derived under section 139.48. In other words, we think it more likely than not that a court would construe the statutory scheme to require that moneys derived for the program in a particular year that are not necessary for program costs in that year or previous fiscal years are unexpended surplus and accordingly must be credited toward the subsequent year's surcharges rather than retained for future program costs. If this construction is adopted, and the department concludes as a factual matter that there are no program costs in 2013 and 2014, then the moneys derived with respect to those fiscal years would properly be considered surplus that must be credited back to the surcharges pursuant to California Code of Regulations, title 8, section 15604.

For the foregoing reasons, it is our opinion that the Director of Industrial Relations is required to annually derive $120 million from non-General Funds of the Workers' Compensation Administration Revolving Fund for purposes of the return-to-work program. It is further our opinion that a court is likely to uphold the department's

construction of section 139.48, which requires that funds derived for the return-to-work program in any particular year and that are not necessary to fund the program for that year or the previous years be credited toward the subsequent year's surcharge on the employers.

Very truly yours,

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**AES:sjk**