

# Getting Prepared for the New Normal: What to Expect as the Pandemic Subsides

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- Nearly 100 Writs of Review
- Over a dozen Supreme Court Petitions for Review



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## It's Only a Virus! (How Bad Can It Be?)

**lack of oxygen and widespread inflammation caused by COVID-19 can damage**  
kidneys  
liver  
heart  
brain  
other organs



severe pneumonia = lung scarring/long-term breathing problems

Increases risk of future problems: heart attack, stroke, kidney disease.

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## Governor Issues Rebuttable Presumption Applicable Through July 5

- ▶ order signed May 6



What does it do?

- ▶ creates a broad *rebuttable presumption* that COVID-19 claims are aoe/coe
- ▶ applies to class of workers larger than "essential" employees

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## What does it say?



CONFUSION:

- ▶ contradictory language about when it applies
- ▶ EEs with DOIs between 3/19 and 5/5 will need to jump through some additional hoops not req'd of DOIs 5/6 - 7/5/20 (the tentative end date)

Applicable to DOI occurring through 60 days following order (5/6)

- ▶ thus, definitely applies to DOI from May 6, 2020 thru July 5, 2020
- ▶ later paragraphs say EEs can get TD for COVID-19 claims if diagnosed or tested positive between March 19 and May 5...  
...if they get a physician's certification by 5/21 stating when they were unable to work due to COVID-19
- ▶ appears to give retroactive application back to March 19, 2020 (We discuss TD in greater detail below.)

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## What does it say?

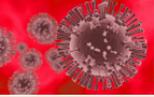
- ▶ only applies to EE who worked at their job site at ER's "direction"



- ▶ does not apply to employees who only work from home
- ▶ no limitation to "essential workers" meaning?  
=applies to all types of businesses

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## What does it say?



- ▶ EE must have a positive test result/diagnosis of COVID-19 w/in 14 days of performing work for the employer
- ▶ diagnosis must be by "a physician who holds a physician and surgeon license issued by the California Medical Board."
- ▶ only has a diagnosis and not a positive test result?  
MUST confirm the diagnosis w/testing w/in 30 days from date of diagnosis

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## Good news!

Apportionment lives!



LC 4663 and 4664 apply to *any* PD stemming from COVID-19 diagnosis (a very big deal given all the potential contributing non-aoe/coe conditions)

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## How quickly?



- ▶ must accept/deny within 30 days
- ▶ clock starts ticking when claim form is filed (don't forget *Honeywell...not* "reasonably certain")
- ▶ not denied w/in 30 days = "presumed compensable"

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## How quickly?

- ▶ can only be rebutted with evidence that is “discovered subsequent to the 30-day period.”

SURPRISE: it does not say “evidence that could have been discovered” during the initial 30-day timeframe



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## Meaning?



discover new evidence after initial 30 days?  
=  
may use to rebut presumption



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## TD

Hopefully EE won't be out of work too long...  
Got paid sick leave benefits available in response to COVID-19  
=  
must be exhausted before TD  
or



Labor Code 4850 benefits  
(public safety officers)  
may begin



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## Hopefully EE won't be out of work too long...

Disabled?  
When does TD begin?  
NOW  
(no "waiting period")

But then “how does EE qualify for TD or LC 4850 benefits?”

Let's find out...



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## “how does EE qualify for TD or LC 4850 benefits?”



- 1) must be certified TD w/in first 15 days after initial diagnosis  
+  
be recertified for TD every 15 days thereafter

“certify–every–15 days” must occur for first 45 days of the claim  
OR...



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## “how does EE qualify for TD or LC 4850 benefits?”

- 2) if tested positive or a positive diagnosis between 3/19–5/5, must obtain TD certification w/in 15 days of May 6

HUH?

IF DOI is March 19 – May 5,  
THEN must get TD cert by May 21, 2020



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### Who can certify for TD/LC 4850?



only "a physician holding a physician and surgeon license issued by the California Medical Board."



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### 30 days have passed?

Don't stop discovery!

REMEMBER: even if claim is presumed compensable, subsequently discovered evidence can rebut the presumption



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DIR is instructed to waive collection on any death benefit payment due pursuant to Labor Code section 4706.5 arising out of claims covered by Executive Order

Meaning?  
Death case?  
No one entitled to dependency death benefit?  
=  
DIR/General Fund gets NOTHING

How much saved?  
equal to the **total dependency** payable to a **surviving spouse**



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### Any other death benefit savings?

No dependents?

Accrued and unpaid compensation (TD/PD)?  
=  
DIR/General Fund gets NOTHING



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### YAWN!

Who cares...?

It's only for a few months...

RIGHT?



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### NOPE!

Despite length listed on Exec. Order will have far-reaching (expensive) effects

There WILL be death claims  
There WILL be huge medical complications resulting in MASSIVE medical costs



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## The Gov. Has Overstepped!

Strong constitutional issues!  
(confirmed by CAAA concerns)



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## Who is supposed to draft the laws?

Legislature

Problem: "separation of powers" re

- 1) presumption
- 2) reduction from 90 to 30 days

Expect a fight!



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## TAKEAWAYS

- ▶ Gov wants ERs to lean toward accepting COVID-19 claims as
- ▶ CA gradually reopens during the next two months
- ▶ Accept every claim?




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## What can ERs do?

Do a thorough factual investigation from the outset of the claim

Build a timeline of

- ▶ when the applicant worked
- ▶ when they stopped working
- ▶ when the infection occurred
- ▶ when other possible exposures may have occurred




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## What can ERs do?

- ▶ Ask EE about other potential sources of exposure
  - family members
  - friends
  - shopping trips
  - recreation (hiking, walking, bike paths, etc).




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## What can ERs do?

- ▶ Ask ER about use of protective gear
  - social distancing
  - masks
  - gloves
  - sanitizers
  - disinfectant
- ▶ Did ER enforce use of those tools




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## What can ERs do?

Issue subpoenas for medical records from

- urgent care clinics
- personal physicians
- hospitals



- ▶ Pay attention to available contact tracing data
- ▶ Performing medical canvassing if one does not know exactly where the applicant has treated (suspicious if EE can't tell you!)

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## 30 days have passed?

Don't stop discovery!

REMEMBER: even if claim is presumed compensable, subsequently discovered evidence can rebut the presumption

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## TAKEAWAY



It's not forever (it just seems that way!)  
GOOD NEWS: expires 7/5

BAD NEWS: lots of legislation creeping through the legislature at this very moment

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## Assembly Bill 664:

would create a conclusive presumption that COVID-19 is aoe/coe for:

- ✓ firefighters
- ✓ law enforcement officials
- ✓ nurses

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## Assembly Bill 196:

would create a conclusive presumption that COVID-19 is an occupational disease for any other worker identified as "essential" in the gov's stay-at-home order

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## Senate Bill 1159:

would create a rebuttable presumption for public sector and private sector workers who are "employed to combat the spread of COVID-19."

- declares intent that these workers be explicitly identified "in order to ensure that they receive all necessary health care through the workers' compensation system."

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**SB 893:**

would create a rebuttable presumption that applies to respiratory diseases contracted by hospital employees.

covered conditions would include:

- ▶ chronic obstructive pulmonary disease
- ▶ asthma
- ▶ COVID-19 and
- ▶ other conditions caused by “novel pathogens”



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**These bills are stuck in initial committees  
...got a LONG way to go!**



Lawmakers returned to SAC on May 4

Calls to staffers reveal that they are still putting their hearing schedules and agendas together



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**Enough about COVID-19  
PLEASE!**

What about all those other body parts that will soon be claimed?



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**The End of the Office as we Know it!  
(with apologies to REM)**

Will folks even return to office  
Nope  
(for many)

given the toll on the economy and workforce many:

- won't have jobs to go back to
- those who are still employed will now permanently work from home
- employers will downsize their leases



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**TD Nightmare**



GENERAL RULE: doi o/a 1/108 = 104 wk TD cap  
(win a period of five years for DOI's o/a 1/1/08)  
HOWEVER (here it comes...) 240 wk cap for injuries to:

1. pulmonary fibrosis; or
2. chronic lung disease



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**Why is this relevant to COVID-19?**



*Pulmonary Fibrosis & Chronic Lung Disease*

"people who have chronic medical issues may be at higher risk for serious illness from COVID-19, including those with *pulmonary fibrosis*."

<https://www.pulmonaryfibrosis.org/our-role/news-media/viewannouncement/pff-guidance-on-covid-19>



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## coworking spaces

= gone

communal spaces = germ fest



THUS: more sanitary/less profitable offices  
vs  
safer/more profitable home office

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## “Once [EE's have] done it, they’re going to want to continue”

- ▶ Once ERs have seen the savings, they are going to want to continue, too
- ▶ ER skepticism will have been overcome!
- ▶ “The investor community is going to insist on it.” (esp given the red ink created by coronavirus)

Kate Lister, pres Global Workplace Analytics

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## The investment is *already* being made

EEs already buying more new technology:

- ▶ video conferencing subscriptions
- ▶ monitors
- ▶ desks
- ▶ office supplies, mice and keyboards

Happening where working from home was a new development



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## A Mindset (and Criteria) Are Already Being Created

ERs have had to create guidelines

Ex. what time of night is appropriate to expect a response

- ▶ how to securely access/transmit files (HIPAA)
- ▶ which at-home items may be expensed



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## Social distance thinking now part of our DNA

= more space

- ▶ post last recession, ERs tried packing more people into open office spaces (“densification”)
- ▶ EEs missed their privacy
- ▶ home = solution for
  - space
  - privacy



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## What does the future hold?

What we know:

- ▶ this thing *will* end (some day)
- ▶ things *won't* (entirely) return to status quo



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## Will there be more claims?

I'll bet there will be....many!



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## Many lay-offs/furloughs will become permanent

- ▶ desperate need for income
- ▶ need medical insurance
- ▶ Consolidated Omnibus Budget Reconciliation Act (COBRA)
  - must qualify
  - premiums

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## Stats

Feb  
3.5% unemployment  
vs

April  
25.5 million jobs lost  
14.7% unemployment  
vs

Oct 2009 (peak of recession)  
10% unemployment

1933 (no records prior)  
25% unemployment

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## It's worse than that!?

Labor Department (5/1) says many other folks (sick, vacation, etc.) should be recorded as "unemployed".

If so, "the overall unemployment rate would have been almost 5% points higher"

=

20%

(5% better than Great Depression)

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## Good news?

78.3% claimed "temporary" layoff  
11% claimed "permanent"

We shall see...

Unforeseeable events  
(executive orders/statutory changes, anyone?)  
won't help!

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## It's just bars, restaurants and theaters, right?

NO

"Across dozens and dozens of industries, only one added a meaningful number of jobs in April: general merchandise, including warehouse clubs and supercenters".

New York Times (5/8/20)

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There's going to be pent-up need

Presently, EEs face a choice:

file w/c claim jeopardize job, go to doctor,  
expose to COVID-19  
or  
don't




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What do you think EEs will do about this when the viral coast is clear!

(And AAs reopen their doors)




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NEW APPROACHES

- ▶ "essential" EEs facing a "special risk/zone of danger"?
- ▶ new laws creating
  - a. presumption Coronavirus is aoe/coe
    - rebuttable?
    - conclusive for
    - essential ees?
    - other employees?
    - health pros/1st responders?
    - all ees?




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NEW APPROACHES



- ▶ what about psych claims arising out of
  - fear of exposure at work?
  - contracting disease

PD precluded as "arising out of a compensable physical injury" [LC 4660.1(c)(1)]

or



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NEW APPROACHES

*Valdes v. City of Torrance*  
2019 Cal. Wrk. Comp. P.D. LEXIS 456

Facts:

- ▶ car struck shovel ee was using
- ▶ pushed into shoulder
- ▶ injured ortho and psych
- ▶ QME: psych caused by events of DOI

Holding: psych PD not barred by LC 4660.1(c)(1) b/c psych related to the incident itself, not to physical sequelae resulting from the incident



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(NOT SO) NEW APPROACHES

virus "lights up, aggravates or accelerates a previously existing disease or condition" (aoe/coe or not) resulting in disability

=

potentially compensable treatment

TD

PD (apportioned)

Etc

"eggshell plaintiff"

"employer takes the employee as he finds him"




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### (NOT SO) NEW APPROACHES

#### EEs Working From Home

- ▶ ordered to work remotely from home?
- ▶ what is the definition of "workplace injury"?

#### Going & Coming Defense apply to a

- ▶ walk from the bedroom to the home office?



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### (NOT SO) NEW APPROACHES

#### Unlikely have:

- ▶ surveillance cameras or
- ▶ other independent proof to determine if legit



#### Much more difficult to defend

- ▶ difficult to monitor when on (and off) the clock
- ▶ no witnesses



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### (NOT SO) NEW APPROACHES

personal savings dwindle  
&  
medical options disappear  
=  
recipe



#### FRAUD

It happened during the crash of 2008-2010 — waves of schemes surfaced by desperate Americans who lost their savings and saw no other way out

WC claims and other insurance crimes rapidly spread



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### Employees & ERs Subjected to Fraud

(clearing way for EEs to search for help, aka DWC-1)



DOJ & FBI have issued warnings re fraudulent activities re COVID-19.



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### Why does this matter?

Defrauded EEs even more desperate for funds (pass the fraud onto ER)



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### (NOT SO) NEW APPROACHES

Holding off on a claim?  
Didn't want to jeopardize job?  
...miss time from work?

Those reasons for not filing have disappeared



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## (NOT SO) NEW APPROACHES

Post-termination Claims

- ▶ Viral/Physical
- ▶ Psych




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## Increased Claims in the Post-Virus World?

What do YOU think?!



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## Home is a VERY dangerous place!



"Personal Comfort Doctrine"

general rule: course of employment is not interrupted by certain acts relating to the employee's **personal comfort** such as short breaks for eating, drinking, using the restroom, smoking, seeking relief from discomfort, changing or from working clothes, etc.

Need not be "working"/providing value to ER for injury to be aoe/coe

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## Doesn't even need to be on ER's premises

Merely need to be "reasonably contemplated by the employment."

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## Who decides?

WCJ



Fair fight?  
No. All ties go to the runner

Virtually everything done on ER's premises is covered

Working from home just expanded ER's "premises" greatly!

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## How bad can it get?



Facts:

- ▶ EE working in home
- ▶ using wheelchair for nonindustrial condition
- ▶ ER accommodated her request to work from home
- ▶ fell while transferring from toilet (during work hours)

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## Can you guess what happened?

BTW: unwitnessed



I hope so...but you get my point!

- ▶ "during work hours" IF EE says "during work hours"
- ▶ sometimes CA's confusing wage & hour requirements are helpful = computer used to clock-in/out

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## GOING & COMING



more exceptions than holes in Swiss cheese  
MORE BAD NEWS

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## Working from home?

Need something from the office/job site?  
We've got problem!

If injured on trip between job sites = compensable

If home is an approved (expressly or impliedly) job site, injury on trip from one to the other = compensable

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## COVID-19 Layoffs & Post-term Defense

- ▶ layoffs
- ▶ furloughs
- ▶ terminations

businesses have been forced to close b/c of

- ▶ state restrictions
- ▶ local health restrictions



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## Millions of Californians have filed for unemployment



What comes with unemployment?  
Answer: w/c claims

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## QUESTION OF THE DAY:

How do we apply the post-term defense to

- ▶ furloughs
- ▶ layoffs



When RTW is, at best, uncertain?

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## What's the purpose of post-term defense?

reduce retaliatory claims  
remember bad days before this?!



YES?  
get your affairs in order!

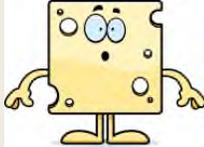
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## Post-Termination Defense

DOI o/a 7/16/93  
LC 3600(a)(10)

REASON: protect er from  
 ▶ retaliatory  
 ▶ fraudulent claims

made by EEs who are  
 ▶ terminated  
 ▶ laid off



applies to specifics & CTs that are filed after termination, layoff or receipt of notice of same

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## LC 3600(a)(10) does not apply to psych

(we'll get to LC 3208.3(e) later!)



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## GENERAL RULE



not compensable if claim:  
 "[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."

ER must prove

- 1) filed after the notice of termination or layoff; and
- 2) for an injury occurring before the time of notice of termination/lay-off

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## GENERAL RULE

Burden shifts:  
 prove the defense does not apply by demonstrating (with a "preponderance of the evidence"), at least one:

- a. ER was aware of the claimed injury before EE was notified of term
- b. Evidence of claimed injury is:
  - in med records existing before notice of termination/layoff
- c) **specific** injury after notice of term/layoff, but before the effective date
- d) **occupational disease/CT** after date of notice of termination/layoff



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## What's a termination?

Layoff? 

LC 3600(a)(10) applies to claims filed after notice of:  
 "termination or layoff, including voluntary layoff"

MUST be ER-initiated (no resignations/quits)  
 "VOLUNTARY LAYOFF": "an involuntary reduction in force instituted at the employer's prerogative that the employees may decide amongst themselves who is to bear the burden of the layoff"

- ▶ ER-initiated separation rather than a voluntary resignation

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### CAREFUL: WORDS HAVE MEANING!

EXAMPLE

F: ER policy: deemed to have "resigned" if have 5 unauthorized misses

I: defense?

H: no

R: more analogous to "voluntary resignation" than and a "termination", and the claim was not barred




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### Picky, Picky

LC 3600(a)(10) does not apply if EE "abandons" job

BUT

EE "terminated" for "job abandonment" may be barred




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LC 3600(a)(10) applies only if terminated on permanent/indefinite basis

EXAMPLE

F:

- EE told would not work b/c "work was slow"
- didn't recall being told "laid off"
- ER's secretary later tried to recall EE
- ER received DWC-1 day after attempting to recall

H: no bar




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F:

- EE was notified there was "no more work"
- Notified EE would no longer pay for lodging
- ER never directly stated "laid off" or gave a "firm date for layoff"

H: defensible




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### MAJOR HINT?

F:

- rumors of impending layoff
- supervisor gave EE a "major hint" of layoff
- afterwards EE claimed injury

H: defensible

R: "major hint" = "actual knowledge"

BUT CONTRAST...




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F:

- ER gave notice of "no pay status"
- EE reported injury after no-pay notice but before notice of layoff

H: indefensible

R: EE only told "no pay" "when" insufficient work

supervisor: "EEs are still considered employed while on no-pay status"




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### EX. Supervisor appeared at accident scene

- Supervisor appeared at hospital

H: knowledge of **injury**

F:

- EE reported fall from ladder to supervisor before fired
- told supervisor: "fine"
- no Ws
- told co-EEs of "injury", but they saw no signs
- no missed time
- no request for treatment
- claim filed post-term




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### EX. Supervisor appeared at accident scene

H: barred

R: ER had knowledge of "incident" but not "injury" before termination




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### Knowledge by Supervisor/Person in Authority

EE may trump 3600(a)(1) by informing ER of injury before termination  
 Oral only is ok  
 But not "just anyone"  
 "person in authority"



LC 5402, notice of the injury may be "obtained from any

- source on the part of the employer,
- his or her managing agent,
- superintendent,
- foreman, or
- other person in authority."

NOT co-worker  
 NOT union rep



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### Honeywell Required Level of Employer Knowledge to Provide DWC-1

Defined (somewhat) via case law

EXAMPLE

H: (WCAB) ER must provide claim form when "reasonably certain" EE suffered or claimed to have suffered an industrial injury

- 90 days starts running when "reasonably certain"

Supreme Court:

H: "reasonable certainty" test is inequitable

- ER must be notified in writing of an injury by EE pursuant to LC 5400, or
- have knowledge of the injury or
- claim from another source pursuant to LC 5402



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not "knowledge" if ER only has facts that would lead "a reasonable person" to conclude with some certainty that an industrial injury has occurred

duty arises when ER "knows of" injury/claim, not when it "should have known"



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*Honeywell* also applies to cases involving the post-termination defense under LC 3600(a)(10)

F:

- several days "hard and heavy work" pruning
- told ER hands were so "painful" and "blistered", couldn't sleep

H: ER "had knowledge"




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### Given our topsy-turvy world...

What—exactly—will a "termination" in our post-COVID-19 world look like?

EEs are told:

- ▶ "Stay at home"
- ▶ "No RTW date available"
- ▶ "Not sure if there ever be more work"

=  
TERMINATION?



### If EE gives notice of injury before the business is closed

BUT  
after being told there is "no work"  
=  
barred post-term?



### Some WCAB Guidance



*Gil v. WCAB* (66 CCC 1557)(2001)

Facts:

- ▶ hired seasonal worker (strawberry picking)
- ▶ 7/98=notified of pending layoff
- ▶ 7/13/98=effective date
- ▶ 8/98=reports DOI alleged to have occurred 5/3/98 = seeks treatment
- ▶ 10/98 = rehired for planting strawberries



### Some WCAB Guidance

Holding: barred by LC 3600(a)(10)

Reason: end of seasonal employment  
=  
layoff/termination



### HOWEVER

When we're dealing with non-seasonal work, we're largely flying blind (little WCAB help available)



Does a "furlough"  
=  
"layoff" that severs employment?



### Let's ask EDD

Although EE "neither performs services nor receives wages during an authorized true leave of absence or a temporary layoff due to lack of work"

=  
"employment relationship continues"

Reason: "because the work will resume at a later date, and there as been no termination of employment"



## Let's ask EDD, con't

HOWEVER:  
 a **layoff** "for an indefinite period, or for an unreasonable length of time, or where there is no contemplation that the employee will resume his or her work in the future may sever the employer-employee relationship."  
 (Cal. Code Regs., tit 22, Sec1256-1(e)(2))




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## EXAMPLE

- ▶ EE is laid off 3/15 due to "lack of work" b/c of COVID-19 health restrictions
- ▶ RTW promised when "more work"
- ▶ EE files claim on 4/1 for 2/1 DOI

Post-term UNLIKELY successful



Reason:

- ▶ employment relationship hasn't been severed



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## CONTRAST

- ▶ EE is laid off 3/15 due to "lack of work" b/c of COVID-19 health restrictions
- ▶ no RTW date provided
- ▶ EE files claim on 7/1 for 2/1 DOI

Post-term LIKELY successful

Reason:

- ▶ layoff was arguably "indefinite"
- ▶ there is no apparent contemplation of returning to work




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## NOT CUT & DRY

- ▶ highly fact-sensitive
- ▶ will vary on case-by-case basis

(those are darn lawyer words!)




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## Got some case law...

...going back to 1982!

*Campos v. EDD* (1982) 132 Cal.App.3d 961, 966

F: "indefinite layoffs subject to recall in order of seniority"

H: "where workers are laid off without a definite recall date, the layoff terminates the employment relationship"



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## CAREFUL:

- ▶ document facts surrounding the layoff

...including whether applicant applied for:

- ▶ EDD *unemployment* benefits
- ▶ *unemployment* benefits elsewhere
- ▶ was there a RTW date offered by ER
- ▶ whether ER resumed business within a "reasonable time"



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## Timing of Notice of "Injury"

Notice of injury SAME TIME as notice of term?  
=  
no LC 3600(a)(10) defense

R: legis intent: bar *retaliatory* claims?!?!  
Injury reported *20 minutes post term?*

Barred!




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## What does "prior med record" say?

LCCC 3600(a)(10): "...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..."

...

(B) ....medical records, *existing prior to the notice of termination or layoff, contain evidence of the injury.*

Why?

- ▶ less chance of retaliation
- ▶ less chance of fraud


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## "evidence of injury"

NOT mere:

- Precautionary stay at home
- or
- Order to social distance
- or
- Order to quarantine


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## Med records need only est. pre-existing injury

NOT est "industrial causation"




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## Multiple body parts claimed from one incident?

Prior records don't confirm all parts?  
Does LC 3600(a)(10) bar parts not referenced?




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## Watch out for bootstrapping

Facts:

- ▶ specific & CT for neck, left shoulder & respiratory
- ▶ 11/23/99 report referenced "stress", "anxiety disorder and/or injury to...circulatory system"
- ▶ no ortho documented on 11/23
- ▶ terminated
- ▶ filed post-term

Ortho not barred


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## EXAMPLE

Reason:  
 EE met the exception of 3600(a)(10)(B):  
 "medical records, existing prior to the notice  
 of termination or layoff, contain evidence of the injury"

Are you kidding me?

What about the purpose...avoiding retaliatory claims?  
 avoiding fraud?  
 Time to revisit?

1. panel decision
2. no others on issue
3. no DCA decisions



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## LC 3600(a)(10)(D) applies to occupational disease/CT injuries

**RULE:** compensable if the OC/CT injury claim  
 is after date of term

"date of injury"= date EE first suffered disability  
 and  
 either knew, or  
 should have known,  
 disability was due to work



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## Do we care about CTs when dealing with viral issues?

Maybe

Multiple exposure may = CT  
 (not a specific)



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## Tough to determine DOI for CT

LC 3600(a)(10)(D) exception is broad

R: Knowledge of industrial causation of OD/CT  
 requires "**medical opinion**"

UNLESS

"nature of the disability of the employee's:

- ▶ training
- ▶ intelligence, and
- ▶ qualifications



are such that EE *should have recognized* the disability's  
 relationship to work"



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## WCAB typically findings DOI for OD/CT is post term

NOTE:

- ▶ if EE has no compensable TD and/or
- ▶ compensable PD or
- ▶ didn't know the disability was work-related

WCAB will find DOI occurred post-term  
 (thus, post-term defense fails!)




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## Post-term claim?

EE fails to prove *any* exceptions?

Life is tough!

(even if it looks like there *really* may have been  
 an injury!)




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### Facts

- ▶ EE reported injury 30 mins post-term
- ▶ alleged back injury; fell off truck
- ▶ described injury to his *assistant*
- ▶ returned to office after shift; didn't report injury then b/c "shift manager [had] departed"
- ▶ new day, *supervisor* fired EE
- ▶ same conversation, EE reported injury to *supervisor*
- ▶ *assistant* testified confirming injury
- ▶ WCJ found *assistant* credible

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### H: claim barred

R: not reported pre-termination  
*assistant's* knowledge not sufficient

LC 5402(a) **Knowledge of an injury, obtained from any source, on the part of an employer, his or her managing agent, superintendent, foreman, or other person in authority..."**

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### We're experts on (physical injury) post-term cases now!

What about post-term psych?

That is for another day!

But don't forget...

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### Psych & Coronavirus



Not "essential"?

EE has probably been ordered to "shelter in place" (home)

Results:

- ▶ home as 2nd work site
- ▶ layoffs

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### "Essential"?

- ▶ social distancing
- ▶ different work hours
- ▶ changing shifts such as day to night



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### LC 3208.3(a):

"A *psychiatric* injury shall be **compensable** if it is a mental disorder which causes **disability** or need for **treatment**."

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## Is COVID-19 stressful?



Rhetorical!

Potential disability & death ain't no "walk in the park"

Is ER liable for the "stress"?


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## LC 3208.3(b)(1)

"In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a **preponderance of the evidence** that **actual events of employment were predominant** as to all causes combined of the psychiatric injury."

1. >50% check!
2. "actual events of employment" huh?


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## Suffered viral "physical injury" aoe/coe?

Caused stress, etc. = psychiatric/psychological problems?

Problems "predominantly caused" by aoe/coe "physical injury"?

=

treatment awarded  
(but—don't forget—not PD)

NOT true if psych is merely caused by "stress" of living in a Coronavirus world...!


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## DETAILS

LC 3208.3(b)(1) requires:

1. "event" ("something that takes place")
2. must be "of employment" (arising out of EE's working relationship with ER)

"[B]road societal events or trends [COVID-19?!] [don't count]....because they cannot reasonably be said to be events which *arise out of* the employment relationship."

*Pacific Gas & Electric Co. v. Workers' Comp. Appeals Bd.*, 69 CCC 21 (2004)


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## *Pacific Gas* held that...

facing tough times during economic downturn and fear of losing job did NOT = "actual events of employment"



"Allowing employees to recover benefits for psychiatric injuries caused by this type of stress would subject employers to virtually unlimited liability."


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## TRUE!

If could obtain psych benefits b/c of stress/worry about contracting virus

=

EVERY working EE would have a viable claim


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## HOWEVER

alterations to job assignments/workplace *may*  
=  
"actual events of employment"

Examples of potential aoe/coe compensable stress:

- a. job duty changes
- b. changes in working condition
- c. creation of a new computer system (what baby boomer *doesn't* find that stressful!?!?)



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## Changes at offices across US

1. working at home (change in working conditions)
2. social distancing (change in working conditions; possible change in job duties)
3. new technology (web-based communication such as Zoom is all the rage)...tough (stressful) for seniors like me!




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## But we're only following [state & local] orders!

Doesn't seem fair...

BUT  
Likely not a successful defense



*Merced City School District v. WCAB (Delgado)* (2008) 73 CCC 1115

*Mnyandu v. Los Angeles Unified School District* (2013)  
2013 Cal. Wrk. Comp. P.D. LEXIS 502.



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LC 3208.3(b)(1)'s requirement that "actual events of employment" be *predominant cause*

decreases to "**substantial cause**" if "injuries resulted from being a **victim of a violent act** or from **direct exposure to a significant violent act.**"



Decreases +50% burden of proof to "at least 35-40 percent of the causation from all sources combined"



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## "violent act" =

"either strong physical force, extreme or intense force, or an act that is vehemently or passionately threatening."



Infected employees "victims" or have "direct exposure to a significant violent act" when exposed to COVID-19?

NOPE



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## Post-termination psychs have their own labor code:

LC 3208.3(e).

Psych DOIs o/a 7/16/93

barred if claim "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"



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**Post-term psych arising from fact of termination = not compensable**

"The workers' compensation system, as well as employers and insurers, cannot absorb, and should not be required to absorb, the very substantial potential cost of awards for emotional distress caused solely by a lawful job termination."



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**Many (most!) involuntary terms = anger, upset, depression, etc.**

Allowing such claims "would quickly convert workers' compensation into another form of unemployment insurance" which is "a result for which neither employers nor compensation insurers have bargained and for which employees could have no reasonable expectation."

*Bray v. WCAB* (1994) 59 CCC 475



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**Filed post-termination?**

EE must demonstrate "by a preponderance of the evidence that actual events of employment were predominant as to all causes combined"

AND

1. injury caused by "sudden and extraordinary events of employment."
2. ER was aware of the claimed injury before term/layoff notification
3. EE's medical records existing before notice of term/layoff contain evidence of treatment of the psych injury.
4. Finding of sexual or racial harassment by any trier of fact.
5. DOI under either LC 5411 (specifics) or LC 5412 (diseases/CTs) is
  - after the date of the term/layoff notice,
  - but before the effective date of termination or layoff



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**That's enough for now**

BUT

There are plenty more considerations



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