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California Law of Employee Injuries and Workers' Compensation

Publication 270 Release 87 March 2018

HIGHLIGHTS

2017 Legislation and Regulatory Changes

- Recent developments have been added.

Cases

- Recent developments have been added.

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CALIFORNIA LEGISLATION. The following legislative changes have been incorporated:

Suspension of Providers. The legislature has amended Labor Code §§ 139.21, 4603.2, and 4615 to provide that liens of medical providers convicted of fraud remain stayed until the end of the suspension proceedings and that the same stay and suspension procedures apply to entities controlled by persons charged with fraud. [*See* § 30.22[1].]

Officers and Directors. The legislature has amended, repealed, and added Labor Code §§ 3351 and 3352 to reduce from 15 percent to 10 percent the ownership threshold for corporate officers and directors to opt out of workers' compensation coverage. [*See* § 3.89.]

Emergency Treatment. The legislature

has amended Labor Code § 4610 to extend to 180 days, from 30 days, following the provision of emergency treatment services the time in which requests for payment for treatment must be submitted to the employer or its insurer or claims administrator. [*See* § 5.06.]

Workers' Compensation Coverage. The legislature has repealed Welfare and Institutions Code § 12302.21, meaning that state government will no longer assume responsibility for providing workers' compensation coverage for employees of nonprofit and proprietary agencies who provide in-home supportive services pursuant to contracts with counties. [*See* § 3.36[3].]

CALIFORNIA REGULATIONS. The following cases have been added:

Suspension of Provider. The DWC has promulgated emergency regulations, 8 Cal. Code Reg. §§ 9788.1–8 Cal. Code Reg. 9788.6, regarding the procedure for suspending a physician, practitioner, or provider from participating in the workers' compensation system, including notice and hearing requirements. [*See* § 30.22[1].]

Lien Claims; Filing and Service. The DWC has amended a regulation, 8 Cal. Code Reg. § 10770, setting forth the requirements for filing and service of lien claims, to delete the prohibition against including supporting documentation when filing a lien claim. [*See* § 30.20[1].]

Self-Insurance. The DWC has amended various regulations, 8 Cal. Code Reg. §§ 15205, 15251, 15422, regarding self-insurance. [*See* § 2.11[1], [2], [3].]

Return-to-Work Supplement. The DWC has amended the regulation, 8 Cal. Code Reg. § 17304, setting forth the deadline to apply for the return-to-work supplement, limiting it to within one year from the date the voucher was served on the individual, except in the case of an individual who was issued a voucher prior to December 1, 2015, for an injury occurring on or after January 1, 2013, in which case the deadline is no later than one year from the effective date of this provision. [*See* § 7.02[4][d][iii].]

FEDERAL CASES. The following cases have been added:

Federal Court Jurisdiction; Removal. The U.S. District Court, Central District of California, in *Camacho v. JLG industries, Inc.* (2017) 82 Cal. Comp. Cases 1009 (C.D. Calif. 2017) has held that the plaintiffs' claim against the defendant did not arise under California's workers' compensation laws, and, at the time of removal, the workers' compensation insurer had not intervened in connection with its subrogation claim, so the defendant's removal of the action was proper and not barred. [*See* § 21.03[5].]

Summary Judgment; Fair Employment and Housing Act. The U.S. District Court, Central District of California, in *Barajas v. Consolidated Disposal Service* (2017) 82 Cal. Comp. Cases 1160 (C.D. Calif. 2017), granting the defendant's motion for summary judgment, has held that there was no genuine dispute as to any material fact regarding the plaintiff's claims for relief, when the defendant carried its initial burden of demonstrating absence of a genuine issue of material fact on all of the plaintiff's claims, and the plaintiff failed to carry its burden of producing sufficient evidence to create a genuine issue of material fact on any of his claims. [*See* § 10.73[1].]

Federal Court Jurisdiction; Settlements; Dismissal of Case; Intervention. The U.S. District Court, Northern District of California, in *Schulte v. Aramark Services, Inc.* (2017) 82 Cal. Comp. Cases

1170 (N.D. Calif. 2017) has held that, when the plaintiff/applicant had settled her claims against a third party tortfeasor, and the court then entered an order dismissing her action with prejudice, thereby divesting the court of jurisdiction over the case, and the plaintiff's employer, who had received adequate notice of the settlement and the pending dismissal of case, now sought to vacate the dismissal and be allowed to intervene to recover workers' compensation benefits paid to the plaintiff/applicant, neither the parties nor the court had an obligation to delay the dismissal until the employer intervened. [*See* § 11.25[2].]

Medical Liens; Stays of Liens; Due Process. The U.S. District Court, Central District of California, in *Vanguard Medical Billing Management, Inc. v. Baker* (2017) 82 Cal. Comp. Cases 1368 (C.D. Calif. 2017) has held that Labor Code Section 4615, as amended in 2017 by AB 1422, does not provide adequate due process notice or right to a meaningful hearing before or after it deprives lien claimants of a protectable interest. [*See* § 30.22[1].]

CALIFORNIA CASES. The following cases have been added:

Published Cases

Petitions for Writ of Review; Time to File; Final Awards. The court of appeal in *Hikida v. W.C.A.B.* (2017) 12 Cal. App. 5th 1249, has held that an employee's petition for writ of review was timely filed, when the Appeals Board's opinion was not a "final decision" with respect to an apportionment issue, since it remanded the matter for a further hearing on that issue. [*See* § 34.10[3].]

Injury AOE/COE; Going and Coming Rule; Transit for Benefit of Employer or Employment. The court of appeal in *Zhu v. W.C.A.B.* (2017) 12 Cal. App. 5th 1031, has held that an employee, employed by a state agency as a home caretaker, who provided a benefit to her employer by riding her bicycle from one home caretaker job to another, thereby typically doing two such jobs per day, and was injured in a collision with an automobile, was eligible for workers' compensation benefits for injuries from the collision. [*See* § 4.155[2][b].]

Subsequent Injuries Benefits Trust Fund; Commencement of Benefits. The court of appeal in *Baker v. W.C.A.B. (Guerrero)* (2017) 13 Cal. App. 5th 1040, has held that Subsequent Injuries Benefits Trust Fund benefits commence at the time the employer's obligation to pay permanent disability benefits begins. [*See* § 31.20[4][c].]

Summary Judgment; Privette Doctrine; Retained Control; Burden of Proof. The court of appeal in *Alvarez v. Seaside Transportation Services* (2017) 13 Cal. App. 5th 635, has held that the employers met their burden as the moving parties on summary judgment and the plaintiff did not raise triable issues of material fact as to whether the *Privette* doctrine did not apply because the defendants retained control over safety conditions at the worksite and affirmatively contributed to the plaintiff's injuries. [*See* § 3.133.]

Employment Relationships; Misclassification of Workers. The court of appeal in *Espejo v. The Copley Press, Inc.* (2017) 13 Cal. App. 5th 329, has held that the indicia set forth in *S.G. Borello & Sons* to distinguish between employees and independent contractors in workers' compensation cases were equally applicable in the present case involving various wages and hours issues, but not workers' compensation. [*See* § 3.61.]

Employment Relationships; Employee vs. Independent Contractor; Wage and Hour Claims. The court of appeal in *Lin-*

ton v. DeSoto Cab Co. (2017) 15 Cal. App. 5th 1208, has held that the applicability of *S.G. Borello & Sons* "and its taxicab-related progeny" is not limited to workers' compensation or unemployment insurance benefits, but rather applies equally to cases, such as the present one, involving wage and hour claims based on Labor Code Sections 201, 203, and 221. [*See* § 3.07[5].]

Exclusive Remedy Rule; Fair Employment and Housing Act; Retaliation; Disability Discrimination; Intentional Infliction of Emotional Distress; Assault. The court of appeal in *Light v. Department of Parks and Recreation* (2017) 14 Cal. App. 5th 75, has held that, as to the defendant California Department of Parks and Recreation, triable issues of material fact precluded summary adjudication of the plaintiff's retaliation claim, but not her disability discrimination claim, and the plaintiff's claim for failure to prevent retaliation or discrimination, therefore, survived, based on her retaliation claim, while, as to the defendant employees of the Department, the workers' compensation exclusive remedy rule did not bar the plaintiff's complaint for intentional infliction of emotional distress, and the plaintiff had raised triable issues of fact on her assault claim against one individual defendant. [*See* § 10.74.]

Fair Employment and Housing Act; Nonemployee Sexual Harassment. The court of appeal in *M.F. v. Pacific Pearl Hotel Management* (2017) 16 Cal. App. 5th 693, has held that the facts were sufficient to state claims under the Fair Employment and Housing Act for sexual harassment by a nonemployee, since Government Code Section 12940(j)(1) provides that, "An employer may . . . be responsible for the acts of nonemployees, with respect to sexual harassment of employees . . . where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action," and for failure to prevent such harassment, Government Code § 12940(k). [*See* § 10.70[3[b]].]

California Self-Insurers' Security Fund; Actions Against Clients of Insolvent Self-Insurer. The court of appeal in *American Cargo Express, Inc. v. The Superior Court of Sacramento County* (2017) 16 Cal. App. 5th 145, has denied an insolvent self-insurer's clients' petition for writ of mandate and/or prohibition, when the Self-Insurers' Security Fund sued the insolvent self-insurer's clients to recover its costs and liabilities. [*See* § 2.11[5].]

Going and Coming Rule; Special Errand Exception. The court of appeal in *Morales-Simental v. Genentech, Inc.* (2017) 16 Cal. App. 5th 445, has held that the plaintiffs failed to establish triable issues of material fact supporting a special errand exception sufficient to overcome summary judgment, when an employee of the defendant was involved in a vehicle collision while driving to the employer's site at approximately 3:35 a.m., which killed a passenger in another car. [*See* § 4.157[2].]

Unpublished Case

Statute of Limitations; Delayed Discovery Rule; Separate and Distinct Injuries. The court of appeal in *Schnueneman v. Lively* (2017) 82 Cal. Comp. Cases 735 (court of appeal unpublished opinion) has held that the plaintiff's complaint sufficiently alleged facts triggering a potential application of the latent-disease exception to the Code of Civil Procedure Section 340.8 statute of limitations, and the defendant failed to negate this exception as part of his initial burden on summary judgment. [*See* § 24.02[1].]

WCAB en banc decision

Lien Claims; Timely Filed Declarations. The Appeals Board en banc in *Rodriguez v. Garden Plating Co.* (2017) 82 Cal. Comp. Cases 1390 (Appeals Board en banc opinion) has held that the liens in the present cases had, pursuant to Labor Code Section 4903.05(c), until July 1, 2017, to file the required declaration, that July 1, 2017, fell on a weekend, and liens in the present cases were filed on July 2 and 3, 2017, that, on August 14, 2017, the DWC announced its intention to dismiss the liens in the present cases for failure to timely file the required declarations, that, on October 3, 2017, the DWC announced its intention to "lift the notation" in EAMS "that indicates that all liens with Labor Code section 4903.05(c) declarations filed on July 2 and July 3 were dismissed," that the DWC announcement continued, "Because July 1 fell on a weekend, workers' compensation administrative law judges will adjudicate the timeliness of lien declarations filed on July 2 and July 3 on a case-by-case basis. DWC's reversal of the dismissal notation is not a decision or order on the timeliness of the declarations and shall not be construed as such," that the DWC's removal of the notation as to dismissal means that the lien claimants are not aggrieved and their petitions for reconsideration are moot and, thus, must be dismissed. [*See* § 30.20[1].]

WCAB decisions denied writ of review

Caution: *The following entries are "writ denied" cases. Practitioners should proceed with caution when citing to these cases and should also verify the subsequent history of these cases.*

Workers' Compensation Fraud; Suspension of Benefits. The Appeals Board in *Intercare Holding Insurance Co. v. W.C.A.B. (Smith)* (2017) 82 Cal. Comp. Cases 602 (writ denied) has denied the employer's request that the employee's benefits be suspended, based on workers' compensation fraud for his allegedly false claim that he did not play in a softball league during the period of claimed temporary disability, when the employer offered no evidence that the employee was convicted of workers' compensation fraud or that he obtained any benefits as a result of his alleged fraud. [*See* Ch. 2, § 2.03[2].]

Medical Treatment; Independent Medical Review; Appeals. The Appeals Board in *Churnside v. W.C.A.B.* (2017) 82 Cal. Comp. Cases 754 (writ denied) has held that the WCJ properly remanded the case to the AD pursuant to Labor Code Section 4610.6(i) to assign the parties' medical treatment dispute to a different IMRO after the WCJ found that the original IMR determination, which upheld a UR decision, was invalid under Labor Code Section 4610.6(h) because it was based on a plainly erroneous findings of fact. [*See* § 5.02[2][d].]

Medical Treatment; Utilization Review and Independent Medical Review; Binding Agreement to Utilize Agreed Medical Evaluator. The Appeals Board in *Federal Express Corp. v. W.C.A.B. (Payne)* (2017) 82 Cal. Comp. Cases 1014 (writ denied) has held that it had jurisdiction to award medical treatment to an employee in the form of an extension of a weight loss program pursuant to a 2003 C&R in which the parties stipulated to utilize an AME to determine the medical necessity for the employee's claimed industrial medical treatment, including weight loss treatment, with the Board stating that the stipulation to utilize the AME was not superseded or nullified by statutory changes implementing UR and IMR. [*See* §§ 5.02[2][d], 22.05[6][b][iv].]

Medical Treatment; Utilization Re-

view; Medical Provider Networks. The Appeals Board in *Willoughby v. W.C.A.B.* (2017) 82 Cal. Comp. Cases 1026 (writ denied) has held that a request for authorization to provide medical treatment in the form of prescription medications and a pain program by the employee's MPN treating physician was not exempt from the UR/IMR process set forth in Labor Code Section 4610 et seq. [*See* §§ 5.02[2][c], 5.03[5].]

Post-Termination Claims. The Appeals Board in *Marroquin v. W.C.A.B.* (2017) 82 Cal. Comp. Cases 903 (writ denied) has held that an employee's claim for an industrial back injury was barred by the post-termination defense in Labor Code Section 3600(a)(10) because he did not file a claim for compensation until after the employer had terminated his employment, and he failed to prove by a preponderance of the evidence that any exception to the statutory bar to post-termination claims applied. [*See* § 11.02[3][a].]

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