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California Law of Employee Injuries and Workers' Compensation

Publication 270 Release 89

March 2019

HIGHLIGHTS

2018 Legislative Changes

- Legislative changes have been added.

2018 Regulatory Changes

- Recent developments have been added.

Cases

- Recent developments have been added.

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CALIFORNIA LEGISLATION.

California Peace Officer Acting Outside State. The legislature has amended Labor Code Section 3600.2 to authorize a peace officer's employer to accept workers' compensation liability for injuries sustained by one of its officers when engaging in the apprehension or attempted apprehension of law violators outside California. [See ch. 4, § 4.130[2].]

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Limitations Period for Commencement of Proceedings to Collect Dependency Death Benefits. The legislature has deleted the sunset clause of Labor Code Section 5406.7 that provides an extended statute of limitations for workers' compensation death benefits payable to survivors

of public safety officers who died as a result of work-related cancer or certain specified diseases. [See ch. 9, § 9.01[4].]

Insurer's or Licensed Rating Organization's Release of Requested Information to Governmental Agency. The legislature has amended Insurance Code Section 1877.3 to provide that a governmental agency in possession of information pertaining to possible workers' compensation insurance fraud must release that information, upon request by another authorized governmental agency, unless to do so would violate federal law or otherwise compromise an investigation. [See ch. 2, § 2.03[3].]

Individually Identifiable Information; Restricted Access. The legislature has amended Labor Code Section 138.7 to provide that individually identifiable information may be used by the Office of Self-Insurance Plans of the Department of Industrial Relations as necessary to carry out its duties, including evaluating the costs of administration, workers' compensation benefit expenditures, and solvency and performance of the public self-insured employers' workers compensation programs. [See ch. 1, § 1.12[2].]

Self-Insurer's Annual Report; AD's Annual Aggregated Summary. The legislature has amended Labor Code Section 3702.2 to provide that the AD may publish information regarding the costs of administration, workers' compensation benefit expenditures, and solvency and performance of public self-insured employers' workers' compensation programs. [See ch. 1, § 1.19.]

Acceptable Methods of Payment of Disability Indemnity Benefits. The legislature has amended Labor Code Section 4651 to authorize pilot programs to permit employers to pay disability indemnity ben-

efits via a prepaid card account. The statutory provisions authorizing and detailing these programs will be repealed on January 1, 2023. [See ch. 7, § 7.03[4], ch. 8, § 8.08[4].]

Unlawful Employment Practices; Discrimination and Harassment. The legislature has amended Labor Code Section 12940 to provide that an employee of an entity subject to this statute who is alleged to have engaged in any prohibited harassment may be held personally liable for any act in violation of Labor Code Section 12940(h). [See ch. 10, § 10.70[3][b], [4][a].]

Private Attorneys General Act; Construction Industry. The legislature has enacted Labor Code Section 2699.6 to except from the Private Attorneys General Act an employee in the construction industry with respect to work performed under a valid collective bargaining agreement in effect before January 1, 2025, that contains a grievance and binding arbitration procedure to redress violations that authorizes the arbitrator to award otherwise available remedies. The statute will be repealed on January 1, 2028. [See ch. 9, § 11.01[9].]

Labor Contracting; Port Drayage Services; Customer Liability. The legislature has enacted Labor Code Section 2810.4 requiring a customer that, as part of its business, engages or uses a port drayage motor carrier that is on a list established by the Division of Labor Standards Enforcement to perform port drayage services on the customer's behalf, to share with the motor carrier all civil legal responsibility and civil liability for port drayage services.

Treatment by Various Therapists and Counselors. The legislature has amended Labor Code Section 3209.8 to add professional clinical counselors to the list of therapists and counselors qualified to pro-

vide treatment to injured workers. [See ch. 5, § 5.04[1], [7], ch. 22, § 22.01[1][a].]

CALIFORNIA REGULATIONS. The following regulations have been added:

Injury Guideline. The Division of Workers' Compensation has amended 8 Cal. Code Reg. § 9792.22, setting forth the general approaches to be employed in using Medical Treatment Utilization Schedule regulations, and added 8 Cal. Code Reg. § 9792.24.5, adopting and incorporating by reference the traumatic brain injury guideline (ACOEM November 15, 2017). [See ch. 5, § 5.02[1], ch. 22, § 22.05[6][a].]

Official Medical Fee Schedule; Physician Fee Schedule. The Administrative Director has amended the following provisions relating to the Physician Fee Schedule component of the Official Medical Fee Schedule: [See ch. 22, § 22.05[2].]

Section 9789.12.1 Physician Fee Schedule: Official Medical Fee Schedule for Physician and Non-Physician Practitioner Services—For Services Rendered On or After January 1, 2014 [amend]

Section 9789.12.2 Calculation of the Maximum Reasonable Fee—Services Other than Anesthesia [amend]

Section 9789.12.6 Health Professional Shortage Area Bonus Payment: Primary Care; Mental Health [amend]

Section 9789.12.8 Status Codes [amend]

Section 9789.12.12 Consultation Services Coding—use of visit codes [amend]

Section 9789.13.2 Physician-Administered Drugs, Biologicals, Vaccines, Blood Products [amend]

Section 9789.16.1 Surgery—Global Fee [amend]

Section 9789.16.7 Surgery—Co-surgeons and Team Surgeons [amend]

Section 9789.18.1 Payment for Anesthesia Services—General Payment Rule [amend]

Section 9789.18.2 Anesthesia—Personally Performed Rate [amend]

Section 9789.18.3 Anesthesia—Medically Directed Rate [amend]

Section 9789.18.11 Anesthesia Claims Modifiers [amend]

Section 9789.19 Update Table [amend]

Section 9789.19.1 Table A [adopt]

CALIFORNIA CASES. The following cases have been added:

Published Cases

General Liability Insurance Policies; Negligent Hiring, Retention, and Supervision of Employees; “Occurrence” Defined. The California Supreme Court in *Liberty Surplus Insurance Co. v. Ledesma & Meyer Construction Co., Inc.* (2018) 5 Cal. 5th 216, has held that, when a third party sues an employer for negligent hiring, retention, and supervision of an employee who intentionally injures that third party, the suit alleges an “occurrence” under the employer’s commercial general liability policy. [See ch. 2, § 2.81.]

Settlements; Compromise and Release Agreements; General Release of Civil Liability. The court of appeal in *Camacho v. Target Corp.* (2018) 24 Cal. App. 5th 291, has held that the language contained in the addendum to the parties’ workers’ compensation compromise and release agreement did not constitute a general release of all of the plaintiff’s civil claims. [See ch. 29, § 29.01[2].]

WCAB Jurisdiction; Professional Athletes; Signing of Employment Contract. The court of appeal in *Tripplett v. W.C.A.B.* (2018) 25 Cal. App. 5th 556, has held that the employee, a football player, and his

agent were outside of California when they signed the employee's employment agreement with the Indianapolis Colts, since the evidence showed that the employee probably signed the contract in Indianapolis, and that his agent, who negotiated the contract from his office in California, faxed his signature from a telephone number in Buffalo, New York. [See ch. 3, § 3.22[2].]

Civil Actions; Injury AOE/COE; Coming and Going Rule; Required Vehicle Exception; Respondeat Superior. The court of appeal in *Newland v. County of Los Angeles* (2018) 24 Cal. App. 5th 676, has held that no substantial evidence supported a finding that an employee was driving in the course and scope of his employment at the time of an accident, because he was not required to use a personal vehicle that day. [See ch. 4, § 4.155[2][a].]

Employment Relationships; Tree Trimmers; Respondeat Superior. The court of appeal in *Jones v. Sorenson* (2018) 25 Cal. App. 5th 933, has held that a hirer did not refute the claim that she was a gardener's (and, therefore, an injured employee of the gardener's) employer and potentially liable under respondeat superior theory for the gardener's alleged negligence. [See ch. 3, § 3.49[5].]

Utilization Review; Exclusivity Rule; Reviewing Physician's Duty. The California Supreme Court in *King v. CompPartners, Inc.* (2018) 5 Cal. 5th 1039, has held that workers' compensation law "preempts tort claims against utilization reviewers hired by employers to carry out their statutory claims processing functions." [See ch. 5, § 5.02[2][d]; ch. 22, § 22.05[6][b][iv].]

Fraudulent Liens; Anti-Fraud Statutes; Constitutionality. The court of appeal in *Barri v. W.C.A.B.* (2018) 28 Cal. App. 5th 428, has held that the provisions

regarding notice to owners of stayed liens by the anti-fraud statutes, Labor Code Sections 4615 and 139.21, while imperfect, were not unconstitutional. [See ch. 30, § 30.22[1].]

Permanent Total Disability; Rating; Evidence. The court of appeal in *Department of Corrections and Rehabilitation v. W.C.A.B. (Fitzpatrick)* (2018) 27 Cal. App. 5th 607, has held that a finding of permanent total disability must be made in accordance with Labor Code Section 4660, which states that a finding and award of permanent total disability must be made "in accordance with the fact," as provided in Labor Code Section 4662(b). [See ch. 8, § 8.02[3].]

Employment Relationships; Employees vs. Independent Contractors; Wage and Hour Action. The court of appeal in *Garcia v. Border Transportation Group* (2018) 28 Cal. App. 5th 558, has held that the facts in evidence established that, pursuant to the ABC test set forth by the California Supreme Court in *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County* (2018) 4 Cal. 5th 903, the plaintiff was clearly an employee of the defendant. [See ch. 3, § 3.06[2].]

WCAB en banc decision

Qualified Medical Evaluators; Information to Be Given to Them; Ex Parte Communications. The Appeals Board en banc in *Suon v. California Dairies* (2018) 83 Cal. Comp. Cases 1803 (Appeals Board en banc opinion) has held that a dispute over what information to provide to a QME is to be presented to the Board if the parties cannot informally resolve it. [See ch. 22, §§ 22.06[3], 22.11[18].]

WCAB decisions denied writ of review

Caution: *The following entries are "writ denied" cases. Practitioners should pro-*

ceed with caution when citing to these cases and should also verify the subsequent history of these cases.

Supplemental Job Displacement Benefits; Inmates. The Appeals Board in *California Department of Corrections and Rehabilitation v. W.C.A.B. (Potter)* (2018) 83 Cal. Comp. Cases 1060 (writ denied) has held that an employee was not precluded under Labor Code Section 3370(e) from receiving a supplemental job displacement voucher by virtue of his status as an inmate of a state prison. [See ch. 35, § 35.01.]

Statute of Limitations; Date of Injury; Knowledge of Compensable Injury. The Appeals Board in *County of San Bernardino v. W.C.A.B. (Nelson-Watkins)* (2018) 83 Cal. Comp. Cases 1282 (writ denied) had held that an employee must have actual knowledge, based on medical opinion, that his or her medical condition was *caused by* employment. [See ch. 24, § 24.03[6][b].]

Injury AOE/COE; Bunkhouse Rule. The Appeals Board in *Velasquez v. W.C.A.B. (Rodela)* (2018) 83 Cal. Comp. Cases 1715 (writ denied) has held that an

employee suffered injury AOE/COE while working as a laborer and living in a trailer on his employer's property, based on application of the Bunkhouse Rule, as described in *Vaught v. State of California*. [See ch. 4, § 4.62[2].]

Permanent Disability; Apportionment; Benson Exception. The Appeals Board in *U.S. Fire Insurance Co. v. W.C.A.B. (Herrera)* (2018) 83 Cal. Comp. Cases 1829 (writ denied) has held that medical evidence indicating that a worker's psychiatric and gastrointestinal injuries were caused by his orthopedic injuries did not justify apportionment of disability caused by the psychiatric and gastrointestinal injuries in line with orthopedic apportionment because causation of injury is not equivalent to causation of permanent disability [See ch. 8, § 8.07[2][d][ii].]

Forms. The Subpoena and Subpoena Duces Tecum forms have been updated in Appendix E. (See § F4.01 and § F4.02, respectively).

Tables and Schedules. Tables 14 and 17 have been updated in Appendix E.

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Publication 270, Release 89, March 2019

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