



BRADFORD & BARTHEL, LLP

MICHAEL PEABODY, ESQ.

The Post-Termination Defense:

USE IT



OR LOSE IT!



What is the Post-Termination Defense?

- Provided for by Labor Code 3600(a)
- A Basic Roadmap is:



- If you get fired and you later on decide to claim a work comp injury, before you get paid work comp, you've got to meet the burden of proof by a preponderance of the evidence to prove at least one of four things:



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3

What is the Post-Termination Defense?

What Injured Workers Have to Prove:



1. The employer knew about it before they fired you or laid you off.
2. You have medical records from *before* you were fired or laid off that "contain evidence" of the injury.
3. The date of injury was after you were told you would be let go, but before the door shut your last day. (LC 5411)
4. The date of injury is subsequent to notice of layoff or termination (LC 5412)



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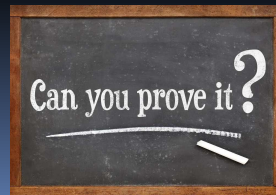
4

What is the Post-Termination Defense?

What Injured Workers Have to Prove:

3. *The date of injury was after you were told you would be let go, but before the door shut your last day. (LC 5411)*
4. *The date of injury is subsequent to notice of layoff or termination (LC 5412)*

(I know these last two sound the same, but we'll get into that a bit later.)



5

What is the Post-Termination Defense?

- **PRESENTING: THE STATUTE!!!!**
 - Provided for by Labor Code 3600(a) (10) Except for psychiatric injuries governed by subdivision (e) of Section 3208.3, where the claim for compensation is filed after notice of termination or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply:



6

What is the Post-Termination Defense?

- A. The employer has notice of the injury, as provided under Chapter 2 (commencing with Section 5400), prior to the notice of termination or layoff.
- B. The employee's medical records, existing prior to the notice of termination or layoff, contain evidence of the injury.



7

What is the Post-Termination Defense?

- Provided for by Labor Code 3600(a)
 - C. The date of injury, as specified in Section 5411, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.
 - D. The date of injury, as specified in Section 5412, is subsequent to the date of the notice of termination or layoff.



8

What is the Post-Termination Defense?

- Labor Code 3600(a) (continued)
 - For purposes of this paragraph, an employee provided notice pursuant to Sections 44948.5, 44949, 44951, 44955, 44955.6, 72411, 87740, and 87743 of the Education Code shall be considered to have been provided a notice of termination or layoff only upon a district's final decision not to reemploy that person.



9

What is the Post-Termination Defense?

So here is what we know:

1. A post-termination is a statutory defense with a clear definition.
2. It is an affirmative defense that is raised by the defendant.
3. The applicant has to overcome this affirmative defense by a preponderance of the evidence.



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Post-Termination and Psyche Claims

4. Psyche claims have a different set of rules.
(LC 3208.3) We will get into that later.



11

What is a Termination?

Generally defined as any *employer-initiated* separation.

Voluntary resignation or retirement usually is not considered termination unless . . . The employee was forced to resign or given a choice to resign or be fired.



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12

What is a Termination?

A termination has to be a final or “indefinite” employment separation – doesn’t count if the employee is seasonal.

Principle: The clearer the fact of termination, the clearer the affirmative defense.



13

What is a Termination?

Job Abandonment = Constructive Termination?

A tricky situation – particularly if the employee later claims that they left because they had to go to the doctor.

A way to *mitigate* this problem is to have a clear directive on absences in the employee handbook, and send a letter to an employee who isn't showing up. (((Certified mail)))



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14

Okay, what's the difference between 5411 and 5412?

5411 – Date of Injury is subsequent to the date of the notice of termination or layoff, but *prior to* the effective date of the termination or layoff.

The date of injury is the day on which occurred the alleged incident or exposure.



Okay, what's the difference between 5411 and 5412?

In 1973 both were amended.

5411 now says, “The date of injury, except in cases of occupational disease or cumulative injury, is that date during the employment on *which occurred the alleged incident or exposure*, for the consequences of which compensation is claimed.”



Okay, what's the difference between 5411 and 5412?

In 1973 both were amended.

5412 now says, "The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee *first suffered disability therefrom* and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment."



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17

Okay, what's the difference between 5411 and 5412?

How it works – Explained in *Save Mart Supermarkets (PSI) v. WCAB (2007)* – Applicant fell and injured his wrist but did not report it for 19 months until he needed wrist surgery. Court found that the injury was not barred because he did not seek compensation and had no compensable consequences until he needed wrist surgery.



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18

How to line up for the defense



1. Terminate the employee. Not “wait and see what happens.” Not “I told him not to come in Monday.” Not “I told him that if he went to Europe to visit his mother he wouldn’t have a job when he got back so he should know better.” Terminate.

(Get an employment attorney involved if you’ve got questions about terminating someone – situations can be complex.)



How to line up for the defense

2. Document everything. Witness names, performance issues, why the person was fired.



(Applicants may try to claim that the termination was in retaliation for claiming an injury (even if you don’t know about it) so get your defenses ready before you fire them. If they did claim an injury, then the post-term defense doesn’t apply.)



How to line up for the defense

3. Separation agreement – have an employment attorney draft a letter that both parties can sign (if that will work) that indicates no injuries at work in addition to other provisions.

Se (Note: If a person claims that they signed the letter under duress, and did have an injury, the letter will not likely be enough to prevent a claim but may help establish the post-term defense, which is our interest here.)



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21

How to line up for the defense

4. Severance Agreement - One thing to try (please consult your lawyer about it) would be to terminate the employee, *then* offer a severance package in return for the letter which they can review with an attorney (or whatever) and send back to you within a specified number of days. That way they will have a hard time claiming duress or that they had “forgotten” an injury because “everything happened so fast.”



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22

How to line up for the defense

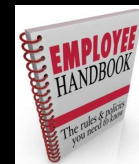
5. Timelines for notifying an employee that they are going to be terminated vary based on union contracts, employee handbook, or other legal obligations. It is amazing how many applicants suddenly remember CT claims and have specifics when they are informed that they will be terminated in 60 days.



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23

How to line up for the defense



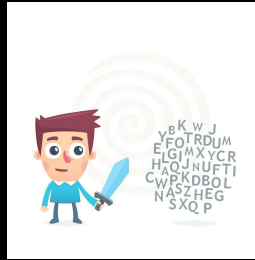
6. Make sure that employees understand how to report a workers' compensation injury to an authorized person. Put it in the lunchroom, in the employee handbook, remind them about it at meetings where they sign in. It doesn't need to be highlighted (you know, *the power of suggestion*) but they should have a clear understanding so they can't claim that telling their co-worker is the same thing.



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24

War Story



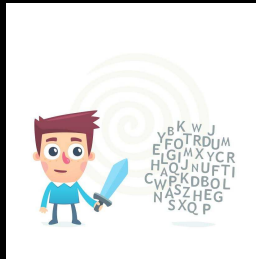
Sam was an account executive who was terminated from employment. His (now former) employer tells him to come back for his check in an hour or two. Applicant goes to his car and sits there for an hour. Then he starts to walk back in and passes out in the parking lot.



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25

War Story



But if he hadn't settled for a nominal sum at deposition, we would have raised a post-term defense and taken the case to AOE/COE trial on the legal issues of

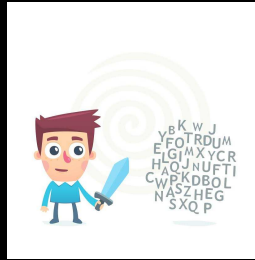
1. post-term; and
2. employment.



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26

War Story



The alleged injury occurred after an effective termination. He was no longer an employee and the fact that applicant could come back in to get his check didn't mean he was suddenly an employee again.



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27

Post-Termination Psyche

LC 3208.3(e) – An applicant is not entitled to compensation for a psyche injury claim filed after receipt of notice of termination or layoff, and claimed to have occurred before that notice,

UNLESS . . .



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28

Post-Termination Psyche

The *employee* proves that the actual events of employment were the predominate cause of the injury;

AND



Post-Termination Psyche

UNLESS Predominant Cause AND . . .

One of the **EXCEPTIONS** to the rule applies.

1. Injury caused by "sudden and extraordinary event of employment."



Post-Termination Psyche

UNLESS Predominant Cause AND . . .

One of the **EXCEPTIONS** to the rule applies.

2. An authorized employer representative was aware of the injury **BEFORE** the notice;



Post-Termination Psyche

UNLESS Predominant Cause AND . . .

One of the **EXCEPTIONS** to the rule applies.

3. Evidence of the psyche injury is contained in medical records in existence prior to the notice



Post-Termination Psyche

UNLESS Predominant Cause AND . . .

One of the **EXCEPTIONS** to the rule applies.

4. The trier of fact makes a finding of sexual or racial harassment.



Post-Termination Psyche

UNLESS Predominant Cause AND . . .

One of the **EXCEPTIONS** to the rule applies.

5. The applicant's date of injury was after notice of termination or layoff but before the effective date of termination or layoff.



Post-Termination Psyche

UNLESS Predominant Cause AND . . .

Note: Post-termination psyche cumulative trauma claims can be barred even though post-term physical injury CT claims may still be pursued.



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35

Good Faith Personnel Action Defense

If an employer can prove that the applicant's psyche injury was "substantially caused" (35% of the psyche injury) by a good-faith personnel action, like a legitimate layoff or termination, the claim may be barred.

Labor Code 3208.3(h)



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36

Good Faith Personnel Action Defense

Where does the 35% figure come from?

For the purposes of this section, "substantial cause" means at least 35 to 40 percent of the causation from all sources combined. – LC 3208.3(b)(3)



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37

Good Faith Personnel Action Defense

Why is it harder for applicants to make a post-term psyche claim? (Hint: It's in the law!)

LC 3208.3(c) **It is the intent of the Legislature** in enacting this section to establish **a new and higher threshold** of compensability for psychiatric injury under this division.



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38

Good Faith Personnel Action Defense

When can you use this defense?

- Even if there was just a rumor of a layoff or termination, argue that there was “constructive” notice of termination.
- GFPA isn’t the same as a post-term defense – it is a different thing – since it can apply to any good faith personnel action, so don’t forget to apply this defense!



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39

Good Faith Personnel Action Defense

How it works:

- Once you can show that 35-40% of the psyche issue is due to GFPA, employer can prove the actual events of employment were
 - a. non-discriminatory and
 - b. in good faith.



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40

Good Faith Personnel Action Defense

Parts of a Good Defense:

1. A good employer witness (if you don't have an employer witness, it can be difficult to prevail).
2. Show the action was following a pre-existing written policy like the personnel handbook.
3. Part of a seniority or merit system.



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41

Good Faith Personnel Action Defense

Note: This can be related to a 132a action, which requires similar defenses – business necessity, decision due to things other than the fact that the employee filed a work comp claim, employer could not reasonably accommodate the employee's disability, etc.

Employers concerned about a potential 132a claim should consult with their employment law counsel before taking employment action.



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42

What Applicant Attorneys Tell Their Clients To Avoid Post-Term Defenses

(Derived from WorkComp Central – “Steps to Avoid the Post-Termination Defense” – 4/11/04)

1. If you get hurt, see a doctor no matter how minor you think it is and keep the doctor’s bill or other documentation.
2. Be sure to demand a claim form from your employer. (They can’t deny you a claim form and it’s not up to them to decide whether you got hurt.) If they don’t give you a form, document the fact in a memo to them.



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43

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3. Think of other evidence that will aid in substantiating your claim (such as phone records)
4. Write down the names of witnesses to the accident or the reporting of the accident who can testify later.
5. When in doubt hire a lawyer.

“Documentation is your friend.”



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44

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45

A word about the 60 day rule

If an employer gives notice of termination or layoff but doesn't follow up within 60 days, it doesn't count. If employers try to get around this by frequently providing notice without actually acting on it, it can be considered a bad faith personnel action in which case the defense won't apply.



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46

Case Law

1. If notice of injury happened at the same time as the notice of termination, the injury is not barred by LC 3600(a)(10) – *Dover v. Fresh Start Bakeries, Inc.* (2006) Cal. Wrk Comp. P.D. LEXIS 53
2. A union rep is not an agent or representative of the employer for purposes of reporting an injury. *UPS v. WCAB (White)* (1999) Cal Comp. Cases 1369 (unpublished)



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47

Case Law

An employee was told that he was going to be terminated because he was seen speeding in a company vehicle. The employer dispatched another driver to bring the to-be-terminated employee 50 miles home, during which time the driver passed out and hit a large tree severely injuring the guy who was speeding. The court found that even though he was going to be fired, the post-term defense didn't apply since he was still an employee at the time of the accident. (*Charter Communications v. WCAB (Medel)* (2014) 79 CCC 81 (writ denied))



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48

Case Law

The Labor Code only requires evidence of an injury, not that it was medically addressed as a workers' comp injury. *Marquez Auto Body et al., v WCAB (Kafka)*(1996) 61 CCC 408 (writ denied)

(An employee who treated on a non-industrial basis before he knew he would be terminated. The court said that the idea is that the post-term defense will not apply in cases where applicant doesn't know the cause of injury, doctor fails to mention it, or the history is incomplete.)



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49

Case Law

Once a post-termination defense is raised, then the applicant has the burden of proving one of the exceptions by a preponderance of the evidence. If the applicant does not put on a case, defendant should argue that the applicant failed to meet its burden of proof. Treatment to the same region of the body is not the same as injury. (Example: *Bonet v. Honda of Oakland* (2011))



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50

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51

Summary

Physical Injury Claims LC 3600(10) and Post-Term Psyche Claims LC 3208.3 can bar recovery unless:

1. Employer has notice of the injury
2. Medical record, existing prior to the notice of termination
3. Date of injury is after the notice of termination or layoff but before termination or layoff (60 days) LC 5411
4. Date of injury is after the notice of termination, LC 5412 (Find out about an old injury later – injury + knowledge.)



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52

Summary

Strategy:

1. Raise Post-Term Defense Early and Often
2. Get witnesses, documents, and other evidence in order.
3. At deposition and in discovery, confirm dates of injury and knowledge.
4. Subpoena records.
5. Prepare to litigate the issue.



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53



- **Contact Information:**
 - Michael D. Peabody - B&B Tarzana
mpeabody@bradfordbarthel.com
 - Office: (818) 654-0411
 - Cell: (818) 212-1587



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54