LFL&M LAUGHLIN, FALBO LEVY & MORESI LLP

A Guidebook On

WORKERS' COMPENSATION LAW FOR PUBLIC AGENCIES

(2021 EDITION)

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As of its printing date, this guidebook presents the most accurate and up to date information. However, appellate court decisions and statutory amendments result in an ever changing picture. We call this a "guidebook" because that is what it is intended to be. It is not comprehensive enough to provide all the answers. What was true yesterday may not be true today or tomorrow.

FOREWORD

The law offices of Laughlin, Falbo, Levy & Moresi LLP represent employers, insurers, self-insured entities and Public Agencies defending disputed workers' compensation claims. We provide advice, perform discovery, negotiate resolution of claims, and offer representation before the Workers' Compensation Appeals Board. Over the years, Laughlin, Falbo, Levy & Moresi LLP has supplemented this emphasis with several complimentary practice areas, including insurance coverage, insurance litigation, and civil litigation.

Today, Laughlin, Falbo, Levy & Moresi LLP has offices in 11 California cities and a legal staff of more than 100 attorneys. We represent Public Agencies in all of our locations. Below is a list of our attorneys committed to servicing Public Agency clients.

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A special thanks to
all our Insurance Carriers, Administrators and Public Agencies
who have endeavored to manage the unique and important
risks of public agency work. This Guidebook reflects
a small part of the benefit of our teamwork.

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SECTION I

UNIQUE EMPLOYMENT RELATIONSHIPS

I.

UNIQUE EMPOYMENT RELATIONSHIPS

Pursuant to §3350 through §3371 of the California Labor Code, certain individuals who would not be normally considered employees under the usual definitions of the term are considered employees for purposes of workers' compensation claims. If you are presented with a claim in which the worker's employment status is not crystal clear, you may wish to consult these code sections for specific definitions. Some of the more common classes of workers whose claims you are likely to encounter are discussed below.

A. Volunteer Firefighters

There are several different groups of volunteer firefighters who are considered employees depending on their relationship to the public entity, as well as their own status. Pursuant to Labor Code §3361, all registered members of an officially recognized volunteer fire department are deemed employees of the entity for whom they are volunteering, such as a city, county, town or fire district. Further, with certain exceptions, individuals who are injured fighting fires at the request of a public officer or employee charged with the duty of fighting fires are deemed employees of the entity they are serving. Prisoners fighting fires are considered employees of the State Department of Corrections for purposes of workers' compensation. However, members of the Armed Services serving under military command are exempted from this coverage. Finally, pilots who do not furnish their own aircraft are also exempted under certain circumstances (Labor Code §3365).

Registry of volunteer firefighters is accomplished by a roster (Form N). There is no official form, so any document that identifies the individual, his status as an active firefighter, and the date of such service is sufficient. At a minimum a roster must be accomplished annually, but it is best to update it monthly. Be certain to remove persons from the active firefighter roster if their duties have changed to other volunteer work. A separate list of non-firefighter personnel (Form N) and fire cadets (Form N) should be kept in a similar fashion.

Volunteer firefighters disabled as a result of a work injury are compensated at the maximum rate for temporary disability, permanent disability, or death regardless of normal rate of earnings from their employment (Labor Code §4458).

B. Non-Firefighting Volunteers

In order to insulate public entities from civil liability for injuries, unsalaried volunteers for recreation and park districts are deemed employees for workers' compensation purposes if the governing board of such districts has adopted a resolution designating volunteers as employees (Labor Code §3361.5). Similarly, school district volunteers are covered if the County Superintendent or District Board adopts a resolution designating those volunteers as employees

(Labor Code §3364.5). There is a "catch all" provision in Labor Code §3363.5 allowing other public agencies to adopt resolutions specifically allowed for recreation and park districts, as well as school districts discussed above, designating volunteers as employees for purposes of workers' compensation benefits. Volunteers are defined as persons receiving no remuneration other than meals, transportation, lodging and reimbursement for incidental expenses.

C. Reserve/Auxiliary Peace Officers

Individuals properly deputized by sheriffs or city police, as well as by regional park and transit district peace officers are deemed employees when assigned specific police functions and when they sustain injuries while performing peace officer duties (Labor Code §3362.5). Reserve/auxiliary peace officers disabled as a result of a work injury are compensated at the maximum rate for temporary disability, permanent disability or death regardless of normal earnings from their employment (Labor Code §4458.2).

D. Fire Cadets

The term "fire cadet" is imprecise, and in our experience can refer to several different types of potential employees. As such, if you are presented with a claim from a fire cadet, information concerning that individual's status in relation to the public agency should be gathered immediately. In some instances, cadets are really volunteers, discussed previously in part A (Page 1). Other cadets who are full-time paid employees may be entitled to Labor Code §4850 benefits depending on their duties. Finally, other cadet programs may be organized under certain public or private programs such as the Boy Scouts of America. Accordingly, cases involving fire cadets need to be analyzed on a case by case basis. Nevertheless all fire cadets should be placed on a separate list and have a job description that accurately describes the limited duty to which they may be assigned. (Form N.)

Where a cadet program permits minors under 18 years of age special precautions must be taken to ensure such minors are not exposed to any dangerous, heavy or potentially detrimental activity as Labor Code §§1294, 1294.1, 1299 preclude such activity whether as employment or volunteer work. Attending fire scenes, operation of firefighting equipment, or emergency medical response are each likely illegal under state and federal law. Additionally even "safe" volunteer work should be established upon parental consent and not involve any activity for which the department may be liable such as operation of an automobile. The best course is to avoid any employment until the individual is over 18 years old. Volunteers under 18 years of age should be restricted in their activities such as clerical/office work, promotional fund raiser activities, or strictly academic training. For this reason, these individuals should be placed on a general volunteer list (Form N). Minors must avoid all active firefighting and response work.

E. Disaster Service Workers

Disaster service workers are specifically addressed by Labor Code §3600.6. To be covered, such workers must be registered by a disaster council, and injured while performing services under the

general direction of the council. Unregistered persons pressed into service during some enumerated types of emergencies are also covered.

F. Independent Contractors

Notwithstanding the above sections, individuals who are found to be independent contractors while performing their duties when injured are not deemed employees. An independent contractor is defined by Labor Code §3353 as:

> …any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only, and not as to the means by which such result is accomplished.

The "burden of proof" (discussed in Section II, part C of this guidebook) to establish that a worker is an independent contractor rests on the employer, as now codified through AB 5 and its reference to the *Dynamex Operations West, Inc. v. Superior Court of Los Angeles (Dynamex)* (2018) 4 Cal.5th 903, "ABC test." The *Dynamex* "ABC test" mandates that a worker is an employee unless free from the control and direction of the hiring entity in the performance of the work, the work performed is outside the usual course of the hiring entity's business, and the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. This is a difficult determination, and you may well wish to seek legal advice before denying a claim based on an individual's alleged status as an independent contractor.

G. Employment by Contract, Shared Employment and Mutual Aid Agreement

Public agencies must take great care when contracting for work with third parties who legally are not independent contractors (discussed in Section F, above) or when contracting between agencies to avoid creating unintended employment relationships. This usually will occur when employees are loaned or shared under the terms of a contract. Also, these situations can convert a private employee to a public agency safety member entitling him or her to all manner of special and costly benefits. You should always obtain a legal analysis of contracts or unwritten agreements that in any way involve employees or the use of any so called independent contractors who are unlicensed or work by the hour. It is always best to address clearly in any agreement which party has the obligation to provide workers' compensation coverage and to require proof of insurance, or naming an additional insured.

Public agencies may contract to share employees to save money or to fully utilize personnel. Shared employment agreements between public agencies are especially difficult to administer because the contractual terms may not create joint employment for all the participating public agencies. If so, the exclusive remedy provision which protects an employer from civil lawsuits in most instances may not apply to some agencies in the agreement.

In the case of *Brassinga v. City of Mountain View* (1998) 66 Cal. App. 4th 195, several Bay Area cities formed a Regional SWAT Team. During a joint practice a Palo Alto member was killed in a mock exercise when a Mountain View member failed to unload his weapon. The deceased Palo Alto member received workers' compensation benefits and his dependents sued Mountain View for wrongful death. The Court allowed the wrongful death case to proceed because it did not find Mountain View and the deceased in an employment relationship. The exclusive remedy defense was unavailable. This is an extremely complex area in which it is very difficult to create a joint employment relationship without careful legal advice, and most likely requires forming a new "joint agency" to limit liability. We recommend public agencies be aware of the risks for both workers' compensation and general liability when considering a shared employment or interdepartmental contract. Expert legal advice is a must. This unfortunate legal exposure for team member injuries, adds costly risks to mutual aid and/or regional response teams especially in this time of limited financial resources. We would welcome new legislation to further protect public agencies from civil liability resulting from mutual aid and/or regional response team member injuries.

Fire Districts and local departments all participate in the Cooperative Agreement with the State of California Office of Emergency Services. The agreement provides reimbursement for personnel and equipment use, but liability for workers' compensation benefits is not covered by the State. Similarly, local mutual aid agreements generally provide that each signatory retains its own liability for workers' compensation benefits. On the local level, however, you may agree to other terms and you should seek legal advice in preparing these agreements to either understand the liability you will assume or to shift it to the other party.

H. Minors and Workfare Recipients

Juvenile court wards and probationers, and juvenile traffic offenders doing rehabilitative work without pay are deemed employees when the governing Board of Supervisors adopts a resolution declaring them to be so. You should be aware that there are particular differences in calculating indemnity rates in these cases; for example, juveniles are not entitled to temporary disability indemnity, and permanent disability is computed at the statutory minimum rate. In such instances the specific Labor Code Sections should be consulted (Labor Code §§3364.55 - 3364.7). In addition to the above statutory provisions, the California Supreme Court has decided that an adult performing community service work in lieu of paying a fine is the employee of both the public entity assigning the work, as well as the entity directing it (*Arriaga v. County of Alameda* (1991) 28 C.A.4th 1685, 59 CCC 188). Individuals performing services in lieu of serving a sentence are generally deemed "volunteers" of the county which imposed the sanction.

I. Inmates, Probationers and Community Service

As a public agency you may be offered the services of inmates or probationers who are in custody under a County administered sentence. While these services are offered "free", there may well be a workers' compensation obligation that attaches. Certainly if you pay any wages on a daily rate, your public agency will be responsible for workers' compensation coverage unless you have a

coverage agreement. In any case, we recommend you have a clear agreement that all workers' compensation coverage will be provided by the custodial agency or County before you accept any community service workers.

J. Non-Profit Workers

You may receive offers for free or subsidized workers from a non-profit agency. Often the hope is to enhance the workers' training and eventual employability after gaining some job experience. Green Thumb, Inc. for example provides this service for senior citizens. Often there is an option for the non-profit to cover the worker. If so, we recommend you opt for such coverage to keep these workers who have not gone through your hiring process from affecting your own Workers' Compensation experience. We recommend you have a clear agreement that all workers' compensation coverage will be provided by the non-profit before you accept any services. In summary you should carefully consider the terms of the agreement and whether the workers' compensation and general liability exposures fit your agency's risk management protocols.

SECTION II

INJURIES ARISING OUT OF EMPLOYMENT & IN THE COURSE OF EMPLOYMENT (AOE/COE)

II.

INJURIES ARISING OUT OF EMPLOYMENT & IN THE COURSE OF EMPLOYMENT (AOE/COE)

A. The Definition of an Industrial Injury

In order for the conditions of compensation to exist (in other words, the employer pays), an industrial injury must occur. Only industrial injuries are compensated under California workers' compensation laws. An "industrial injury" is an injury or illness which arises out of a worker's employment, although in most circumstances it need only be shown that the worker's employment contributed to the condition - not that it was the sole cause. Additionally the injury must occur in the "course of employment" which requires to the time, place and manner if the event be industrially related.

There are three ways in which an industrial injury can occur. The simplest is a "specific injury", i.e., a specific event such as a fall or other such occurrence that results in a physical or mental condition.

The second variety is called an occupational disease. A contagious air borne disease for instance is compensable if it is contracted as a result of an exposure that is peculiar to an employment or encountered because of the employment. Examples of an occupational disease might be hospital workers encountering and contracting a disease such as hepatitis, a commercial traveler sent into an area where a disease is epidemic or endemic, etc. Occupational diseases may also result from continuous exposure to deleterious substances in the work environment. Common examples are asbestosis, lead poisoning, and cancer from exposure to certain carcinogens.

Closely akin to and frequently indistinguishable from occupational diseases are the third type of industrial event - cumulative injuries. By statute, these types of injuries are defined as "repetitive mentally or physically traumatic activities", the combined effect of which causes disability or need for medical treatment. (Labor Code §3208.1)

Examples of cumulative injuries include back or upper extremity disabilities resulting from the stress and strain of repetitive movements or acoustical trauma resulting in hearing loss. It is not the one individual act by itself that causes the damage/injury, but rather in the aggregate, the activities over an extended period of time (the cumulative effect), produce a gradual onset and deterioration to the point where the condition becomes symptomatic and medical care becomes necessary.

Disability resulting from aggravation of a pre-existing condition or disease by employment activities (such as stress) also entitles the worker to compensation. Heart attacks precipitated by mental or physical stress are examples of this type of injury. It is not necessary that the work

precipitating the disability be of an unusual nature; there need only be a causal connection between the strain and the disabling event.

Damage to artificial limbs, dentures, hearing aids, eye glasses and medical braces is an injury, however physical damage to eye glasses and hearing aids will not be compensated "unless injury to them is incident to an injury causing disability" (Labor Code §3208). Damage to clothing and other personal property is not covered under workers' compensation, but may be compensated under the employer's statutory obligation to indemnify the employee for a loss in direct consequence of the discharge of employment duties (Labor Code §2802).

B. Special Situations

1. Personal Comfort and Convenience

During the work day, a worker is likely to pause for a drink of water, get some fresh air, visit the lavatory, or to engage in other acts of comfort and convenience. Although none of these activities are the services for which the employee was hired, they are incidental to the employment and impliedly within its contemplation. Injuries sustained while engaged in such acts arise out of and in the course of the employment.

2. Lunch and Coffee Breaks

Lunch and coffee breaks on the employer's premises are in the course of employment. Injuries that occur away from the employer's premises during a lunch break generally do not require payment of compensation. (See Section II, part B-12, Going and Coming Rule) There are many exceptions to this rule, such that off premises coffee breaks can be in the course of employment if they have become customary and have the implied approval of the employer.

3. Bunkhouse Rule

The employer's premises include living quarters furnished to the employee if the employment contract contemplates, or the nature of the work requires the employee to live on the premises. Pursuant to what is known as the "Bunkhouse Rule", the worker is considered to be performing services incidental to the employment whenever making reasonable use of the premises.

4. Proximate Cause

Compensation is payable if the injury has been proximately caused by the employment. Proximate cause exists when the employment brings the worker within the range of the danger which causes the injury. The employment need not be the sole cause of the danger which causes the injury; it need only be a substantial contributing cause. Examples of compensable injuries or conditions include: an injury sustained in a vehicle collision on the way to treatment for an industrial injury; an injury incurred while delivering a return to work slip to the employer after recovery from an industrial injury; drug addiction from pain medication prescribed for the industrial injury; a new injury caused by pain and weakness from the industrial injury.

5. Intoxication

No compensation is payable if the injury has been caused by the employee's intoxication. The employer must prove that the intoxication was the proximate cause of the injury. An employer who condones or encourages the drinking may be stopped from asserting the intoxication defense (i.e., office parties where the alcohol is provided or condoned).

6. Self-Inflicted Injury

An intentionally self-inflicted injury is not compensable.

7. Suicide

Compensation paid in the form of statutory death benefits is not payable if the death was willfully and deliberately caused by the employee. The employer must, however, show that the employee voluntarily committed suicide and also that he could have resisted the impulse to commit the act. If expert testimony shows that without the industrial injury, there would have been no suicide, the injury is a proximate cause of the death. A death by suicide is also compensable when the pain resulting from an industrial injury has caused the employee to feel that death would afford the only relief unless it appears that the employee could have resisted the impulse to act.

8. Initial Physical Aggressor

Work puts employees under strains and fatigue that create frictions and sometimes cause altercations. An injury sustained in a fight that grows out of a dispute over the employment may be compensable, whether inflicted by a supervisor, fellow employee or a subordinate. Conversely, an injury sustained in an altercation engendered by personal animosity wholly unrelated to the employment does not arise out of the employment. There is no recovery if the worker who claims benefits for an injury sustained in an altercation was the initial physical aggressor. The person making the first physical contact is not necessarily the initial physical aggressor. A worker who approaches a fellow worker in such a manner that the fellow worker is placed in reasonable fear of bodily harm is the initial physical aggressor even though he does not strike the first blow. Thus, the initial physical aggressor is the first person engaging in conduct amounting to the legal definition of an "assault".

9. Recreational, Social and Athletic Activities

There is no recovery for injuries arising out of voluntary participation in off-duty recreational, social or athletic activity that is not a part of the employee's work related duties, unless the activity is a reasonable expectation of employment or is expressly or impliedly required by the employment. However, activities of a worker who is hired to engage in recreational or athletic activities are in the course of employment. Some commentators have suggested that when an employee furnishes equipment for the activity, or has an interest in the activity, for example in relation to advertising the business, a compensable injury is more likely to be found. In any instance, an employer should post notice pursuant to Title 8, regulation 9881 that "your employer or its insurance carrier may not be liable for payment of workers' compensation benefits for any injury which arises

out of an employee's voluntary participation in any off-duty recreational, social or athletic activity which is not a part of the employee's work-related duties."

10. Felonies

Injuries sustained while in the commission of a felony do not result in payment of compensation by the employer.

11. Injuries After a Firing or Lay-Off

Injuries claimed after a notice of termination or lay-off (including a voluntary lay-off) may or may not be entitled to compensation depending upon when the notice of termination or lay-off was issued, and a number of other criteria [Labor Code §3600a(10)]. There are additional elements of proof that the employee must produce if the claimed injury is of a psychiatric nature (see Labor Code §3208.3 - discussion following in part 13). It is good practice to provide written notice of termination or lay-off to the employee, and to keep a copy of the notice in the employee's personnel file for easy documentation. The effective date of the termination or lay-off must be within 60 days of the notice to insure this potential defense.

12. Commute Injuries (Going and Coming Rule)

The "Going and Coming Rule" precludes compensation for injuries sustained en route to and from work, in other words, during a normal commute. The rule has numerous complex exceptions. Two examples of exception are a) the employer provides or contributes to the cost of the transportation, or b) the employee is on a special mission for the employer. A basic statement of the rule is as follows: "travel to and from work is deemed to be in the course of employment unless it is an ordinary commute to a fixed place at a fixed time." Injuries suffered during a commute are compensable if the employment subjected the worker to a special risk or there are special circumstances. For example if a worker is required to participate in off-site training an injury during such travel is compensable as this is a "special mission" even if the travel is uncompensated.

13. Psychiatric Injuries

Sweeping and drastic changes were implemented by the Legislature in 1993 with respect to compensation payable for psychiatric injuries. To be compensable, a psychiatric injury must: a) cause disability or need for medical treatment; b) be diagnosed pursuant to procedures promulgated by the Industrial Medical Council; c) have been caused by actual events of employment which are predominant (more than 50%) as to all causes combined of the psychiatric injury; d) not have been substantially caused by a lawful non-discriminatory good faith personnel action. If, however, the injured worker was the victim of a violent act or was directly exposed to a significant violent act, the actual events of the employment need only be a substantial cause (i.e., 35% to 40%). There is also a requirement that the worker must have been employed for six months before the injury, unless it was caused by a sudden and extraordinary condition. Additional criteria for the payment of compensation exist if the psychiatric claim is filed after a notice of termination or lay-off. (See Section II, part B-11).

Effective January 1, 2020, specified firefighters and peace officers diagnosed with post-traumatic stress disorder are rebuttably presumed to have sustained an industrial injury. While the statute does not specify the evidence necessary to evaluate rebuttal of the presumption, it was enacted with the clear goal of circumventing the above-stated ordinary thresholds to establish compensability for a psychiatric injury. The statute defines injury as post-traumatic stress disorder that is diagnosed according to the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association. The post- traumatic stress disorder must develop or manifest during service of the department or unit, but the presumption is extended by time of service. Compensation for these post-traumatic stress disorder claims includes full hospital, surgical, medical treatment, disability indemnity, and death benefits. The Firm will continue to monitor developments on the interpretation of the statute. The laws of apportionment apply to permanent disability for presumptive psychiatric injuries.

14. COVID-19 Injuries

In direct response to the COVID-19 pandemic, the Legislature enacted new Labor Code sections that create presumptions for public safety and health employees and others that work at a specific place of employment that sustains an outbreak of COVID-19, as defined by statute. The laws cover the time period from March 19, 2020 through the date of enactment and continuing through self-repeal on January 1, 2023, apply to the burden of proof on causation and do not negate the rules of apportionment. The testing methods necessary vary by section. Review the text of each section carefully to determine eligibility, length of investigation period, potential reporting requirements and next steps in handling. See section "C" presumptions for additional information.

Labor Code §3212.86 created a rebuttable presumption that employees diagnosed with COVID-19 within 14 days of performing labor or services at the employee's place of employment and at the employer's direction contracted the virus at work if that work occurred on or after March 19, 2020 and on or before July 5, 2020. There are only 30 days to investigate the claim notwithstanding Labor Code §5402. Medical qualifications for diagnosis, testing method and timing are statute specific. Review the text and consult with counsel before accepting the claim.

Labor Code §3212.87 created a rebuttable presumption that certain public safety and health care employees who test positive for COVID-19 contracted the virus at work. The presumption applies to employees diagnosed within 14 days of performing labor or services at the employee's place of employment at the employer's direction if that work occurred on or after July 6, 2020. Like §3212.86, there are only 30 days to investigate the claim notwithstanding Labor Code §5402. Medical qualifications for diagnosis, testing method and timing are statute specific and more restrictive than §3212.86. Review the text and consult with counsel before accepting the claim.

Labor Code §3212.88 created a rebuttable presumption that persons who tested positive for COVID-19 during an outbreak at the employee's specific place of employment, and

whose employer has five or more employees. Outbreak is defined by the statute and all employers with five or more employees are subject to this rule. The presumption applies to employees diagnosed within 14 days of performing labor or services at the employee's place of employment at the employer's direction if that occurred on or July 6, 2020. There are only 45 days to investigate the claim notwithstanding Labor Code §5402. Attempts at mitigation may rebut the presumption, including, but not limited to, measures in place to reduce potential transmission of COVID-19 in the employee's place of employment and risks of COVID-19 infection that are not work-related. The statute created affirmative reporting requirements that involve the employer and the claims administrator and failure to comply may carry administrative penalties. Medical qualifications for diagnosis, testing and timing are statute specific. Review the text and consult with counsel before accepting the claim. The laws of apportionment apply to permanent disability for presumptive COVID-19 injuries.

C. Presumptions

1. Burden of Proof

In a normal case of industrial injury, the employee has the burden of proof to show that an injury/disability arose out of and in the course of employment (Labor Code §§3600, 3202.5):

a. The employee must meet his burden by a "preponderance of the evidence."

b. "Preponderance of the evidence" is defined as evidence which weighed with that opposed to it, has more convincing force and the greater probability of truth.

2. Safety Officers Entitled to Certain Presumptions

Certain safety officers, such as police officers, firefighters, deputy sheriffs, jailers, state prison guards, campus police, district attorney investigators, and other law enforcement personnel have the benefit of a presumption of work injury respecting certain medical conditions. These medical conditions are outlined in several statutes, Labor Code §3212 through §3213.2 (see Table I – Page 37). More detail about these medical conditions will be covered in part C-5 of this section.

a. These presumptions do not apply to all public safety officers - the safety job title must be specifically covered in a statute.

3. What is a Presumption?

a. Simply put, a presumption is an assumption of fact the law requires to be made from another fact or group of facts formed in the case (Evidence Code §600 (a)). These statutorily enacted facts can either be "conclusive", meaning that you cannot

dispute them, or they are "rebuttable", which means that you can produce evidence to overcome what you are told you must assume to be true.

b. The presumptions we are dealing with in these statutes are rebuttable.

4. Why do we have Presumptions?

a. To provide additional compensation to certain public employees who provide vital and hazardous services by easing their burden of proof – it is a benefit to them, conferred by the legislature, to which other employees are not entitled.

b. This additional compensation is delivered by easing the burden of proof that the employee has to show and, in fact, actually shifts this burden of proof to the employer to disprove the statutorily enacted fact.

5. Types of Presumptions (see Table I – Page 37)

a. The presumption for certain illnesses is such that the specified illness set forth in the statutes arose out of the employment relationship if it **developed** or **manifested itself** during the **employment period**.

1) Litigation over the terms "developed", "manifested itself" and "employment period" abound.

2) The following illnesses are presumed to have been attributable to the employment for certain specifically enumerated employees.

a) Heart trouble

This has a rather expansive term. In general, it encompasses any affliction to, or additional exertion of, the heart caused directly by that organ or the system to which it belongs, or to it through interaction with other afflicted areas of the body, which might be produced by the stress and strain of the covered employment.

(1) Examples: the presumption has been applied to a fire-fighter's aortic valve disease, to acute and chronic arteriosclerotic occlusive disease in the iliac arteries, to a heart attack caused by valvular lesions due to rheumatic fever, to atherosclerotic heart disease, to cardiomyopathy, and to coronary insufficiency.

(2) For purposes of the presumption, **hypertension** is not deemed the equivalent of "heart trouble" even though this condition is frequently the precursor of other cardiac conditions that may be so characterized - such as cardiomyopathy, etc.

(3) Stroke (CVA's): **no presumption**.

(4) Labor Code §3212.5 indicates that for California highway patrol, peace officers and district attorney investigators to

enjoy the presumption for heart trouble, they must have worked full time for five years. Firefighters (even volunteers) are covered immediately.

b) Pneumonia

c) Hernia

d) Tuberculosis

e) Cancer

(1) This presumption applies when the cancer develops or manifests itself during a period while the member is in the service of the department. For injuries filed after 1-1-97, this statute provides that cancer or leukemia is a presumed injury that may only be controverted by evidence showing the primary site of cancer has been established, and the carcinogen to which the claimant has demonstrated exposure is not reasonably linked to the disabling cancer. Specifically included as a cancer condition is leukemia. This provision shifts the burden of proof to the defendants to disprove a presumed injury once the firefighter/peace officer establishes the presence of a cancer and an exposure to a known carcinogen. In the case of *Joy v. WCAB* (2009) 74 CCC 871, the WCAB held that a reserve police officer's thyroid cancer, having a latency of 10 years, manifested when the applicant was a Penal Code §830.6 "reserve officer" not covered by the presumption. Peace officers covered by the cancer presumption only include those engaging in active law enforcement and sworn under Penal Code §§830.1, 830.2 (a), and 830.37 (a). Based upon a latency finding defendants proved the presumption did not apply, and further the latency proved the absence of a reasonable link between his later employment exposure as a regular City police officer and the thyroid cancer. In the same case however, Joy suffered a separate unrelated cancer in the form of Hodgkin's disease during a period when he was a regular City police officer under Penal Code §830.1, and therefore he was entitled to the presumption, and found the Hodgkin's disease compensable.

f) Low back where a police “duty belt” is a condition of employment

g) Blood borne diseases

h) Meningitis

i) Biochemical exposure

j) Lyme Disease

k) Methicillin-resistant staphyloccusaureus skin infection (MRSA)

l) Post-Traumatic Stress Disorder (PTSD)

This presumption begins effective 1/1/2020 and sunsets on 1/1/2025 unless extended by the Legislature.

m) COVID-19
All COVID-19 presumption statutes sunset on January 1, 2023 or on repeal, whichever occurs first.

6. UC & CSU Personnel

For statutory reference applicable to University of California Firefighters and Law Enforcement Officers, see Table I – Page 37. For statutory reference applicable to California State University Police Officers, see Table I – Page 37.

7. Duration of Presumptions (Labor Code **§**3212, et. seq.)

a. Toward the beginning of this section, the statement is made that the presumption applies if the disease manifests itself during the employment period - what is the employment period?

1) It can extend beyond the **last date worked** in the covered capacity as opposed to the effective date of retirement.

2) If the safety job title is specifically enumerated by statute, the presumption is extended post-active service up to a maximum of 60 months (120 months for cancer, Labor Code §3212.1 amended in 2010) from the last day actually worked. The extension is for each full year of service a three month extension is granted. In order to get the maximum 60 months (120 months for cancer), the officer must have 20 years of safety service (40 years for the cancer maximum). Less than 20 years service provides three months for every year of safety service; so as an example, five years service permits a post-service extension of 15 months, 10 years service provides 30 months and 15 years service provides 45 months.

Exception: Under Labor Code §3212.8 the MRSA presumption extends only 90 days from the last day actually worked. COVID-19 presumptions extend to diagnosis within 14 days of performing labor or services at the employee's place of employment at the employer's direction.

8. Rebutting Presumptions

a. Must a claim be accepted when the treating physician makes a diagnosis of one of the presumed compensable illnesses? No.

b. Should a medical opinion be obtained? Yes, not so much for causation, although it must be addressed to a certain degree to rebut the presumption, but also to confirm the diagnosis because only the specifically identifiable illnesses are presumed to be compensable.

1) Is an opinion from a medical expert (PQME/AME) that "heart trouble" was not caused by the employee's work as a safety officer sufficient to rebut presumption? No. The opinions of the expert must establish a cause other than work to rebut presumption, that is, medical opinion that heart trouble such as a heart attack is of unknown cause does not rebut the presumption. However, a medical opinion that cardiomyopathy (enlargement of the heart muscle) was heart trouble but was caused by non-industrial alcoholism may rebut the presumption.

c. Failure to properly rebut presumption can result in penalties being assessed.

d. "Anti-attribution clause"

1) No hernia, heart trouble, pneumonia, or blood borne infectious disease that develops or manifests itself during the period the member is in service may be attributed to any disease existing prior to that development or manifestation (Labor Code §3212) - however, a contemporaneous non-work related event or set of circumstances can sufficiently rebut this presumption. This presumption is called the anti-attribution clause.

2) By comparison other presumptions like the cancer presumption do not include an anti-attribution clause allowing rebuttal by a broader scope of evidence, which includes prior diseases or medical conditions that generally are not admissible evidence in presumptions which do include the anti-attribution clause such as "heart trouble". Evidence that may rebut the cancer presumption includes the lack of reasonable link between the latency period of the specific cancer and the "development or manifestation" of the cancer.

3) The presumptions discussed above and found in Table I have been expanded to disallow apportionment of permanent disability beginning 1-1-07 (Labor Code §4663(e)) (See also, Section III Benefits Apportionment of Permanent Disability).

9. Off Duty Injuries

a. Are safety officers' off duty injuries compensable?

1) Off duty peace officers' (peace officers are defined in Penal Code §830, et seq.) injuries are compensable if:

a) The employer must require the officer to be on call,

b) The injury must occur within the jurisdiction of the employer,

c) The activity producing the injury must be one the officer is required to perform when on duty (Labor Code §3600.3).

b. Injury producing activities while the off duty officer is acting as an employee of another entity or independent contractor in any capacity other than as a peace officer are not within the course of the employment (Labor Code §3600.3).

c. Firefighters not under immediate direction are covered if:

1) Proceeding or engaging in fire suppression, rescue operation, or preserving property **except** when:
    a) Paid by a non-firefighting agency at the time of injury; OR
    b) The activity is prohibited by law, ordinance or department regulation (Labor Code §3600.4).

SECTION III

BENEFITS

III.

BENEFITS

A. Workers' Compensation Benefits

Typical benefits under California Workers' Compensation laws generally fall into five categories. These categories are:

- Medical benefits
- Temporary disability indemnity benefits
- Permanent disability indemnity benefits
- Supplemental Job Displacement Benefits (for injuries after 1-1-04)
- Dependency (death) benefits.

There is a separate category of benefits called penalties which will be dealt with in another section (see Section IV).

1. Medical Treatment

California law provides that an employee who is injured on the job is entitled to all the medical treatment which is reasonably required to cure or relieve from the effects of the injury. Determination of the reasonableness and necessity of medical treatment is subject to Utilization Review (UR) (Labor Code §4610), which is mandatory for all employers and effective for all dates of injury. UR standards must be consistent with the schedule for medical treatment utilization adopted pursuant to Labor Code §5307.27 and the Medical Treatment Utilization Schedule (MTUS).

Labor Code §4604.5(b) states that medical treatment is determined by the MTUS. Effective July 18, 2009 the Administrative Director's (AD) changes to the MTUS include Acupuncture Guidelines, Chronic Pain Medical Treatment Guidelines, and post Surgical MT Guidelines (see Cal Code of Regulations §9792.24 1- 3). The ACOEM based guidelines and MTUS (including new guidelines) adopted pursuant to Labor Code §5307.27 shall be presumptively correct on the issue of the extent and scope of medical treatment. This presumption may be rebutted by a preponderance of scientific medical evidence based on other scientifically based, nationally recognized and peer reviewed guidelines. Medical care is not limited in terms of time or money and is provided entirely by the employer without co-payments or deductibles from the employee.

a. MPN Medical Treatment

Utilization Review determinations are now effective for 12 months unless there is a documented change in the injured worker's condition. Labor Code §§4616, et seq. allow the employer on or after 1/1/05 to establish a medical provider network

(MPN) for provision of medical treatment to injured employees. The framework for provision of medical treatment differs depending on whether it is within or outside of an MPN.

Once an injury has been reported to the employer, it is the employer's obligation to make an offer of medical care on a timely basis. If the employer does so, the employer and/or its administrator/insurance company has the right to control the provision of medical care for the first 30 days after the injury is reported. Thereafter, the employee may select his own treating physician at a facility of his choice within a reasonable geographic area. A chiropractor shall not be a treating physician after an employee has received a maximum number (24) of chiropractic visits (Labor Code §4600(c)). If the employer fails to make an offer of medical care on a timely basis, the injured worker has the right to obtain medical care with a physician or medical facility of his choice at the employer's expense. It is therefore extremely important that the employer, when an injury is reported, makes a timely offer of medical care in order to maintain the right to direct medical care for at least the first 30 days and up until the point where the employee designates his own physician to provide further medical care.

Labor Code §4600 allows an employee to pre-designate his personal physician as the medical provider in the event of an industrial injury. Under these circumstances, the injured worker may then go to his own pre-designated personal physician immediately. In order for an employee to pre-designate his physician, the following five requirements must be met:

1) The employee must have health care coverage for non-occupational injuries or illnesses on the date of injury;
2) Written notice must be given to the employer setting forth the physician's name prior to the date of injury;
3) The medical provider must be a physician as defined in the Business and Professions Code (may not be a chiropractor) who has previously directed the employee's medical treatment; and
4) The named physician must retain the employee's medical records, including medical history, in the physician's office;
5) The physician must agree to be pre-designated.

The medical care to be provided to injured employees is defined in broad terms. Medical treatment includes medical, surgical, chiropractic and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches and apparatus including orthotic and prosthetic devices and services. Also included may be reasonably needed psychological counseling provided by a psychiatrist, psychologist or other mental health practitioners (with certain restrictions for monitoring by a medical physician). Medical treatment also includes reasonable transportation expense to and from offices of physicians; travel to hospitals and for

obtaining prescriptions authorized by the treating physician and temporary disability benefits in the event the employee loses wages while obtaining medical care.

While the employer has the right to control medical care for the first 30 days (in the absence of pre-designation of the personal physician or failure to offer medical care), employees have the right to request the employer to provide a change of treating physician at any time including during the first 30 days. Any such request must be responded to within five working days, or thereafter employees may select any physician they choose to provide care. Employees are also entitled, in a serious case, upon request to the services of a consulting physician or chiropractor of their choice at the expense of the employer. Contrary to common belief, an employee may change physicians more than once, so long as the changes are reasonable.

The MPN established by the employer **on or after 1/1/13** must meet the statutory requirements set forth in Labor Code §4616 and the employer must secure approval of the proposed MPN from the AD. MPN approval by the AD is valid for four years. (Commencing 1/1/14 existing and approved MPNs shall likewise be valid and approved for four years.) Moreover, if the AD does not act on a submitted MPN, within 60 days it shall be deemed approved. Once approved, there shall be a conclusive presumption by the Appeals Board that the MPN is valid.

If an employee disputes either the diagnosis or treatment prescribed by the MPN physician, the employee may seek the opinion of another physician within the MPN. If the injured employee disputes the diagnosis or treatment prescribed by the second MPN physician, the employee may seek an opinion from a third MPN physician.

Noteworthy is that **commencing 1/1/14**, every MPN must provide one or more individuals within the United States to serve as medical access assistants to help the injured employee find an available physician.

b. Medical Treatment Disputes

Pursuant to Labor Code §4610.5(d), for all dates of injury, if a treatment recommendation is denied, modified, or delayed pursuant to Utilization Review, the employee's remedy for appeal is to request an Independent Medical Review (IMR) within 30 days of service of the adverse determination.

The request must be made on the form prescribed by the AD to initiate the IMR process. Within 10 days of notice of assignment to an IMR organization (the identity of the IMR physician remains confidential) the employer must provide all requisite medical records and correspondence as set forth in Labor Code §4610.5(l), including the following:

All medical records regarding current medical condition, medical treatment, disputed medical treatment requested, correspondence regarding disputed treatment, employee information and "all other relevant documents."

Contemporaneous service must be made on the employee and the requesting physician. The foregoing must be supplied to the IMR within 10 days for regular treatment requests, and 24 hours for Expedited Treatment requests. The IMR will make a determination on the request within 30 days for regular requests, or 3 days for Expedited Requests, based upon the standards of medical necessity as defined in Labor Code §4610.5(c).

The IMR determination is deemed a determination of the AD and is binding upon all parties. The grounds for appeal are limited to fraud, conflict of interest, bias, or mistake of fact. If the decision of the AD is reversed, the matter is remanded to the AD to submit dispute to IMR by a different review organization. Any decision of medical necessity must be "promptly" implemented by the employer.

2. Temporary Disability Benefits

During periods when injured workers are temporarily incapacitated from the effects of their injuries and unable to work, they are entitled to receive compensation payments. The rate of TD payments is dependent upon employment status as well as earnings. For injuries prior to 4/19/04, the duration of temporary disability payments is not limited by statute. For injuries on or after 4/19/04, aggregate temporary disability payments for a single injury shall not extend for more than 104 compensable weeks within a period of two years from the date of commencement of temporary disability payment. For injuries on or after 1/1/08, aggregate temporary disability payments for a single injury shall not extend for more than 104 compensable weeks within five years of the date of injury. This change allows for the temporary disability to be paid any time with in the five years of the date of injury. Exceptions to these limitations are provided in the case of nine statutorily specific injuries and illnesses for which TD may extend to 240 weeks (Labor Code §4656(c)). Temporary disability benefits are not taxable.

Under the COVID-19 presumptions, some public safety and health employees may become entitled to subspecies of benefits created by other state or federal law in lieu of Labor Code §4850 or temporary disability. Consult with counsel to inquire if in doubt.

a. Public Safety Officers

Labor Code §4850 defines several categories of public safety officers (this includes any police officers, deputies or firefighters of a district, city or county fire department whose principle duties include active police or fire fighting) who are to receive, in lieu of temporary disability, payment of "full salary" and benefits for up to one year. Effective 1-1-10, Labor Code §4850 requires the injured worker to be "employed, on a regular full-time basis". This recent amendment deleted the

requirement for membership in a retirement program. The period of one year does not have to be continuous. After the termination of one year of benefits, the public safety officers are entitled to regular compensation benefits and may also be entitled to retirement benefits. If the injured worker is still temporarily totally disabled after payment of one year of full salary continuation benefits, then he/she will receive TD in accordance with Labor Code §4656 for an additional year or a total of 104 weeks of disability benefits. Pursuant to the recent Court of Appeal case of County of *Alameda v. WCAB* (*Knittel*) (2013), 78 CCC 81, the payments made under §4850 do count toward the 104 week limitation for "aggregate disability benefits". As a result, the maximum for a qualifying safety officer is 52 weeks of §4850 salary continuation, followed by 52 weeks of temporary disability payments payable at 2/3 Average Weekly Wages up to the maximum, $1,128.43. These full salary benefits are not taxable, but the employer can continue the usual payroll deductions as the taxation of this income is an issue between the taxpayer and the IRS. 26 USC 104 provides that "amounts received under Workmen's Compensation" are not taxable income. Consider and be guided by any employment agreements or MOU regarding withholding of taxes when providing "full salary" benefits under Labor Code §4850.

Volunteer Firefighters and Reserve Police Officers are presumed to have maximum wage earning regardless of their compensation from the safety work or elsewhere. (Labor Code §4458 and §4458.2). The presumption of maximum wages does not apply to full-time paid Firefighters or Police.

For statutory language applicable to UC employees (Fire & Police), refer to Labor Code §4804.1 & §4806. For statutory language applicable to CSU employees (Police), refer to Labor Code §4816.

b. Non-Public Safety Employees

Employees who are not entitled to the full salary in lieu of temporary disability pursuant to Labor Code §4850 are entitled to temporary disability indemnity benefits (TD). Temporary disability indemnity benefits continue during the period while employees are incapacitated from their usual and customary occupation until they have either returned to work, returned to partial duty, been declared permanent and stationary (and therefore have fully recovered or have permanent disability restrictions), or the statutory period for payment of TD has expired. Temporary disability benefits are payable every two weeks at the rate of two thirds of injured workers' average weekly wages subject to statutory maximums as set out in Table II.

Employers can limit their obligation to pay temporary disability indemnity by offering modified duty to employees. Upon release by a physician of the employee to modified duty, an employer may stop paying temporary disability indemnity benefits if they are able to offer the employee work within his stated restrictions.

This occurs even if an employee refuses to return to the modified duty upon release. Because this issue is often subject to litigation, it is recommended that any and all offers of modified or alternative work to an employee by the employer be made in writing. If the employer is unable to accommodate the restrictions given by the physician the employee's right to receive temporary disability indemnity benefits continues.

Early return to work, through offers of modified work, saves money and keeps the injured worker involved with the employment environment creating a positive relationship through the recovery process. An employer should maintain clearly defined job descriptions of all employees' usual work and light duty opportunities. These descriptions of work options should be quickly communicated to the treating doctor by providing them to the claims administrator or directly by the employer. The goal is to have the treating doctor know that the employer wants the injured worker back as soon as possible and is willing to provide temporary light duty if needed.

In summary, the employer's obligation to pay temporary disability benefits for the effects of an injury continues until one of the following: 1) permanent and stationary status; 2) an offer of modified or regular work; 3) but in no event more than 104 weeks for most injuries (unless limited exceptions found in Labor Code §4856).

3. Permanent Disability Benefits

Should an industrial injury leave an employee with permanent impairment, the employee is entitled to an award of money based upon the employee's injury or disfigurement, his occupation, and age. Volunteer Firefighters and Reserve Police Officers are presumed to have maximum wage earning regardless of their compensation from the safety work or elsewhere. (Labor Code §4458 and §4458.2). The presumption of maximum wages does not apply to full-time paid Firefighters or Police. **For injuries on or after 1/1/13**, Permanent Disability (PD) is governed by new Labor Code §4660.1(c)(1), which eliminates some psychiatric injuries such as sexual dysfunction and sleep impairment as compensable consequences (with notable exceptions for violent crimes or catastrophic injuries). Injured employees can still receive treatment however, for injuries affecting those body parts or giving rise to those conditions.

Labor Code §4650(b) is amended to provide (**Effective 1-1-13 for all dates of injury**) that if the employer offers an injured employee a job that pays at least 85% of his pre-injury wages and compensation or if the employee is employed in a position that pays at least 100 percent of the pre-injury wages and compensation, no PD advances are required to be paid **prior to a PD award by the WCAB**.

When a PD award is made, the PD amount due is calculated from the last date of TD or the date the employee's disability became P&S, whichever is earlier. This incentivizes both

the employee to return to work as soon as possible, and the employer to make a job offer paying at least 85% of pre-injury wages and compensation as soon as possible.

In summary, the employer is not required to begin PD indemnity if the employee returns to work with his employer at 85% of pre-injury wages and compensation, or is working at a job that pays 100% of pre-injury wages and compensation – **even if the employee is working for a different employer**.

For pre-1/1/13 dates of injury, Labor Code §4658(d)(2), still requires a 15% PD increase for employers with 50 or more employees. However regardless of the number of employees, permanent partial disability benefits may be reduced by 15% per week if the employer offers regular, modified or alternative work within 60 days of the employee's condition becoming permanent and stationary. Labor Code §4658(d)(3)(A). Failure to offer regular, modified or alternative work within 60 days of the employee's condition becoming permanent and stationary will result in a 15% increase in the weekly PD benefit thereafter. **For injuries occurring on or after 1/1/13, the 15% increase or decrease has been eliminated.**

An employee left permanently and totally disabled as a result of an industrial injury will still receive the temporary disability indemnity benefits in effect on the date of injury for the remainder of his life. Life Pension provisions also remain unchanged. The Supreme Court has decided that the COLAs operative in Labor Code §4659(c) for injuries after 1/1/03 are to begin on the January 1st of the year following the date the worker became entitled to receive and actually begins receiving either permanent total disability payments or a life pension payment.

4. Apportionment of Permanent Disability

In general, an employer is responsible to pay only for the permanent disability directly caused by the industrial injury. The law of apportionment is set forth in Labor Code §4663 and §4664; however, its interpretation is highly complex and often litigated. The California Appellate Court in *Benson v. WCAB* 170 CA 4th 1535, 37 CWCR 27, 74 CCC 113, held that "the new statutory scheme requires apportionment to each cause of a permanent disability, including each distinct industrial injury." Labor Code §4663(e) states that apportionment as to causation shall not apply to the presumptive injuries under Labor Code §3212 et seq. (see also Section II, C presumptions). Thus a Public Safety worker whose injury is covered by presumption in Labor Code §§3212 - 3213 is excluded from apportionment to pre-existing conditions, but not actual disability previously awarded by the WCAB.

5. Vocational Rehabilitation Benefits

Workers injured before 1/1/04 that are unable to return to their usual and customary occupations as a result of their injuries, are eligible pursuant to Labor Code §139.5 to vocational rehabilitation benefits to assist them in the return to employment, but must request services before 1/1/09. As of 1/1/09 Labor Code §139.5 ceased to be in effect. The

WCAB issued a unanimous decision in *Weiner v. Ralph's Co.* (2009) 37 CWCR 147, 74 CCC 736 (en banc) which held that the repeal of 139.5 terminated all rights to vocational rehabilitation benefits or services where the right to VR benefits had not vested prior to 1/1/09.

6. Supplemental Job Displacement Vouchers And the Interactive Process

For Dates of Injury 1/1/04 – 12/31/12 qualified employees are entitled to supplemental job displacement vouchers (Labor Code §4658.5). Workers injured on or after 1/1/05 are not entitled to Vocational Rehabilitation Benefits discussed previously in Section IV. Up to 10% of the value of the vouchers may be designated for vocational or return to work counseling. This benefit does not provide a weekly maintenance allowance and is a reduced benefit when compared to its predecessor. The amount of this benefit is determined by the amount of permanent disability. (See Form L3 & M2). A voucher must be used within five years of the date of injury or within two years of the date it was furnished if it was issued **on or after 1/1/13**.

Effective 1/1/13, there are new limitations on the monetary value of vouchers for **dates of injury on or after 1/1/13**. Vouchers now have an expiration date; new vouchers for injuries **on or after 1/1/13** are capped at $6,000. Also, vouchers for injuries **on or after 1/1/13** cannot be settled, and injuries sustained during the use of the voucher are not compensable. **For the dates of injury on or after 1/1/13**, the voucher expires two years after the date it is furnished or five years after the date of injury (Labor Code §4658.7). Covered voucher expenses have been expanded under the new legislation.

For dates of injury on or after 1/1/2013, a voucher must be used within five years of the date of injury or within two years of the date it was furnished if it was issued **on or after 1/1/13**, whichever is later (§4658.5(d)). For dates of injury **on or after 1/1/13**, the voucher expires two years after the date it is furnished or five years after the date of injury (§4658.7).

Covered voucher expenses have been expanded.

For injuries on or after 1/1/13, the applicant is entitled to a voucher if he has residual disability and the employer does not make an appropriate timely job offer lasting 12 months. A timely offer is within 60 days of the carrier receiving the first P&S report from the treating physician or medical-legal evaluator. An appropriate job offer must be within the applicant's work restrictions.

To ensure that the offer is within the work restrictions, Labor Code §4658.7 essentially puts the burden on the carrier to start the interactive process. The new code section provides that if the employer or carrier provides the employee's job description to the physician, that physician shall evaluate and identify work restrictions. The carrier must then send the work restrictions to the employer in order to evaluate the availability of appropriate work (§4658.7(b)). The obligation of the employer to initiate the interactive

process may have civil implications pursuant to AB 2222. Employers should familiarize themselves with the requirements of the FEHA/ADA and AB 2222 in handling employment decisions. It is recommended that employers have prepared Job Descriptions and engage in the interactive process to explore reasonable accommodations of the employee's disability, by meeting with the employee to discuss those accommodations, even if the injury is impossible to accommodate or there is no alternative work is available. Failure to undertake the interactive process may result in a civil lawsuit in state or federal court.

Offers of modified or alternative work must be made by the employer through the use of Form 10133.35 (Form L1) for **injuries occurring on or after 1/1/13**, or Form DWC-AD 10133.53 (Form L3).

For positions which involve public safety (such as police, firefighters and emergency personnel), the requirement to provide reasonable accommodation is tempered by a recognition that the public's safety must be maintained. Accommodation in these cases may not be required if the employer maintains reasonable physical fitness standards that the injured worker cannot meet or if increased risk to the public can be shown. Remember the process by which an accommodation must be reasonable and involve communication with the injured worker.

The AD has established a Return to Work Supplement Program, if an injured has first received a supplemental job displacement benefit for injuries occurring on or after 1/1/13, as contained in 8 California Code of Regulations §17302 through §17309.

7. Dependency (Death) Benefits

Should an employee be killed or sustain injuries which result in death as a result of an injury during the course and scope of employment, his dependents (or the estate in certain instances), are entitled to statutory benefits. The amount of benefits is determined by the date of injury, the level of dependency and the number of dependents. In addition, the families of deceased employees, regardless of dependency, are entitled to a burial benefit up to a statutory maximum according to the chart in Table IV subject to proof of actual expenses.

In order for death benefits to be payable, the injured employee's death must occur within 240 weeks of the date of injury.

Families of safety members who are killed in the line of duty may be entitled to special death benefits from CalPERS or other retirement systems.

The Legislature enacted §5406.7 effective 1/1/2015. This provides a potential lengthening of the time to file for a presumptive cancer related death claim available to dependents of certain safety personnel under §3212.1. This statute applies to all pending cases but its application is complex. If applicable, it will extend the time to claim a death benefit from

the statutory 240 weeks up to 420 weeks. It is recommended that you seek legal advice to determine if this extension applies. In 2018, the Legislature deleted the sunset clause that had provided that this provision would only be effective through 1/1/2019, thereby making the 420 week extension permanent.

B. Retirement Benefits

The majority of public employees of the State of California are members of one of three retirement systems; the Public Employees' Retirement System (CalPERS), the County Employees' Retirement Law of 1937, or the State Teachers' Retirement System. For our purposes we will focus on the first two in this discussion. Coordination of the benefits under CalPERS and the County Employees' Retirement Law of 1937 (CERL) is relevant and critical to the provision of workers' compensation benefits.

1. Public Employees' Retirement System (CalPERS)

For public safety members, the provision of benefits under the public Employees' Retirement Systems has significant impact on workers' compensation benefits. These include the following:

a. CalPERS safety members who are permanently disabled from their work because of an industrial injury can receive a service connected disability retirement (this is also called an industrial disability retirement or "IDR"). Upon receipt of a service connected disability retirement benefit, or advances from the employer of those benefits under Labor Code §4850.3 or 4850.4, salary continuation under Labor Code §4850 ends. When an employer makes advances under Labor Code §4850.3 or §4850.4 the employer is paid back by CalPERS when the disability retirement is affirmed by CalPERS.

b. In addition to termination of benefits pursuant to Labor Code §4850, a service connected disability retirement terminates the obligation of the employer to pay temporary disability indemnity benefits and vocational rehabilitation maintenance allowance benefits if applicable. It does not affect the obligation to pay permanent disability benefits, or supplemental job displacement vouchers.

c. For a non-service connected disability retirement or a retirement for service, the obligation to pay temporary disability indemnity and vocational rehabilitation maintenance allowance benefits is not affected. Service connected disability payments are usually 50% of the member's "final compensation" which is determined by one of several formulas depending upon the option the employer selected. Non-service connected disability benefits and service retirement are determined based upon years of service and earnings.

Effective January 1, 2003, Labor Code §4850.4 requires an employer to make advances in cases where the Industrial Disability Retirement is disputed, and there is no current

authority for reimbursement by PERS should the injury be found to be non-industrial. However, the agency may pursue recovery (Labor Code §4850.4(8)). For general information about PERS call or write:

CalPERS
Benefit Application Services Division
P. O. Box 2796
Sacramento, CA 95812
T: 888-225-7377
www.calpers.ca.gov/

2. County Employees' Retirement Law of 1937 (CERL)

For public safety members, the provisions of benefits under the County Employees Retirement Law of 1937 are distinct from the provisions of CalPERS.

a. CERL safety members who are permanently disabled from their work because of an industrial injury can receive a service-connected disability retirement. Upon receipt of a service-connected disability retirement benefit, or advances from the employer of those benefits under Labor Code §4850.3, salary continuation under Labor Code §4850 ends. However, as distinguished from CalPERS, when an employer makes advances under Labor Code §4850.3, the Labor Code does not provide that the employer be reimbursed by the retirement association under CERL.

b. Unlike CalPERS, a service-connected disability retirement under CERL does not terminate temporary disability indemnity benefits or vocational rehabilitation maintenance allowance benefits. This issue was distinguished in *Pennington v. WCAB*, County of Los Angeles, 20 Cal. App. 3d 55 (1971) and *Burns v. WCAB and County of Los Angeles*, 190 Cal. App. 3d 759 (1987).

c. A safety member who is a member of both CalPERS and CERL, as a result of employment under both systems during the course of his career, and is granted a service-connected disability retirement may continue to receive temporary disability indemnity benefits or vocational rehabilitation benefits, despite the fact that if only having been a member of CalPERS, such benefits would have ended.

For retirements under both CalPERS and **the County Employees' Retirement Law of 1937, service connected disability retirement benefits are generally non-taxable** whereas retirement benefits based on length of service are taxable. Therefore, even if the benefits are relatively comparable, the tax free benefit of a disability retirement substantially weigh in favor of the employee to retire for service connected disability reasons.

For general information about the County Employee's Retirement Law of 1937 call or write your local County retirement association office.

SECTION IV

PENALTIES

IV.

PENALTIES

Workers' Compensation law provides for several different types of "penalties" payable by employers and/or their insurance companies and adjusting agencies for various violations of either the law or public policy. The important ones are outlined as follows:

A. Serious and Willful Misconduct – Labor Code §4551 and §4553

Should the employee be able to demonstrate that his injury was sustained as a result of Serious and Willful Misconduct on the part of the employer, the employer is obligated to pay to the employee a supplemental benefit totaling 50% of all compensation and medical benefits payable to the employee. This benefit is payable by the employer, not the insurance company and/or a third party administrator (TPA), and may not be insured against although the employer may buy insurance to cover the costs of defending such a claim.

In order for an employee to demonstrate that the injury occurred as a result of Serious and Willful Misconduct, he must demonstrate either one of the following two:

1. That the injury occurred as a result of the violation of a safety order which was designed to prevent the type of injury which occurred and that the employer through a managing representative had knowledge of the existence of the safety order and the violation of same, or

2. The employer had knowledge that a substantial risk of harm existed and took no steps to prevent the harm or correct the defect which was proximate cause of the resulting injury.

    a. There is also a provision for the employer to claim that an injury was a result of the employee's own Serious and Willful Misconduct. If the WCAB determines that the employee's injury was caused by such conduct, the employee's benefits are to be reduced by 50%. This remedy is rarely granted and is limited in application (Labor Code §4551).

B. Employer Discrimination Under Labor Code §132(a)

Labor Code §132(a) prohibits an employer from retaliating against an employee for filing or making known the intent to file a claim for workers' compensation benefits. The Supreme Court has held that an injured worker must show two elements to establish discrimination under §132(a). The injured worker must show the right to a benefit, condition of employment or status to which he or she is in some way "singled out" detrimentally, and that the detriment is not simply the result of a uniformly applied policy that is not itself discriminatory. When those two elements are shown then the employer must show its action, though detrimental to the injured worker, was the result of

a reasonable "business necessity". *Department of Rehabilitation v. WCAB* (*Lauher*) 30 Cal. 4th 1281, 68 CCC 831 (Supreme Court, 2003). Any action that affects the employee's benefits, employment status, seniority, etc., must be considered as potentially conflicting with this protection and evaluated as to the possibility of being considered discriminatory.

In the event of a finding of employer violation of Labor Code §132(a), the employee is entitled to reinstatement with lost wages and benefits from the date of the discriminatory act, plus penalty of 50% of all benefits provided, up to a maximum of $10,000, and costs of up to $250. Similar to Serious and Willful misconduct, an employer cannot insure against a claim for benefits under Labor Code §132(a).

Further, a separate civil remedy for industrial injury discrimination is allowed, and creates an even greater liability which is generally not covered by insurance. *City of Moorpark, et al v. Superior Court of Ventura County (Dillon)*, (1999), 18 Cal. 4th 1143, 63 CCC 944 (Supreme Court).

C. Miscellaneous Penalty Provisions

1. Unreasonable Delay in Payment of Benefits

Labor Code §5814 provides that in the event of a delay in the provision of benefits without reasonable doubt from a medical or legal standpoint, the benefit delayed (e.g.: a temporary disability payment) shall be increased up to 25% but not more than $10,000. If the delay is merely the failure to pay a medical bill (where the services were timely provided), a different penalty applies payable to the medical provider (Labor Code §4603.2).

2. Delayed Disability Payments

An automatic, self-imposed penalty for any delayed payment of temporary or permanent disability requires a 10% increase on the amount delayed (Labor Code §4650). This penalty highlights the need for the claims examiner, employer and medical professional to effectively communicate with one another.

3. Unreasonable Delay in Paying an Award by a Public Entity

Labor Code §5814.5 provides for a special penalty for employers who are found to have unreasonably delayed payment on an award. Such a finding also entitles the injured worker to have attorney's fees for enforcing the Award ordered in addition to the Labor Code §5814 penalty for delay.

4. Costs for Frivolous or Dilatory Tactics (Labor Code §5813)

For injured workers whose claims are filed after 1/1/94, there is also a provision for an award against a party whose actions are determined by the WCAB to be frivolous or solely for causing delay, of attorney's fees, costs and a special penalty of up to $2,500. This penalty may be assessed against either party and is not limited to payment by the defendant.

SECTION V

CLAIMS HANDLING

V.

CLAIMS HANDLING

A. Teamwork

When a claim is presented, it is of utmost importance that the employer and claims administrator work together to gather facts necessary to process the claim. Under Labor Code §5402, the administrator has only 90 days "(less time if a COVID-19 presumption is applicable) from the time the Claim Form was filed with the employer to accept or deny the claim. Further, during the 90 day delay time period or until a denial issues, the employer must pay up to $10,000 in reasonable medical costs consistent with utilization review limitations (Labor Code §§5402, 4610, 4616). Failure to act timely results in the claim being "presumed" accepted. This places considerable time pressure on the claims administrator and employer to accomplish the factual investigation and as may be required, obtain medical evidence to address causation issues.

An employer should have one person act as the "contact person" for the claims administrator to gather necessary facts and forms. This individual should become familiar with general claims handling to facilitate the process. Such a person is convenient as a central source of information for the employer and administrator. The position requires strict confidentiality as to all information, written or verbal as claims may become adversarial or result in litigation beyond workers' compensation. An employer must insure that documents concerning claims are properly secured with limited access. Labor Code §3762 further protects the injured worker's right to privacy by limiting the medical information the employer can receive to (1) the diagnosis and the treatment provided for this condition and (2) information necessary to modify work duties. This limitation makes it difficult for claims examiners to fully communicate the medical status of an injured worker to the employer, and eliminates the prior practice of providing full medical reports to the employer. Nevertheless, the employer does have a "bill of rights" in Labor Code §3761 which provides for an information exchange regarding (1) the filing of claims directly upon the carrier, (2) an employer's right to give information to dispute any aspect of the case or its settlement and (3) how reserves are calculated.

We hope to see further legislation that will help the employer and claims examiner exchange necessary medical information, yet protecting the employee's privacy.

B. Early Employer Investigation

The employer can help the claims administrator by sharing background information that either proves or disproves a claim. Questionable claims should be clearly identified in order that the claims administrator can proceed with appropriate investigation. The filing of false claims by an employee is punishable as a felony; however, a corollary is the false denial of a claim is likewise punishable (Labor Code §5401.7). Thus it is important to establish facts and evidence to handle claims appropriately.

The employer should in a normal course of business investigate an industrial accident to document facts, retain physical evidence, identify witnesses, and obtain photographs as appropriate. Identifying the cause of an accident is critical to future prevention, by eliminating the problem, i.e. defective equipment, or becoming a topic for safety and training meetings.

This information gathered by the employer gives the claims administrator a chance to take appropriate action within the short time limits of the law and provides an opportunity for the employer to knowledgeably participate in either claim acceptance or rejection.

Employers must exercise care to avoid improper disclosure of medical and personnel information in their possession to third parties other than the claims administrator. Further disclosure of such material by the claims administrator to third parties may require medical, psychiatric, or employment/personnel record releases from the injured worker before disclosure can be made. Employers should be especially careful to abide by the "Peace Officers Bill of Rights Act" and the "Firefighter's Bill of Rights Act" with respect to personnel records of these safety employees. [Govt. Code §3300 et.seq (POBRA), and §§3250 et seq. (FBRA)]. Particularly, in psychiatric injury claims where a "good faith personnel action" defense is asserted against the safety officer, the personnel record must be secured by proper release before disclosure to third parties such as reviewing physicians. If the safety officer refuses, a special court proceeding called a "*Pitchess* Motion" exists in which the judge will make a confidential, "in camera", review of the protected records allowing disclosure only to the extent necessary for the litigation. *Pitchess v. Superior Court* (1974) 11 Cal. 3d 531. If there is any doubt by the employer regarding the confidentiality of records, it should be fully discussed with the claims administrator before any disclosure is made to third parties.

C. Continuing Employer Involvement

Even after a claim is accepted, an employer gaining knowledge that disproves the claim or any portion of it should communicate it to the claims administrator immediately. Most often this kind of information concerns the activities of the injured worker when they are inconsistent with the nature of the injury or, the activities demonstrate an ability to perform at least light duty work. In some cases, fraud may be involved requiring undercover investigation and appropriate legal steps. The employer plays a vital role by continuing to communicate facts about the claim and the injured worker's activities which in turn maintains the integrity of the system as well as keeping it financially viable.

D. Key Personnel/Special Circumstances

Sometimes key or confidential personnel like the chief, a board member, or the contact person is the subject of a workers' compensation claim. When this occurs it is necessary to avoid any conflict of interest or inappropriate disclosure of confidential information. Should this occur, consideration of an alternate claims contact person, or removal of the file entirely to the administrator may be needed. Discuss how to best handle claims with special circumstances or personnel with the claims administrator and, if need be, with legal counsel.

E. Mistakes to Avoid

Twelve mistakes employers make that increase worker compensation costs are listed below with a brief description of the consequence. It provides a good checklist for effective claims handling at the employer level.

COMMON EMPLOYER MISTAKES AND CONSEQUENCES

1. The Employer Ignores Employee's Report of Injury

Employer/claims administrator is charged with knowledge of injury from the earliest date of knowledge.

2. The Employer Fails to Forward Claim Form or Medical Bills to Claims Administrator

Claims administrator is charged with knowledge from date of the employer's receipt of the DWC-1. Failure to timely forward medical bills may preclude adjustment of charges and result in expensive penalties.

3. The Employer Fails to Investigate or Report Relevant Information Regarding Injury to Claims Administrator

Claims administrator barred from presenting employer's investigation or information in employer's possession to rebut presumption of injury if it could have been discovered within the first 90 days "(less time if a COVID-19 presumption is applicable). Employers should be aware that legislative changes in 2013 now permit the administrator to file an Application for Adjudication to commence formal discovery without incurring applicant attorney's fee for litigation.

4. The Employer Fails to Direct Employee to Designated Medical Provider

Failure to make immediate offer of medical care and direct employee to obtaining care results in waiver of right to control medical care.

5. The Employer Fails to Provide Accurate Wage Statement When Requested

Claims administrator is required to pay benefits at maximum rates unless it can prove otherwise by a wage statement. This can also result in penalties if payments are made at an inaccurate lower rate.

6. The Employer Refuses to Provide Early Return to Work (ERTW) Program (Temporary Modified Work)

Across the board increase in all benefits particularly TD and employee loyalty/interest for the work diminishes.

7. The Employer Refuses to Consider Alternative/Modified Work Options and Does Not Engage the Employee in the Interactive Process

Across the board increase in costs for all benefits, particularly rehabilitation for injuries prior to 1/1/04 and for injuries on or after 1/1/05, permanent disability, and possible FEHA and ADA exposure. AB 2222 requires employers to use an "interactive process" to involve the employee in the accommodation process. Additionally, under legislation effective 2013, an offer of return to work either full or modified duty serves to delay permanent disability advances under §4650 (b)(2) until an award issues which can be advantageous for settlement.

8. The Employer Fails to Correct Known/Acknowledged Safety Hazards

Potential exposure for "Serious and Willful Misconduct," an uninsurable 50% penalty, on all workers' compensation benefits provided and increased risk for more claims.

9. The Employer Fails to Control Receipt and Distribution of Medical Information

Exposure to possible civil liability for invasion of privacy (especially AIDS information).

10. The Employer Fails to Train Employees on Workers' Compensation & Safety Issues, and/or to Become Involved in Claims Handling

All of the above consequences.

11. Failure to Maintain a Roster of Volunteer Firefighters, Non-Firefighter Personnel and Fire Cadets

Non-qualified employee may be able to assert a claim for special firefighter presumptive injuries or presumed maximum temporary disability benefits.

12. Failure to Maintain Confidentiality of Medical and Personnel Information Concerning Safety Officers

This can result in civil lawsuit, sanctions, and fines. Special protection for safety officers POBRA and FBRA. Records concerning HIV status and psychiatric are specially protected.

SECTION VI

COMMONLY USED FORMS

VI.

COMMONLY USED FORMS

Disclosure: The forms and notices included within this guidebook are not exhaustive. A complete compilation of forms can be found at the following two links:

http://www.dir.ca.gov/dwc/forms.html
https://www.dir.ca.gov/dwc/BenefitiNoticeManual/BenefitNoticeManual.pdf

A. DWC-1 Workers' Compensation Claim Form

The DWC-1 Claim Form must be provided to an employee, either personally or by First Class Mail, within one day of an industrial injury if that injury results in lost time or medical treatment beyond first aid (Labor Code §5401). "First aid" is defined as "one time treatment of minor scratches, cuts, burns, splinters or other minor industrial injury." Minor industrial injury specifically excludes "serious" exposure to hazardous substances as defined by Labor Code §6302(i).

B. Form 5020 - Employer's Report of Occupational Injury or Illness

Form 5020 must be filed within five days of an industrial injury or occupational disease claim when injury or disease results in lost time beyond the day of the injury, or medical treatment beyond first aid as defined by Labor Code §5401.

C. Form 5021 - Doctor's First Report of Occupational Injury or Illness

Form 5021 must be completed by the doctor, as well as one section by the employee if they are able to do so and filed within five days of the initial exam by any physician providing treatment for an occupational injury or disease. Subsequently doctor's reports may be narrative or use "physicians progress Report," "Treating physician's Permanent and Stationary Report" entitled PR-2 and PR-3 respectively. New forms are being created as a result of passage of SB899 to address the new permanent disability schedule and apportionment issues.

D. Application for Adjudication of Claim

An Application for Adjudication must be filed in post-1/1/94 injuries in order to invoke the jurisdiction of the WCAB to allow discovery beyond obtaining records informally.

E. Notice Regarding Temporary Disability Benefits

The Notice Regarding Temporary Disability Benefits must be used whenever temporary disability payments are first made. The purpose of this notice is to inform the injured worker that his claim has been accepted, and to briefly explain the benefits that will be received. The form also reports initial payments to the Division of Workers' Compensation. In cases of employees entitled to

Labor Code §4850 benefits or other employees entitled to wage continuation or benefits in excess of statutory disability benefits, the form 500-F should be used.

F. Notice Regarding Permanent Disability Benefits Denial

The Notice Regarding Permanent Disability Benefits Denial should be used when the first and final payments of temporary disability benefits are being made at the same time, primarily in instances with very short amounts of lost time.

G. Notice Regarding Delay of Workers' Compensation Benefit

The Notice Regarding Delay of Workers' Compensation Benefit is used when a claim is placed on delay, where insufficient information is available to either accept or deny a claim for temporary disability benefits. The form must identify the reason for the delay and the decision, and inform the injured worker of the date by which the decision is likely to be made. This decision date cannot be more than 90 days after the date of the injury.

H. Notice Regarding Denial of Workers' Compensation Benefit

The Notice Regarding Denial of Workers' Compensation Benefit is to be used when a decision has been made to deny the claim. This notice relates both to eligibility for temporary as well as permanent disability benefits. The Division of Workers' Compensation requires that the denial notice must be sent within 14 days after the decision has been made, and must be sent to the employee within 90 days after the injury occurs to avoid the presumption of compensability provided for in Labor Code §5402.

I. Notice Regarding Indemnity Benefits Payment Change

As noted above, the Notice Regarding Indemnity Benefits Payment Change must be used whenever the injured worker first receives benefits in excess of the statutory temporary disability benefits, most commonly in relation to employees entitled to receive §4850 benefits. Even though the employee is entitled to further benefits, the form must identify the statutory maximum and minimum benefits, particularly as eligibility for Labor Code §4850 benefits is limited to one year.

J. DWC Form IMR - Application for Independent Medical Review

This form is completed by, or on behalf of, the injured worker within 30 days following a Utilization Review decision letter delaying, denying or modifying a treating physician's request for medical services or treatment.

K. DWC Form RFA - Request for Authorization for Medical Treatment

This form is to be attached to the treating physician's report to request authorization for treatment. This form is **required** to initiate the Utilization Review process required by Labor Code 4610.

L. DWC Notices of Offer of Regular Work and Modified or Alternative Work

L1 DWC - AD 10133.35 - Notice of Offer of Regular, Modified, or Alternative Work for **dates of injury on or after 1/1/13**.

L2 DWC - AD 10118 - Notice of Offer of Regular Work for **dates of injury between 1/1/05 to 12/31/12, inclusive.**

L3 DWC - AD 10133.53 - Notice of Offer of Modified or Alternative Work for **dates of injury between 1/1/04 to 12/31/12, inclusive**.

The proper form depending on date of injury must be used when making an offer or modified, alternative or regular work. Remember to employ an interactive process with the injured worker before making a return to work decision (AB2222).

M. DWC Supplemental Job Displacement Vouchers

M1 DWC - AD 10133.32 - Supplemental Job Displacement Non Transferrable Voucher Form for **dates of injury on or after 1/1/13**.

M2 DWC - AD 10133.57 - Supplemental Job Displacement Non Transferable Training Voucher Form for **dates of injury between 1/1/04 to 12/31/12**.

The proper form depends on the date of injury. For **dates of injury on or after 1/1/13** the voucher expires in two years, whereas prior to 1/1/13 there is no expiration of the voucher. The voucher expiration date is triggered by date of **receipt** of the voucher by the injured worker. The voucher for **dates of injury on or after 1/1/13** should be sent certified mail.

N. Rosters

This is a sample format which can be modified. A similar format should be used to list non-firefighting volunteers. Each department should therefore keep at least two lists, volunteer firefighters and non-firefighting volunteers. Three forms are included:

- Firefighters
- General Volunteers (Non-Firefighters)
- Fire Cadets (Limited Duties)

SECTION VII

TABLES

TABLE I

EVIDENTIARY PRESUMPTIONS UNDER LABOR CODE §§3212 – 3213.2 as of 2020

OFFICER CLASSIFICATION	HEART TROUBLE/ PNEUMONIA	HERNIA	TUBERCULOSIS	CANCER	LOWER BACK	BLOOD BORNE INFECTIOUS DISEASES MRSA	MENINGITIS	BIOCHEMICAL	LYME DISEASE	PTSD	COVID-19
Sheriff's Office (PC 830.1)	3212.5 **	3212	3212.6	3212.1	3213.2 **	3212.8	3212.9	3212.85	3212.12	3212.15	3212.87
Police Officer (PC 830.1)	3212.5 **	3212	3212.6	3212.1	3213.2 **	3212.8	3212.9	3212.85	3212.12	3212.15	3212.87
DA investigators/ Inspectors (PC 830.1)	3212.5 **	3212	3212.6	3212.1		3212.8	3212.9	3212.85	3212.12	3212.15	3212.87
DOJ Officers (PC 830.1)	3212.7	3212.7	3212.7	3212.1		3212.8		3212.85	3212.12	3212.15	3212.87
Firefighters (local)	3212	3212	3212.6	3212.1		3212.8	3212.9	3212.85		3212.15	3212.87
Dept. Forestry f/fighters	3212	3212	3217.7	3212.1		3212.8	3212.9	3212.85		3212.15	3212.87
UC firefighters	3212.4	3212.4	3212.6	3212.1		3212.8	3212.9	3212.85		3212.15	3212.87
UC police (PC 830.2(b))	3213 **	3212	3212.6		3213.2 **	3212.8		3212.85	3212.12	3212.15	3212.87
CSU firefighters	3212	3212	3212.6	3212.1		3212.8	3212.9	3212.85	3212.12	3212.15	3212.87
CSU police (PC 830.2(c))		3212				3212.8	3212.9			3212.15	
Fish & Game Wardens (PC 830.2(e))	3212	3212		3212.1		3212.8		3212.85	3212.12		3212.87
CHP Officers (PC 830.2(a))	3212.3 / 3212.5 **	3212	3212.6	3212.1	3213.2 **	3212.8	3212.9	3212.85	3212.12	3212.15	3212.87
Other State police	3212.3 **	3212	3212.6	***		3212.8		3212.85	3212.12		
Dept. Corrections parole, probation, Custodial Officers or Youthful Offender parole Board and Youth Auth. Group Counselors & Supervisors, Security, Custodial parole officers (PC 830.5)	3212.10	3212.7	3212.10	***		3212.8	3212.9 & 3212.10	3212.85	3212.12	3212.15	3212.87
Lifeguards				3212.11 (skin)							
School Dist. & Community College Police Officers (PC 830.32)										3212.5	
CA Conservation Corps									3212.12		

* Anti-attribution clause precludes evidence of causation from pre-existing disease in §§ 3212, 3212.3, 3212.4, 3212.5, 3212.7, 3212.8, 3212.11 and 3213.
After 1-1-07 no apportionment of Permanent Disability resulting from any presumptive injury unless a prior award exists. See §4663(e) & §4664.
** Presumption arises only after 5 years; and for LC §3213.2, Lower Back presumption, additionally requires a duty belt is a condition of employment.
*** All peace Officers sworn under §§830.1, 830.2, and 830.37 are expressly covered under the cancer presumption §3212.1(a).
WARNING: Where specified in the presumption, only those stated peace officers defined by specific penal code subsections get the presumption. There are statute specific conditions or precursors to the application of a presumption. Where the application of a presumption is in doubt, seek the advice of counsel.

TABLE II

TEMPORARY DISABILITY BENEFITS

Injury During Period	Max Earnings****	Rate Payable	Min Earnings	Payable
1/1/84 - 12/31/89*	$336.00	$224.00	$168.00	$112.00
1/1/90 - 12/31/90**	$399.00	$266.00	See Below *	$112.00
1/1/91 - 6/30/94**	$504.00	$336.00	See Below **	$112.00
7/1/94 - 6/30/95**	$609.00	$406.00	“ ”	$112.00
7/1/95 - 6/30/96**	$672.00	$448.00	“ ”	$112.00
7/1/96 - 12/31/02	$735.00	$490.00	“ ”	$112.00
1/1/03 - 12/31/03	$903.00	$602.00	$189.00	$126.00
1/1/04 - 12/31/04	$1,092.00	$728.00	$189.00	$126.00
1/1/05 - 12/31/06	$1,260.00	$840.00	$189.00	$126.00
1/1/07 - 12/31/07	$1322.49	$881.66	$198.37	$132.25
1/1/08 - 12/31/08	$1,374.50	$916.33	$206.17	$137.45
1/1/09 - 12/31/09	$1,437.10	$958.01	$215.55	$143.70
1/1/10 - 12/31/11	$1,480.04	$986.69	$222.01	$148.00
1/1/12 - 12/31/12	$1,515.75	$1,010.50	$227.36	$151.57
1/1/13 - 12/31/13	$1,600.08	$1,066.72	$240.00	$160.00
1/1/14 - 12/31/14	$1,611.96	$1,074.64	$241.79	$161.19
1/1/15 - 12/31/15	$1,654.94	$1,103.29	$248.25	$165.49
1/1/16 - 12/31/16	$1,692.64	$1,128.43	$253.89	$169.26
1/1/17 – 12/31/17	$1,758.85	$1,172.57	$263.82	$175.88
1/1/18 – 12/31/18	$1,822.91	$1,215.27	$273.44	$182.29
1/1/19 – 12/31/19	$1,877.07	$1,251.38	$281.57	$187.71
1/1/20 – 12/31/20	$1,949.14	$1,299.43	$292.37	$194.91
Labor Code §4850 Benefits***	(Full Salary)	(Full Salary)	(Full Salary)	(Full Salary)

*

For injuries after 1/1/90, but before 12/31/90 minimum rates are as follows:

For AWE < $98, TD = $98
For AWE > $98, but < $112, TD = AWE
For AWE > $112, minimum TD = $112

**

For injuries on or after 1/1/91 but before 1/1/07 minimum TD rates are calculated as follows:

For AWE < $126, TD = AWE (i.e.: If AWE = $45, Then TD = $45)
For AWE > $126, Minimum TD = $126

***

Full salary means the guaranteed salary payment for the position (i.e.: job description, memorandum of understanding [“MOU”] if applicable). Routine overtime or past annual average salary does not decide the issue. However if there is required overtime which is part of the job requirement such as a firefighter who is required to work 56 hours per week, year-round, then such overtime is part of full salary.

****

Labor Code §4458 (volunteer firefighters) and §4458.2 (reserve police officers) provide presumption of maximum earnings.

*****

For injuries occurring after 1/1/07, the minimum and maximum earnings for computing rates payable will be increased in conjunction with the “State Average Weekly Wage” (SAWW), as determined by the U.S. Department of Labor. This resulted in no increase until 1/1/07.

TABLE III

PERMANENT PARTIAL DISABILITY: MINIMUM AND MAXIMUM RATES

Date of Injury	Minimum - Maximum PD Rate	Labor Code Section
1-1-84 to 12-31-90	$70 - $140	L.C. §4453 (b)(2)
1-1-91 to 6-30-94		
1:0 to 14:3	$70 - $140	L.C. §4453 (b)(2)
25:0 to 99:3	$70 - $148	L.C. §4453 (b)(4)
7-1-94 to 6-30-95		
1:0 to 14:3	$70 - $140	L.C. §4453 (b)(2)
15:0 to 24:3	$70 - $148	L.C. §4453 (b)(3)
25:0 to 69:3	$70 - $158	L.C. §4453 (b)(5)
70:0 to 99:3	$70 - $168	L.C. §4453 (b)(6)
7-1-95 to 6-30-96		
1:0 to 14:3	$70 - $140	L.C. §4453 (b)(2)
15:0 to 24:3	$70 - $154	L.C. §4453 (b)(3)
25:0 to 69:3	$70 - $164	L.C. §4453 (b)(5)
70:0 to 99:3	$70 - $198	L.C. §4453 (b)(6)
7-1-96 to 12-31-02		
1:0 to 14:3	$70 - $140	L.C. §4453 (b)(2)
15:0 to 24:3	$70 - $160	L.C. §4453 (b)(3)
25:0 to 69:3	$70 - $170	L.C. §4453 (b)(5)
70:0 to 99:3	$70 - $230	L.C. §4453 (b)(6)
1-1-03 to 12-31-03		
1:0 to 69:0	$100 - $185	L.C. §4453 (b)(6)
70:0 to 99:0	$100 - $230	L.C. §4453 (b)(7)
1-1-04 to 12-31-04		
1:0 to 69:0	$105 - $200	L.C. §4453 (b)(6)
70:0 to 99:0	$105 - $250	L.C. §4453 (b)(7)
1-1-05 to 12-31-05*		
1:0 to 69:0	$105 - $220	L.C. §4453 (b)(6)
70:0 to 99:0	$105 - $270	L.C. §4453 (b)(7)
1-1-06 to 12-31-12*		
1:0 to 69:0	$130 - $230	L.C. §4453 (b)(6)
70:0 to 99:0	$130 - $270	L.C. §4453 (b)(7)
1-1-13 to 12-31-13		
1:0 to 54:0	$160 - $230	L.C. §4453(b)(8)
55:0 to 69:0	$160 - $270	L.C. §4453(b)(8)
70:0 to 99:0	$160 - $290	L.C. §4453(b)(8)
1-1-14 and after		
1: to 99:00	$160 - $290	L.C. §4453(b)(9)

* Actual rates subject to a 15% increase or decrease depending on size of employer and availability of regular, modified or alternate employment (L.C. §4658(d)). This increase/decrease does not apply to injuries on or after 1-1-13.

Life pension, PD > 70:0

Formula : (PD - 60) x 0.015 x Earnings

Example - for 80% PD Award for 2015 injury at maximum $515.38:
(80 – 60) x 0.015 x $515.38 = $154.61/week

Subject to annual SAWWs COLA beginning January 1 of the calendar year following year in which LP benefits begin.

Max weekly earnings, Labor Code §4659

4-1-74 to 6-30-94	107.69
7-1-94 to 6-30-95	157.69
7-1-95 to 6-30-96	207.69
7-1-96 to 12-31-05	257.69*
1-1-06 to 12-31-16	515.38*

* For injuries on or after 1-1-03, a COLA adjustment will increase benefits. The Supreme Court decided that the increases begin on January 1st of the year following the date the worker became entitled to receive and actually begins receiving either permanent total disability payments or a life pension payment.

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TABLE IV

DEATH BENEFITS PAYABLE FOR TOTAL AND PARTIAL DEPENDENCY

Applicable to Injuries Occurring on or After January 1, 1991 Labor Code §4702

Status of Dependence		Death or Injury On or After			
		01/01/91	**07/01/94**	**07/07/96**	**01/01/06**
A.	One total and no partial dependents	95,000	115,000	125,000	250,000
B.	Two or more total dependents, regardless of the number of partial dependents	115,000	135,000	145,000	290,000
C.	Three or more total dependents, regardless of the number of partial dependents	115,000	150,000	160,000	320,000
D.	One total and one or more partial dependents	95,000*	115,000*	125,000*	250,000*
	* plus four times the amount annually support of any partial dependents, with the total paid not to exceed:	115,000	125,000	145,000	290,000
E.	No total and one or more partial	Four times the amount annually devoted to the support of partial dependents, not to exceed:			8 times support:
	dependents	95,000	115,000	125,000	250,000
F.	For injuries on or after 1/1/04, where there are no total nor partial dependents, $250,000 is payable to the Director of Industrial Relations – Death Without Dependents Unit.*				

* The estate benefit has been held unconstitutional in *Six Flags, Inc. v. WCAB* (B184245, 2nd Dist. Court of Appeals). Consult counsel for status.

Death Benefits are payable in installments in the same manner and amounts as temporary disability indemnity per Labor Code §4702(b), and are subject to increases under §4661.5 where earning qualify for the new maximum.

For injuries on or after 1/1/06, death benefits payable to a beneficiary physically or mentally "incapacitated from earning" continue for life of the child.

Labor Code §5406.7 may, under special circumstances, extend the time for filing for the dependent's death benefit up to 420 weeks for presumptive cancer claims under Labor Code §3212.1. We recommend legal advice be obtained for its application.

Maximum Burial Expense Benefit: Labor Code §4701(a)

Date of Injury	Maximum Benefit
1/1/91 to 12/31/2012	5,000 All employees
1/1/13 to present	10,000 All employees

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TABLE V

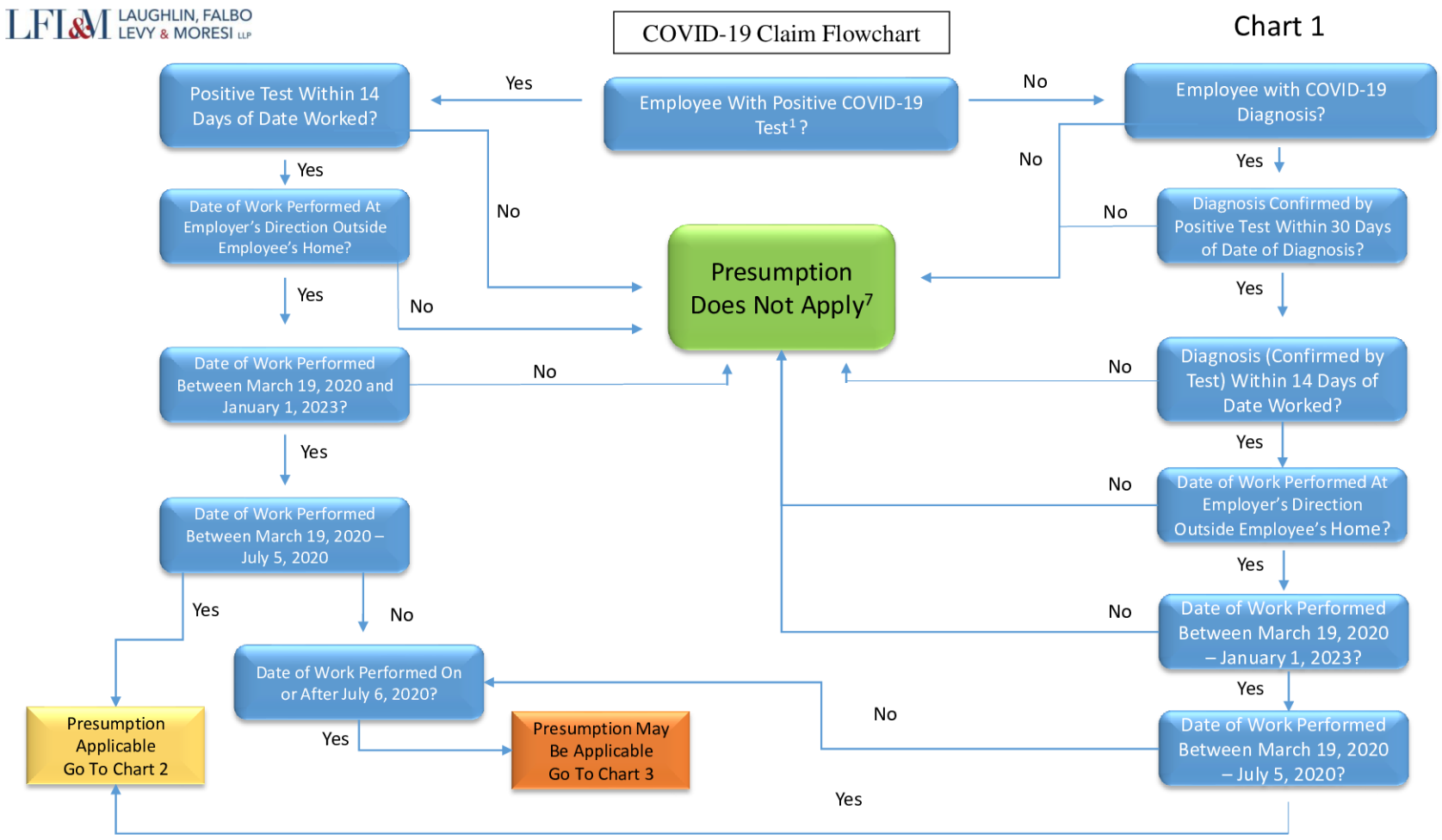

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TABLE V *cont'd*

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Chart 2 – Labor Code § 3212.86

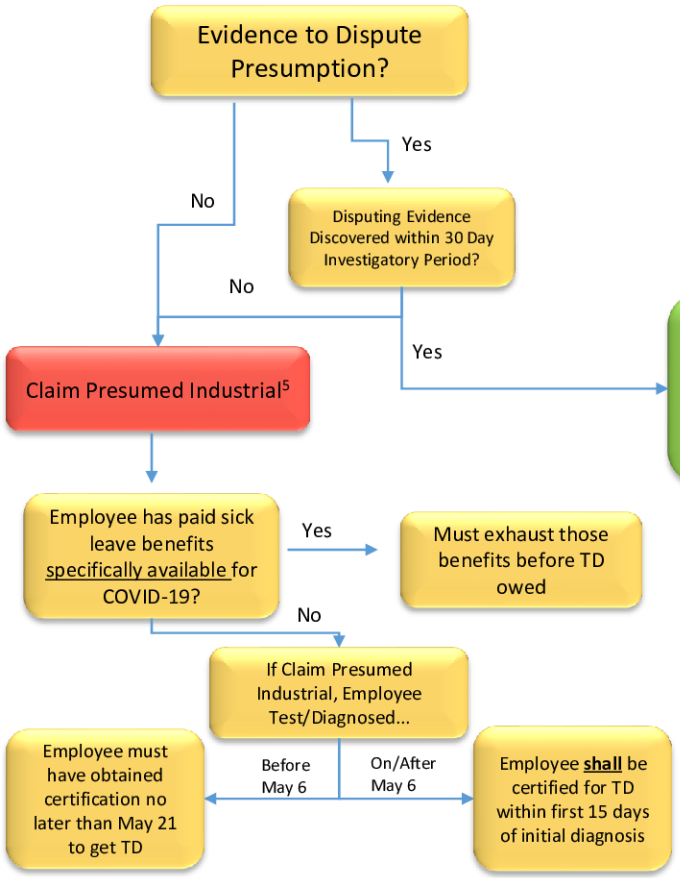
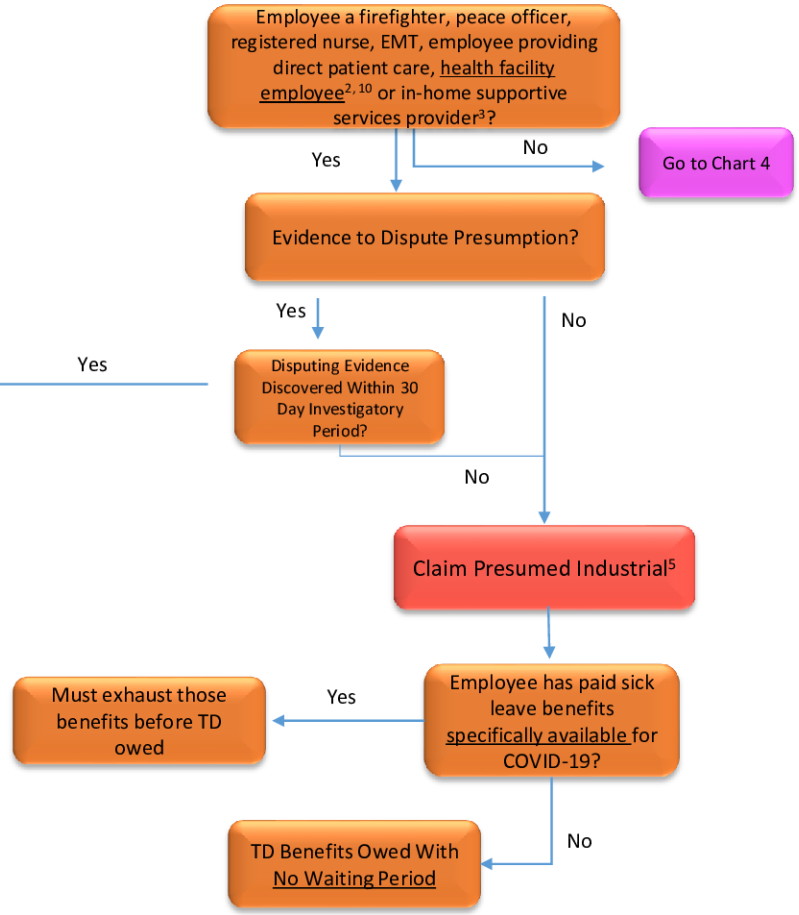


Chart 3 – Labor Code § 3212.87



Claim May Be Denied in Good Faith

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TABLE V *cont'd*

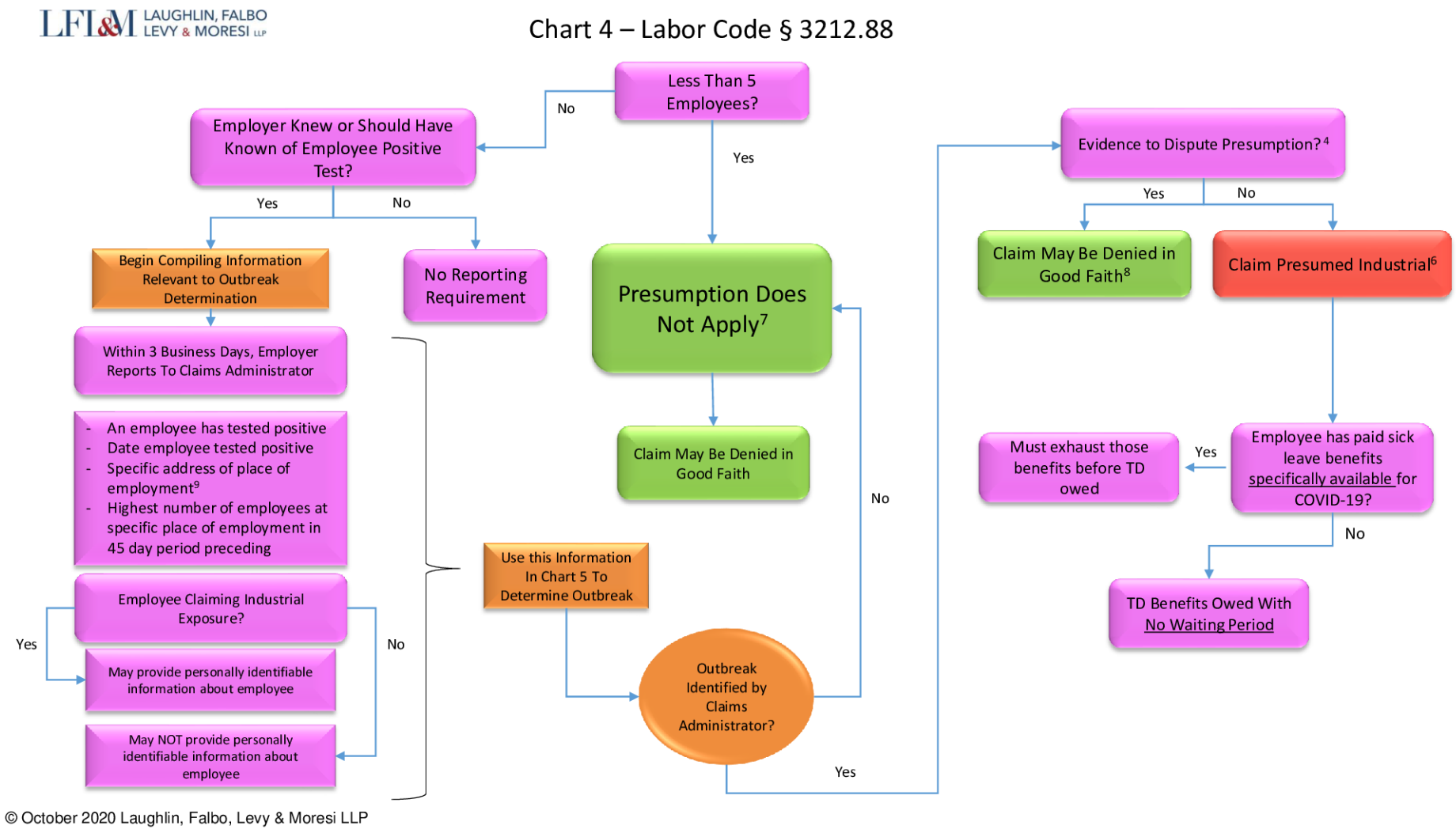
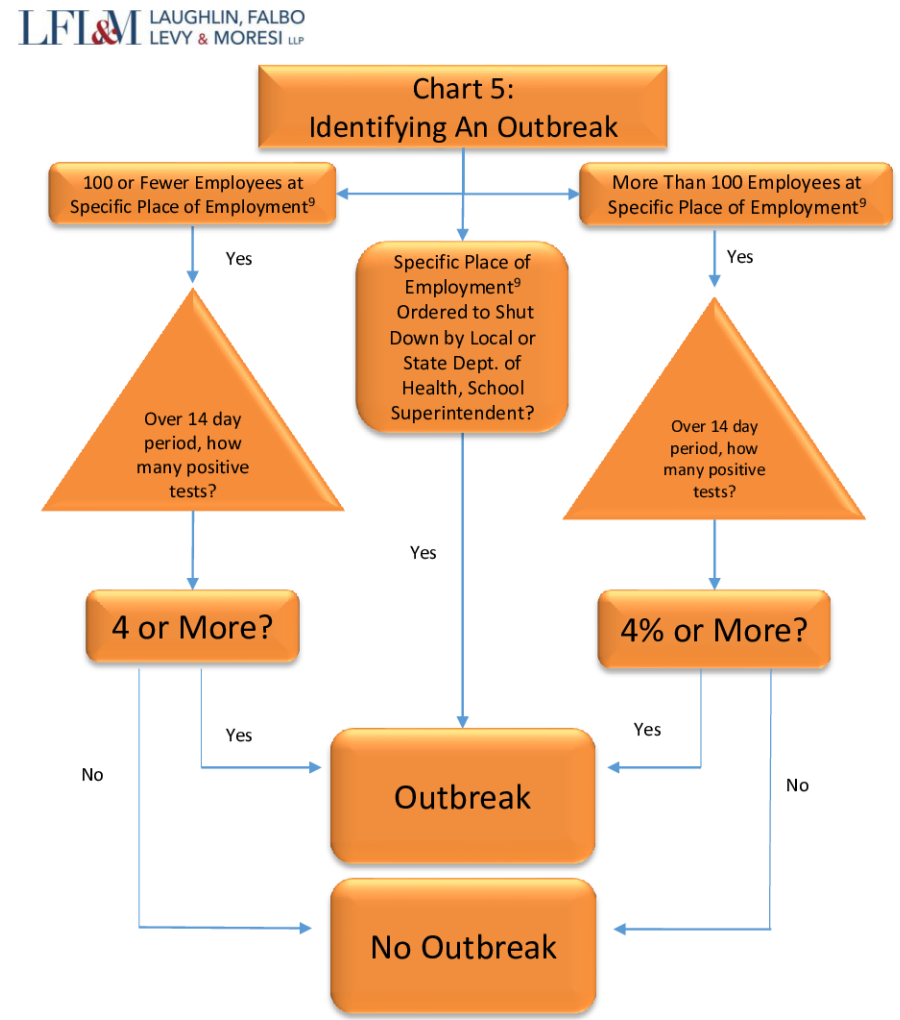


TABLE V *cont'd*



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Footnotes: Additional Information

1. Test → PCR (Polymerase Chain Reaction) approved by USFDA. Serologic testing permitted only for claims falling under LC §3212.86. May include any other viral culture test approved for emergency use by USFDA
2. Health Facility generally defined as one providing 24 hour care. For more specific definitions see Health and Safety Code Section 1250 (a), (b), (c), (m), (n)
3. In-home supportive services defined Under Article 7, Chapter 3 Part 3 Division 9, or 14132.95, 14132.952, 14132.956 of Welfare Institutions Code, and performed outside their own home or residence.
4. Evidence relevant to controverting presumption may include "evidence of measures in place to reduce potential transmission, and evidence of employee's non-occupational risks of COVID-19 infection."
5. If claim presumed industrial, benefits include full hospital, surgical, medical treatment, disability indemnity, and death benefits. DIR waives right to collect any death benefit. If case presumed industrial, claim may only be rebutted by evidence discovered after initial 30 day investigatory period
6. If claim presumed industrial, benefits include full hospital, surgical, medical treatment, disability indemnity, and death benefits. DIR waives right to collect any death benefit. If case presumed industrial, claim may only be rebutted by evidence discovered after initial 45 day investigatory period.
7. While the presumption may not apply, the claim may still be industrial upon showing that employment placed applicant at increased risk for infection on preponderance of the evidence.
8. Labor Code Section 3212.87 states that in these specific cases where the presumption does not apply, the claim "shall be evaluated pursuant to Sections 3202.5 and 3600."
9. Specific Place of Employment, as used throughout the statutes, means "the building, store, facility, or agricultural field where an employee performs work at the employer's direction." When performing the "outbreak" determination, each specific location the applicant worked must be considered, and if an outbreak exists at any of the places of employment, that location shall be considered the "specific place of employment
10. Labor Code 3212.87(a)(10): The presumption does not apply to a health facility employee who does not provide direct patient care, and who does not have contact with a health facility patient within the last 14 days who tested positive.