The Workers' Compensation Newsletter

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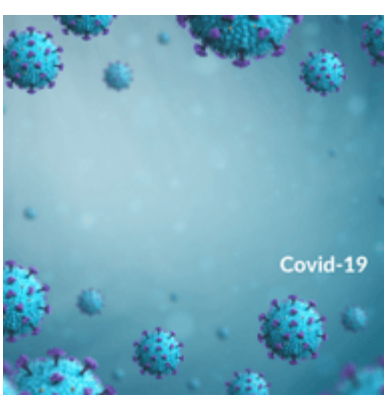
The 2023 LFLM publications are in!

Laughlin, Falbo, Levy & Moresi LLP publishes annual educational materials to assist our clients in claims handling. **Educational Entities Guidebook**, **PD Rating Schedule** (*including SAWW, TD, & PTD information*), **Public Agencies Guidebook**, **WCAB & DOL Directory**, **WC Flow Chart**.

The 2023 editions are now available. All of these publications are posted and can be printed from our website (News & Knowledge / Educational Material). Or if you would like to receive a hard copy of any of the publications, please contact Diane Freeman (dfreeman@lflm.com).

You have been signed up to receive *The Workers' Compensation Newsletter* because of your previous connection with Laughlin, Falbo, Levy & Moresi LLP. Should you ever want to unsubscribe, it is very easy to do at any time (see link in the footer below).

News / Articles



COVID-19 IN THE WORKPLACE: Updates on Legislation

By: Crystal Tappin, Associate Attorney, Oakland

As COVID-19 continues to linger in California, it remains an ongoing concern for state lawmakers. In response to this ongoing threat, California continues to provide updated regulations as it pertains to COVID in the workplace. This article will cover the recent updates adopted by the State of California.

Full Article

IMPACT OF SB 1127

By: Brian Hull, Associate Attorney, Concord

On September 29, 2022, updates to the Labor Code went into effect when Governor Newsom signed SB 1127 into law. Two of these updates significantly expanded benefits for safety officers, one update imposed a potentially hefty penalty for unreasonably rejected claims, and the final update related to data collection.

Full Article

Setting the Bar

We realize the focus in workers' compensation defense is often centered around mitigation of exposure. True "victories" though, occur as well. Here are a few examples throughout the Firm this past quarter.

San Francisco Office

Lindsay Wagenman, Partner, was able to successfully defendant against a life pension case where the range of evidence was vast. She was able to demonstrate the subjective complaints were not consistent with the objective findings which then questioned the substantiality of the evidence presented by applicant's attorney to push for life pension. The WCJ agreed and issued a decision well under life pension, mitigating our exposure-drastically. Fortunately, the decision was not appealed.

San Jose Office

Johnny Shiu, Senior Associate Attorney, prevailed on an issue that has wide implications for California employers who are compelled to provide alternate transportation for its employees. In his case, four workers were riding in a van going to work when it was involved in a motor vehicle accident. One of the passengers died with others sustaining various injuries. Typically, the "Going and Coming Rule" bars a worker from recovering Workers' Compensation while a worker is traveling to and from work. However, in this case the Applicant argued because the employer provided the transportation and paid for it, the injury should be industrial. Citing an obscure Labor Code provision, section 3600.8, Mr. Shiu successfully proved at trial that because defendant was required by law to provide alternate transportation to its employees to meet air quality requirements per Regulation 14 of the Bay Area Air Quality Management District Act, defendant was exempt from Workers' Compensation liability. The Trial Judge agreed. As a result, defendant received a "take nothing" decision. Because the accident caused injury to others occupying the same van, the Judge's decision should apply against the other passengers as well.

Congratulations to our newest Office Managing Partners & Partners:

Marc Leibowitz
Managing Partner - San Diego
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Kate Lozano
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Travis Sams
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Let's welcome our newest attorneys:

Frank Cabibi
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LFLM Law with L.A.W. Podcast Series Returns

LFLM Law's podcast series, "LFLM Law with L.A.W" is back! In each episode, Lindsay Wagenman, a partner based in San Francisco, interviews attorneys from LFLM to provide valuable insights into the world of workers' compensation. This podcast offers an informative and engaging discussion on a range of relevant topics. If you missed any previous episodes, you can easily access them on the LFLM Law website, as well as on popular platforms such as Apple and Spotify. Be sure to tune in for upcoming episodes, as there are more informative and interesting discussions on the way. If you have ideas for future episodes please reach out to info@lflm.com.

CAAA Winter 2023 Recap Webinar- Second Date Added - March 8, 2023 10am

We have reached full capacity for our 1st webinar scheduled on February 28. If you would like to attend our second webinar on March 8, 2023, please register below to receive a Zoom link.

Jonathan Liff, Partner, Sacramento & John Orman, Partner, Fresno will discuss the topics covered at the 2023 Winter CAAA convention, with a focus on how they apply to claim handling. They will also discuss important recent cases that CAAA emphasized and how those cases impact the defense of claims.

Register

2023 Conferences

EWC Conference

April 25, 2023
Anaheim, CA

LFLM is a proud Silver Sponsor.

Sessions:

"The Altered State of Post-Pandemic Work: From the Dining Room Table to Downtown"
Vicki Lindquist, Partner, LFLM Oakland
Kevin Hagel, Workers' Compensation Specialist
Lisa Ivancich, Partner, Ivancich & Cotis LLP

CSIA Conference

May 15-16, 2023
Disneyland - Anaheim, CA

LFLM is a proud Sponsor.

CCWC Conference

June 7-9, 2023
Disneyland - Anaheim, CA

LFLM is a proud Platinum Sponsor.

Sessions:

"Creative Resolutions to Complex Claims"
Demetra Johal, Office Managing Partner, LFLM Los Angeles
Erika Vargas, Applicant Attorney, Gordon, Edelstein, Krepack, Grant, Felton & Goldstein
Diana Toste, Claims Administrator, Sedgwick
Dawn Watkins, Chief Risk Officer, Los Angeles USD
John Pinto, Broker, Arcadia Settlements Group

"SB 1127 - Where Are We Now?"
Jonathan Liff, Partner, LFLM Sacramento

Click here to schedule in-house trainings

Address: 1001 Galaxy Way Suite 200, Concord CA 94520

COVID-19 IN THE WORKPLACE: Updates on Legislation

As COVID-19 continues to linger in California, it remains an ongoing concern for state lawmakers. In response to this ongoing threat, California continues to provide updated regulations as it pertains to COVID in the workplace. This article will cover the recent updates adopted by the State of California.

Non-Emergency COVID-19 Prevention Regulations

Up until present, the state has been operating under Emergency Temporary Standards as it pertains to COVID-19 Prevention Regulations. On December 15, 2022, Non-Emergency COVID-19 Prevention Regulations were adopted. Said Regulations will take effect once they are approved by the Office of Administrative Law (OAL), which was set to take place in January 2023. However, the OAL has thirty working days to complete its review – so the final adoption of these regulations remains pending as of this article's publish date. **The COVID-19 Prevention Emergency Temporary Standards (ETS) remain in effect up until the new regulations are officially approved by the OAL.** The Non-Emergency Standards are set to remain in effect for two years from the date of approval by the OAL.

While the new regulations include many of the requirements found in the previously issued Emergency Temporary Standards, there are also some key changes that are directed both at making it easier for employers to abide by the protections required, and to allow more flexibility for employers as further potential changes are implemented as needed from the California Department of Public Health.

Changes to the COVID-19 Prevention Regulations:

Employers are no longer required to maintain a standalone COVID-19 Prevention Plan. Instead, employers must now address COVID-19 as a workplace hazard under the requirements found in section 3203 (Injury and Illness Prevention Program, IIPP), and include their COVID-19 procedures to prevent this health hazard in their written IIPP or in a separate document.

Employers must do the following:

- Provide effective COVID-19 hazard prevention training to employees.
- Provide face coverings when required by CDPH and provide respirators upon request.
- Identify COVID-19 health hazards and **develop methods to prevent transmission** in the workplace.
- Investigate and respond to COVID-19 cases and certain employees after close contact.
- Make testing available at no cost to employees, including to all employees in the exposed group during an outbreak or a major outbreak.
  -- An outbreak is defined as 3 or more cases in a workplace within a 14- day period
  -- A major outbreak is defined as 20 or more Covid-19 cases in an exposed group who visited the workplace during their infectious period within a 30-day period.
- Notify affected employees of COVID-19 cases in the workplace.
- Maintain records of COVID-19 cases and immediately report serious illnesses to Cal/OSHA and to the local health department when required.

Employers must now report major outbreaks to Cal/OSHA.

The COVID-19 Prevention regulations do not require employers to pay employees while they are excluded from work. Instead, the regulations require employers to provide employees with information regarding COVID-19 related benefits they may be entitled to under federal, state, or local laws; their employer's leave policies; or leave guaranteed by contract.

Changes to Related Definitions

"Close contact" is now defined by looking at the size of the workplace in which the exposure takes place.

For indoor airspaces of 400,000 or fewer cubic feet, "close contact" is now defined as sharing the same indoor airspace with a COVID-19 case for a cumulative total of 15 minutes or more over a 24-hour period during the COVID-19 case's infectious period.

For indoor airspaces of greater than 400,000 cubic feet, "close contact" is defined as being within six feet of a COVID-19 case for a cumulative total of 15 minutes or more over a 24-hour period during the COVID-19 case's infectious period.

"Exposed group" was clarified to include employer-provided transportation and employees residing within employer-provided housing that are covered by the COVID-19 Prevention standards.

Requirements from the Emergency Temporary Standards that remain a part of the COVID-19 Prevention Regulations:

Employers must provide face coverings and ensure they are worn by employees when CDPH requires their use.

- Employers must review CDPH Guidance for the Use of Face Masks to learn when employees must wear face coverings.
- Note: Employees still have the right to wear face coverings at work and to request respirators from the employer when working indoors and during outbreaks.

Employers must report information about employee deaths, serious injuries, and serious occupational illnesses to Cal/OSHA, consistent with existing regulations.

Employers must make COVID-19 testing available at no cost and during paid time to employees following a close contact.

Employers must exclude COVID-19 cases from the workplace until they are no longer an infection risk and implement policies to prevent transmission after close contact.

Employers must review CDPH and Cal/OSHA guidance regarding ventilation, including CDPH and Cal/OSHA Interim Guidance for Ventilation, Filtration, and Air Quality in Indoor Environments.

Employers must also develop, implement, and maintain effective methods to prevent COVID-19 transmission by improving ventilation

This guidance is an overview, for full requirements see Title 8 sections 3205, 3205.1, 3205.2, and 3205.3

Masking

The universal indoor masking requirement that was allowed to expire as of February 15, 2022, remains expired.

On March 1, 2022, the requirement for unvaccinated persons to mask in indoor public settings and businesses was replaced by a strong recommendation that all people, regardless of vaccine status, mask in indoor public settings and businesses. Additionally, after March 11, 2022, the universal masking requirement for K-12 and childcare settings terminated.

On April 20, 2022, the universal masking requirement on public transit and in transit hubs was replaced by strong recommendations that continue to mask while on public transit and indoors in transit hubs.

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IMPACT OF SB 1127

On September 29, 2022, updates to the Labor Code went into effect when Governor Newsom signed SB 1127 into law. Two of these updates significantly expanded benefits for safety officers, one update imposed a potentially hefty penalty for unreasonably rejected claims, and the final update related to data collection.

Expanded Temporary Disability for Cancer Claims

The first provision of SB1127 is a significant expansion of temporary disability benefits for safety officers, namely firefighters, peace officers, and fire and rescue services coordinators, who have sustained injury or illness related to cancer. This modified Labor Code section 4656 by increasing the temporary disability cap of 104 weeks within five years from the date of injury, to a total of 240 weeks, during the entire period of the claim (meaning temporary disability benefits no longer must be paid within five years from the date of injury). The increase in temporary disability benefits for presumptive cancer cases applies to injuries on or after January 1, 2023.

This creates a distinct, and unresolved conflict with Labor Code section 5410 which limits the right of an injured worker to file a petition to reopen, alleging new and further disability within five years of the initial date of injury. The language of the new statute suggests that a safety officer who has industrial cancer, and then later relapses, could request additional temporary disability benefits even if it is well beyond five years after the date of injury and after a Stipulated Award. Notably, Labor Code section 4656, subdivision (d), does not contain the same restricting clauses as subdivisions (a), (b), and (c), indicating a limit within a period of five years from the date of injury. This subdivision, however, does not indicate that it is intended to provide additional authority to the WCAB and contravene the limitation contained within section 5410.

It is therefore important to note that if a case has not been finalized by way of a Compromise and Release Agreement, if a timely petition to reopen is filed within five years from the date of injury, the WCAB could award temporary disability beyond five years from the initial date of injury.

If one goes beyond the plain language of the statutes, based upon legislative history, it is likely the rationale for the expanded timeline for collection of temporary benefits is due to the risk and likelihood that public safety officers can relapse after more than five years have passed from the initial injury. An early comment in the Assembly Committee on Insurance also cited to the fact that "14 of the largest 20 wildfires in California history (4 in 2021 alone) have occurred in the past 10 years" and contended "[t]his is our new normal." (Assem. Com. on Insurance, Rep. on Sen. Bill 1127 (2021-2022 Reg. Sess.), as amended June 13, 2022, at p. 3.) That rationale, however, is not mentioned later in the Senate or Assembly Floor Analyses in August 2022. (*See, e.g.*, Senate Floor Analysis, 3d reading analysis of Sen. Bill 1127 (2021-2022 Reg. Sess.) as amended August 23, 2022, p.1, paragraph 3 ["Increases the maximum time specified firefighters and peace officers can access wage replacement disability benefits for cancer work-related injuries from 104 weeks within five years to 240 weeks."].

Increased Penalties and Shortened Claim Investigation

The enactment of SB 1127 also increased possible penalty claims relating to the unreasonable denial of claims made by certain safety officers who qualify for presumptions of injury contained within Labor Code sections 3212 to 3212.85 and 3212.9 to 3213.2, which includes cancer, hernia, heart trouble, pneumonia, blood-borne infections, meningitis, tuberculosis, and low back (for peace officers wearing a duty belt). Under Labor Code section 5414.3(a), the penalty is now five times the amount of the benefits unreasonably delayed with a cap of $50,000. The WCAB does not have discretion when determining the amount. The language of Labor Code section 5414.3(a) is clear that the penalty "shall" be five times the amount of unreasonably delayed benefits, up to $50,000. Of course, the WCAB still has discretion to determine whether a claim denial was unreasonable.

It is important to note this penalty applies to all injuries under Labor Code section 3212 and 3213.2, not just injuries on or after January 1, 2023.

Under Labor Code section 5402(b)(2), the timeframe for denying a claim for statutorily presumptive injuries to firefighters, peace officers and first responders was shortened from 90 days to 75 days. This reduced investigation period went into effect on January 1, 2023 and did not retroactively apply.

When an injury claim falls under one of the various presumptions, as with all claims, the employer has a duty to investigate in good faith. (*Ramirez v. Workers' Comp. Appeals Bd.* (1970) 10 Cal.App.3d 227; Cal. Code Regs., §10109.) With respect to delaying or denying payment, there must be "genuine doubt from a medical or legal standpoint as to liability for benefits" and "the burden is on the employer or carrier to show substantial evidence of the basis for doubt." (*Bekins Moving & Storage Co. v. Workers' Comp. Appeals Bd.* (1980) 103 Cal.App. 3d 675, 681 [citations omitted].) All of these presumptions are rebuttable and "may be controverted by other evidence," which is often a challenging path for an employer. The legal liability in presumption cases is often something that cannot be challenged. Instead, it is a dispute over the medical benefits that are at issue. For example, while broad, the presumptions relating to "heart trouble" require the existence of actual heart trouble, not simply hypertension. (See, e.g., *Palmier v. WCAB* (1991) 56 Cal.Comp.Cases 287, 288; see also *Parish v. County of Ventura* (1989) 210 Cal.App. 3d 92, 97–98 [discussing the breadth of the definition of heart trouble].)

A typical workers' compensation case will entail a discussion with the injured employee (by way of deposition or an interview by the claims adjuster), followed by obtainment of records for prior treatment received by the employee, if any. Typically, specific injury claims, whether they fall under a presumption or not, are readily accepted. (Assem. Com. on Insurance, Rep. on Sen. Bill 1127 (2021-2022 Reg. Sess.), as amended June 13, 2022, at p. 4 [citing CWCI and RAND, noting more than 90% of all workers' compensation claims and requests for medical treatment are approved].) However, complicated medical cases involving heart trouble or cancer often require a more extensive investigation to determine if the condition actually exists and to determine the causative factors for the alleged condition. It is often difficult to investigate these more complicated claims within the previously allotted 90 days, and will therefore be even more difficult with the shortened timeframe of 75 days, particularly as these types of claims require a medical-legal evaluation to determine causation.

Further, the shortened timeframe for investigation is concerning as updated medical legal regulations, effective February 2023, have extended the time for Qualified Medical Evaluators to schedule medical-legal evaluations to 90 days, or 120 days if the party with the legal right to schedule the evaluation so chooses (previously 60 and 90 days, respectively). The report after an initial evaluation will then issue within 30 days. (Cal. Code Regs., section 38 (b).) Thus, a 75-day timeline to determine compensability of a claim is a tall order.

There are also additional circumstances that cause alarm with the shortened timeframe to deny a claim. These include claims where an employee is not cooperating with the investigation or has an extensive medical history. Subpoenas can take quite a bit of time to result in the production of medical records, despite the strict production date deadlines that should be adhered to. There will also be issues in cases where a possible factual dispute is raised. Given that judges often require a medical-legal evaluation before proceeding with litigation, the shortened period for an investigation means more claims will likely be denied as the investigations simply cannot be completed without receipt of a medical-legal opinion.

When it comes to the penalty for the denial, there are a few types of cases or situations where this may come into play. The language of the statute simply states that when liability is "unreasonably rejected," then the penalty is owed. This does not, strictly speaking, indicate that it has to be the initial denial. For example, the denial could be issued based on a reasonable difference of a medical opinion, but then the employer does not accept the claim until the day of a trial or a mandatory settlement conference, possibly months after receipt of the medical-legal report. Alternatively, there could be a factual dispute regarding the injury (e.g., for the low back presumption, there could be a dispute as to whether the injury was incurred at home or at work). It is likely that an employee's attorney will list Labor Code section 5414.3 as an issue when a presumption case proceeds to trial. Litigation over the penalty, and whether a denial issued in good faith, will surely increase the already high workload of the judges at the WCAB.

In light of the fact that the penalty is five times the amount of delayed benefits, if a WCJ finds a denial is unreasonable, the exposure will likely be the maximum penalty of $50,000. It is therefore imperative that employers act diligently and swiftly during the 75-day period of investigation. If a presumptive claim is denied, the employer must be confident in the basis for their denial, and must be prepared to litigate the good faith basis for the denial.

Data Collection

The final provision of SB 1127 requires the Administrative Director to develop or augment a workers' compensation information system to allow data to be collected electronically. Specifically, the system must collect information of the date in which a claimant is notified of acceptance, denial, or conditional denials. It is unclear what this means as well as how this information system will be funded as the language simply indicates that this will be done upon "appropriation from the Legislature."

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