

January 23, 2018

# Workers Compensation

## Accusations of Bad Faith - A Legal Tactic with Consequences

Workers compensation is a system that was created in the early 1900s in response to the growing number of injuries and fatalities brought about by the industrial age. Back on the farm, when someone was injured, they were taken to the house, cared for by the family and made to feel guilty for not working.

As the economy grew to involve most people working at jobs for other people in their places of business, the issue of workers getting injured started to raise the question about “who was at fault” for the injury. When a failed overhead crane drops a steam locomotive on a worker, it is unseemly to argue about which was the larger fault – the failed crane or the worker standing in the wrong place.

### ***Enter exclusive remedy.***

For more than 100 years, the answer has been the establishment of the workers compensation system and a “no fault” system that is known as the exclusive remedy. What this muddled term means is that when workers are injured at work, they will receive medical treatment and a portion of lost wages – period – no questions about fault. In exchange for getting “made whole”, the worker cannot go to court to sue the employer.

### ***Using a legal tactic to get to court anyway.***

Businesses that are involved in the workers compensation industry report a growing use of “bad faith” accusations when a claim is denied. In a bad faith claim, the injured worker accuses the employer (and by extension, the insurance company) of turning down the claim without justification. This claim is first made during mediation but then is allowed to go directly to court. South Dakota is one of very few states that allow bad faith accusations to go directly to court.

The increased use of bad faith claims would appear to be a legal tactic aimed at increasing settlements agreed to through mediation by using the court system (also referred to as the tort system) as an end run around the principle of exclusive remedy. The South Dakota Chamber of Commerce and Industry does not take lightly the obligation of employers to provide workers compensation coverage to address workplace injuries. Neither does the Chamber intend to sit idle if that system is being eroded by legal tactics that involve bad faith claims being systematized without regard to the validity of the claim.

Admittedly, knowing how many bad faith claims are being filed and what the impact of those filings might be having on the final settlements is less than certain. When the industry points to potential problems with these systems, the Chamber will support a thorough examination of those trends. There are 37 states using an administrative process to review and determine claims of bad faith.

A bill is being drafted that will have South Dakota follow a similar process. Capitol-ism wants Chamber members to be aware of this issue and prepare to talk with legislators about it in a few weeks.

## **SB 62 - An Act to provide for the notification related to a breach of certain data and to provide a penalty therefor.**

Attorney General Jackley is bringing SB 62 in an attempt to protect South Dakota consumers against the kind of data breach that occasionally makes national headlines. This bill has been amended and most likely will be amended again. Attorney General Jackley is trying to balance the goals of making sure consumers know if a business has been hacked and that someone rather nasty has their personal information, while avoiding forcing onerous regulations on businesses. The bill had its initial hearing last Thursday and will have that hearing continued Tuesday morning. Below you will find a key provision of the bill which is the definition of “personal information”.

Personal information is defined as:

***"Personal information," a person's first name or first initial and last name, in 6 combination with any one or more of the following data elements: (a) Social security number; (b) Driver license number or other unique identification number created or collected by a government body; (c) Account, credit card, or debit card number, in combination with any required security code, access code, password, routing number, PIN, or any additional information that would permit access to a person's financial account; (d) Medical information; 14 (e) Health insurance information; or (f) An identification number assigned to a person by the person's employer in combination with any required security code, access code, password, or biometric data generated from measurements or analysis of human body characteristics for authentication purposes. The term does not include information that is lawfully made available to the general public from federal, state, or local government records or information that has been redacted, or otherwise made unusable; and (5) "Protected information," includes: (a) A user name or email address, in combination with a password, security question answer, or other information that permits access to an online account; - 3 - SB 62 1 and 2 (b) Account number or credit or debit card number, in combination with any 3 required security code, access code, or password that permits access to a 4 person's financial account;***

The purpose of the bill is to make sure that businesses will notify customers if a data breach is discovered. The South Dakota Chamber of Commerce and Industry will continue to monitor this bill.

## **Update – SB 58 – Tax Increment Financing (TIFs)**

### **Affordable Housing as Economic Development**

Last Friday, Chamber members received a special report explaining Tax Increment Financing Districts (TIFs). The report explained how SB 58 was going to allow TIFs that are used to build affordable housing to recover the funds paid to school general funds as part of the state-aid formula.

SB 58 was approved by the full Senate on a vote of 33 – 0 with 2 excused. The South Dakota Chamber of Commerce is working to pass SB 58 and appreciates the strong vote on the Senate floor. Here is that vote:

### **SB 58, Senate, Do Pass Amended - 2018**

Yeas **33** Nays **0** Excused **2** Absent **0**

Bolin	Yea	Cammack	Excused	Cronin –Yea
Curd	Yea	Ewing	Yea	Frerichs - Yea
Greenfield (Brock)	Yea	Haverly	Yea	Heinert – Yea
Jensen (Phil)	Yea	Kennedy	Yea	Killer - Yea
Klumb	Yea	Kolbeck	Yea	Langer - Yea
Maher	Yea	Monroe	Yea	Nelson - Yea
Nesiba	Yea	Netherton	Yea	Novstrup
Otten (Ernie)	Yea	Partridge	Excused	Peters - Yea
Rusch	Yea	Russell	Yea	Soholt - Yea
Solano	Yea	Stalzer	Yea	Sutton - Yea
Tapio	Yea	Tidemann	Yea	White - Yea
Wiik	Yea	Youngberg	Yea	

**Business Day at the Legislature is set for Thursday, February 22, 2018. The agenda, speakers and registration information is available at [sdchamber.biz](http://sdchamber.biz).**

***Thank you for your support of the South Dakota Chamber of Commerce & Industry.***