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**Route to:** ☐ ____ ☐ ____ ☐ ____ ☐ ____
☐ ____ ☐ ____ ☐ ____ ☐ ____

# Rassp & Herlick, California Workers' Compensation Law

Publication 80117 Release 24 December 2023

## HIGHLIGHTS

**Key Developments in the Law**

- Recent legislation
- Rule changes
- Recent case law developments have been added

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**RECENT LEGISLATION**:

**Public Employees' Retirement Systems Special Death Benefit.** Effective January 1, 2024, the limitations in Labor Code section 4707(a) also do not apply to specified peace officers and firefighters for the Department of Forestry and Fire Protection. The amendment to Labor Code section 4707(c) may be applied retroactively to January 1, 2019, for injuries not previously claimed or resolved. [*See* Ch. 9, § 9.14[1].]

**Extension of Presumption Related to PTSD.** Effective January 1, 2024, the Commission on Health and Safety and Workers' Compensation must submit a report to the Legislature analyzing claims filed for posttraumatic stress disorder injury for which compensation is claimed by

public safety dispatchers, public safety telecommunicators, and emergency response communication employees, from January 1, 2020, through December 31, 2023 [Lab. Code, § 3212.15(f)(2)]. [*See* Ch. 10, § 10.07[5][k].]

**COVID-19 Presumptions.** The 2022 Legislature extended the COVID-19 presumptions until January 1, 2024. The legislation also added first responders to the list of employees covered by the presumption. [*See* Ch. 10, § 10.07[5][1].]

**Firefighters and Peace Officers; Aggregate Disability Payments.** Pursuant to Labor Code § 4656(d), aggregate disability payments for a single injury sustained by firefighters and peace officers specified in Labor Code § 3212.1 may be paid for up to 240 compensable weeks [*See* Ch. 6, § 6.01[1].]

**REGULATORY CHANGE:**

**Mileage Reimbursement.** Mileage reimbursement for medical and medical-legal expenses was increased from 62.5 cents per mile to 65.6 cents per mile, effective January 1, 2023. [*See* Ch. 4, § 4.05[1].]

**CASE LAW DEVELOPMENTS:**

***Supreme Court Decision:***

**Derivative Injury Rule; COVID-19 Liability.** The Supreme Court in *Kuciemba v. Victory Woodworks, Inc.* (2023) 14 Cal. 5th 993, 88 Cal. Comp. Cases 667, answering two questions certified to it by the Ninth Circuit Court of Appeals, indicated (a) if an employee contracts COVID-19 at the workplace and brings the virus home to a spouse, the derivative injury rule of California's workers' compensation law does not bar a spouse's negligence claim against the employer, and (b) the employer does not, however, owe a duty of care under California law to prevent the spread of COVID-19 to employees' household members. [*See* Ch. 12, § 12.09[1].]

***Court of Appeal Published Decisions:***

**Constitutionality of Proposition 22 Pending in California Supreme Court**. In a split decision, the Court of Appeal in *Castellanos v. State of California* (2023) 89 Cal. App. 5th 131, 88 Cal. Comp. Cases 348, reversed the superior court in relevant part, holding that Prop 22 did not intrude upon the Legislature's workers' compensation authority nor did it violate the single-subject rule. The court agreed with the superior court, however, that Prop 22's definition of what constitutes an "amendment" violated separation of powers principles. Because the unconstitutional provisions could be severed from the rest of the initiative, the divided court affirmed the trial court's judgment insofar as it declared those provisions invalid. **WARNING:** The California Supreme Court granted review in this case. Be sure to check the subsequent history of this case before citing to it. [*See* Ch. 2, § 2.06[1].]

**Real Estate Agents as Independent Contractors.** The Court of Appeal in *Whitlach v. Premier Valley, Inc.* (2022) 86 Cal. App. 5th 673,

found that Bus. & Prof. Code § 10032(b), which incorporates the test found in Unemp. Ins. Code §§ 650 and 13004.1, provides the standard for determining employee or independent contractor status applicable to real estate salespersons for purposes of the Labor Code's wage and hour provisions, and dictates that the real estate agent is an independent contractor if (1) the agent is licensed, (2) the agent is paid through commissions, and (3) the agent has signed an independent contractor agreement. This three-factor employment-status test continues to apply after the enactment of Lab. Code § 2778(c)(1) by AB5, which removes real estate licensees from *Dynamex*'s "ABC" test of employment classification codified in Lab. Code § 2775(b)(1). Here, the plaintiff was held to be an independent contractor as a matter of law since he was a licensed real estate agent paid by commission, and he had entered into written contract specifying that he was independent contractor. [*See* Ch. 2, § 2.06[2][a].]

**Securities Broker-Dealers and Investment Advisors as Independent Contractors.** The Court of Appeal in *Quinn v. LPL Financial LLC* (2023) 91 Cal. App. 5th 370, 88 Cal. Comp. Cases 591, held that the Labor Code section 2783(d)(1) exemption from the application of the "ABC test" (first adopted in *Dynamex,* and later codified in Labor Code section 2775(b)(1) through enactment of AB5) for securities broker-dealers and investment advisors to determine employee or independent contractor status, did not violate equal protection because there was a rational basis for the Legislature to believe financial professionals have more skill and bargaining power than the average worker and are, therefore, less vulnerable to exploitation. [*See* Ch. 2, § 2.06[2][a].]

**Discrimination Under Gov. Code § 1290**. The Court of Appeal in *Lin v. Kaiser Foundation Hospitals* (2023) 88 Cal. App. 5th 712, 88 Cal. Comp. Cases 415, reversed a trial court's decision granting summary judgment to plaintiff's former employer, and held there were triable issues of fact where plaintiff had offered evidence that the employer's final decision to terminate her employment was reached after she became disabled. The court stressed as well that the plaintiff need not show her disability was the *sole* reason for the termination, only that it was a "substantial motivating factor." [*See* Ch. 11, § 11.27[14].]

***Privette* Rule; Delegation of Control over Contracted Work.** The Court of Appeal in *Martinez Marin v. Department of Transportation* (2023) 88 Cal. App. 5th 529, 88 Cal. Comp. Cases 231, reiterated that under the *Privette* rule, the hiring entity is liable only if it is established that it both retained control over the contracted work and actually exercised such control in a manner that affirmatively contributed to the employee's injuries. [*See* Ch. 12, § 12.06[9].]

**Equitable Contribution Among Carriers.** The Court of Appeal in *California Capital Ins. Co. v. Em-*

*ployers Comp. Ins. Co.* (2023) 89 Cal. App. 5th 638, 88 Cal. Comp. Cases 339, held that an employer's commercial general liability insurer was not entitled to equitable contribution from the employer's workers' compensation insurer (the policy provided both Part A and Part B coverage) for defense and settlement of a negligence claim brought by the plaintiff/employee who suffered a traumatic brain injury in a motor vehicle accident while driving with an intoxicated co-worker after the plaintiff was off-shift from his job since the two insurers did not share the same extent of liability on the same risk. [*See* Ch. 12, § 12.15[1].]

**Petitions for Reconsideration; Board's Practice of Granting Petition to Allow for Further Study.** The Court of Appeal in *Earley v. Workers' Comp. Appeals Bd.* (2023) 94 Cal. App. 5th 1, 88 Cal. Comp. Cases 768, issued a writ of mandate commanding the Board to end its practice of granting petitions for reconsideration solely for purposes of further study, and to comply with Labor Code section 5908.5 when granting petitions for reconsideration, including the requirement that the Board "state the evidence relied upon and specify in detail the reasons for its decision." The court stopped short of requiring the Board to make a final determination with the 60-day time period. [*See* Ch. 19, § 19.21.]

***U.S. Court of Appeals, Ninth Circuit Decision:***

**AB 5; App-Based Gig Companies.** The Ninth Circuit Court of Appeals in *Olson v. State of California* (2023) 62 F.4th 1206, 88 Cal. Comp. Cases 429, concluded that a federal district court had erred when it dismissed plaintiffs' equal protection claims that sought to enjoin the State of California from enforcing AB 5 (codifying the "ABC test" adopted in *Dynamex*) and its amendments. The Ninth Circuit found that the plaintiffs had plausibly alleged that the primary impetus for the enactment of AB 5 was the disfavor with which the architect of the legislation viewed Uber, Postmates, and similar gig-based business models, that the exclusion of thousands of workers from AB 5's mandates was starkly inconsistent with the legislation's publicly stated purpose of affording workers "basic rights and protections they deserve," and that their exclusion from wide-ranging exemptions, including for comparable app-based gig companies, could be attributed to animus rather than reason. [*See* Ch. 2, § 2.06[1].]

***U.S. District Court, Northern District of California Decision:***

**App-Based Drivers; Business-to-Business Exemption from "ABC Test".** On remand from the U.S. Court of Appeals, Ninth Circuit, the federal district court in *Lawson v. Grubhub. Inc.* (2023 N.D. Cal.) 88 Cal. Comp. Cases 444, held in relevant part that app-based food delivery service, Grubhub, Inc. (Grubhub), did not qualify for Labor Code section 2776(a) business-to-business exemption from application of ABC test to the driver's minimum

wage and overtime claims, because Grubhub did not show that the driver advertised or held himself out to the public as a provider of food delivery services, nor that he actually negotiated his own rates or had the ability to do so, and, therefore, Grubhub did not establish Labor Code section 2776(a)(8) and (10) criteria necessary for application of business-to-business exemption. [*See* Ch. 2, § 2.06[2][a].]

***Appeal Board En Banc Decisions:***

**Apportionment.** The Appeal Board, in *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal. Comp. Cases 741 (Appeals Board en banc decision) (Nunes I), held that vocational evidence may be used to address issues relevant to the determination of permanent disability and may be used to identify and distinguish industrial and nonindustrial factors, but it is not appropriate to substitute impermissible "vocational apportionment" in place of an otherwise valid medical apportionment. All factors of apportionment must be analyzed, irrespective of whether they resulted from pathology or asymptomatic prior conditions, or manifested in diminished earnings, work restrictions, or inability to perform job duties, and such analysis is required even when applicant is deemed not feasible for vocational rehabilitation. Discussion of Nunes II included as well. [*See* Ch. 7, § 7.41[3].]

**TABLES.** New table of cases and table of statutes are included.

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## VOLUME 1

| Revision | | |
|---|---|---|
| ☐ | Title page thru xxi | Title page thru xxi |
| ☐ | 1-9 | 1-9 thru 1-10.1 |
| ☐ | 2-29 thru 2-35 | 2-29 thru 2-36.1 |
| ☐ | 3-3 | 3-3 thru 3-4.1 |
| ☐ | 3-41 thru 3-69 | 3-41 thru 3-70.9 |
| ☐ | 4-21 | 4-21 |
| ☐ | 4-35 | 4-35 thru 4-36.1 |
| ☐ | 4-69 | 4-69 |
| ☐ | 5-15 thru 5-16.1 | 5-15 thru 5-16.1 |
| ☐ | 6-1 | 6-1 thru 6-2.1 |
| ☐ | 7-21 | 7-21 thru 7-22.1 |
| ☐ | 7-42.1 | 7-42.1 thru 7-42.2(1) |
| ☐ | 7-105 thru 7-106.1 | 7-105 thru 7-106.1 |
| ☐ | 7-121 | 7-121 thru 7-122.1 |
| ☐ | 7-133 | 7-133 thru 7-134.1 |
| ☐ | 8-1 thru 8-49 | 8-1 thru 8-57 |
| ☐ | 9-25 thru 9-31 | 9-25 thru 9-31 |
| ☐ | 10-15 | 10-15 thru 10-16.1 |
| ☐ | 10-48.1 thru 10-50.1 | 10-49 thru 10-50.1 |
| ☐ | 10-69 | 10-69 thru 10-70.1 |
| ☐ | 10-83 thru 10-89 | 10-83 thru 10-89 |
| ☐ | 11-1 thru 11-2.1 | 11-1 thru 11-2.1 |
| ☐ | 11-13 thru 11-23 | 11-13 thru 11-23 |
| ☐ | 11-77 thru 11-78.1 | 11-77 thru 11-78.1 |
| ☐ | 11-111 | 11-111 thru 11-112.1 |
| ☐ | 12-53 | 12-53 thru 12-54.1 |
| ☐ | 12-64.3 | 12-64.3 |
| ☐ | 12-109 | 12-109 thru 12-110.1 |

## VOLUME 2

| Revision | | |
|---|---|---|
| ☐ | Title page | Title page |
| ☐ | 13-4.3 thru 13-4.5 | 13-4.3 thru 13-4.5 |
| ☐ | 14-54.1 thru 14-54.5 | 14-54.1 thru 14-54.5 |
| ☐ | 15-101 | 15-101 thru 15-102.1 |

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|---|---|---|
| ☐ | 16-16.1 thru 16-17 . . . . . | 16-17 thru 16-18.1 |
| ☐ | 16-45 thru 16-71 . . . . . | 16-45 thru 16-72.1 |
| ☐ | 19-33 thru 19-35 . . . . . | 19-33 thru 19-36.1 |
| ☐ | 20-27. . . . . | 20-27 thru 20-28.1 |
| ☐ | TC-1 thru TC-99 . . . . . | TC-1 thru TC-101 |
| ☐ | TS-1 thru TS-53 . . . . . | TS-1 thru TS-53 |
| ☐ | I-1 thru I-91 . . . . . | I-1 thru I-91 |

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