NEW WORKERS' COMPENSATION LAWS AND CASES

Presented by RTGR Law LLP

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LCSWs are now Providers

- **SB 1002:** This new law added the services of a licensed clinical social worker (LCSW) to the "treatment" that every employer is reasonably required to provide under the Labor Code.
  - It also added LCSWs as providers to be included in every MPN.
  - However, it prohibits an LCSW from making disability determinations.
  - The law requires a physician referral before LCSW's are allowed to treat or evaluate.

Prepaid Debit Cards for Indemnity

- **AB 2148:** This law extends the use of pre-paid debit cards to pay indemnity benefits for another year, until January 1, 2024.
- That law was set to expire on January 1, 2023.

COVID Presumptions Extended a Year

- **AB 1751:** Extends the life of California's COVID-19 workers' compensation presumption laws for **one additional year.** Those laws (Labor Code sections 3212.86, 3212.87, and 3212.88) were set to expire at the end of 2022, and this law pushes that date back to the end of 2023.
- The law also adds certain safety officers employed by various state departments and state hospitals to those covered by the 3212.87 safety officer/health care worker COVID presumption.

COVID Presumptions: Summary

- Labor Code §3212.86: Any worker diagnosed with COVID-19 within 14 days of work between 03/19/2020 and 07/05/2020 (30-day investigation period)
- Labor Code §3212.87: Peace Officers, Firefighters, and certain Healthcare workers diagnosed with COVID-19 within 14 days of work on or after 07/06/2020 (30-day investigation period)
- Labor Code §3212.88: Any other worker diagnosed with COVID-19 within 14 days of work on or after 07/06/2020 during an "outbreak" at their employer's place of employment (45-day investigation period).
- If employee does not fall under any of the above, there is no presumption, and the usual 90-day investigation period applies.

3212.87 COVID Presumption

- Positive test must be within 14 days of the last date of work at the employer's place of employment at the employer's direction.
- Test must be made by Polymerase Chain Reaction (PCR) test (typically nasopharyngeal swab) or other USFDA approved test with similar or higher sensitivity.
- Serologic (blood/antibody) testing is insufficient.
- Date of injury is the last date worked prior to the positive test.
- Presumption extends for up to 14 days following termination from the last day worked.
- Shortened investigation period to investigate: 30-days.

3212.88 COVID Presumption

- Employer must have 5 or more employees.
- Positive test must be within 14 days of the last date of work at the employer's place of employment at the employer's direction AND during an "outbreak."
- Test must be made by PCR test (or similar USFDA approved test to detect viral RNA).
- Date of injury is the last date worked prior to the positive test.
- Presumption extends for up to 14 days following termination from the last day worked.
- Shortened Investigation Period – Denial must issue within 45 days from the date a claim form is filed, or injury else is presumed compensable

Convincing Medical Evidence Required

- Any COVID claim needs substantial medical evidence to support causation. The medical examiner must have the specific history, such as applicant's working conditions, frequency and duration of her contacts with public and with her coworkers, and whether applicant's coworkers were diagnosed with COVID-19 during any relevant period.
- Nichole Jackson v. County of Los Angeles, Workers' Compensation Appeals Board (Board Panel Decision) 87 Cal. Comp. Cases 1017, August 23, 2022

What if a presumption applies?

- A legal presumption shifts the burden of proof to the employer, to show that the disease was more likely not transmitted to the employee while working, and was instead more likely contracted in a social or off-work setting.
- In short, if a presumption does apply, the claim probably should be accepted if the employer does nothing to rebut the presumption.

The Presumptions are Rebuttable

- "Outbreak" Presumption: Sec. 3212.88(e)(2) specifically identifies relevant evidence to rebut the presumption.
- "Healthcare/Public Safety" Presumption: Sec. 3212.87(e) also says the presumption is rebuttable, though it does not specify the relevant rebuttal evidence.

The Presumptions are Rebuttable

- 3212.88 says, "(e)(2) Evidence relevant to controverting the presumption may include, but is not limited to, evidence of measures in place to reduce potential transmission of COVID-19 in the employee's place of employment and evidence of an employee's nonoccupational risks of COVID-19 infection."

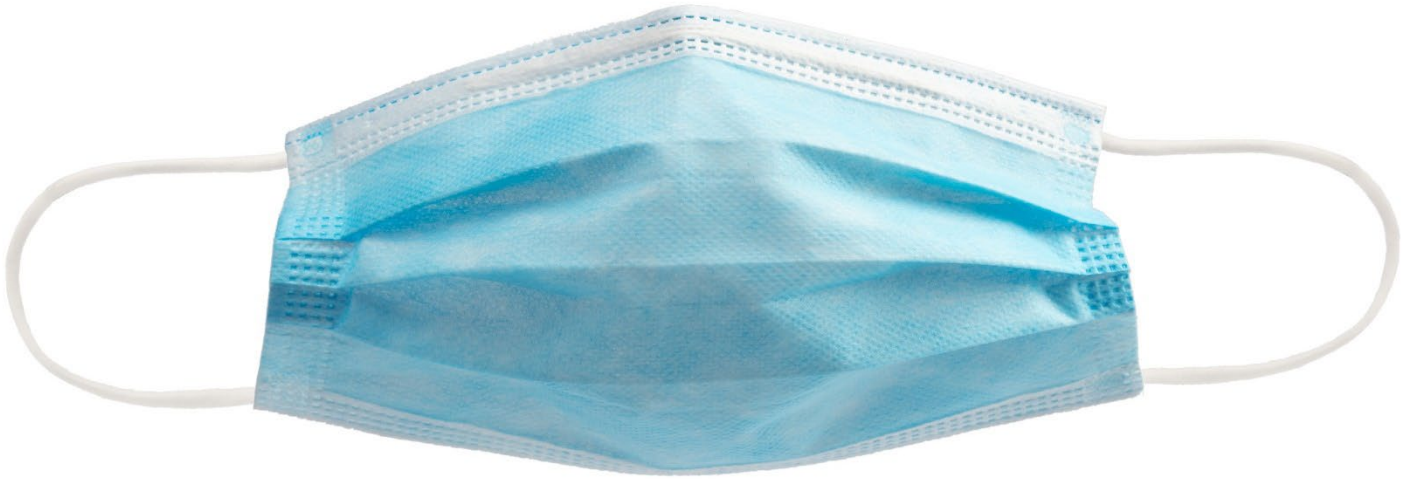
Presumption claim denial criteria

- If a presumption does apply, the presumption can still be rebutted and the claim can still be denied if the employer had **good remedial measures in place** at the time of the alleged exposure, *and*:
  - There was insufficient "**exposure**" at work to a COVID case, or
  - There are known **contemporaneous non-work "risks."**

COVID-19 Prevention Non-Emergency Regulations

- Effective Feb. 3, 2023, thru Feb. 3, 2025.
- https://www.dir.ca.gov/DOSH/Coronavirus/Covid-19-NE-Reg-FAQs.html#workCases
- Defines "close contact" and covers training, ventilation and vaccines.
- Main requirements of COVID Prevention Program that must be included in the ER's Injury and Illness Prevention Program (IIPP).
- Addresses RTW after testing positive, including the "infectious period."

The See's Candies case & "Take-Home" COVID lawsuits



Background of See's Case

- Matilde Ek worked at a See's Candies assembly and packing plant.
- She contracted COVID-19 and convalesced at home. A few days later, her husband and daughter became got ill.
- The husband, Mr. Ek, passed away from the illness, it is claimed. He was not an employee of See's.
- The family and Estate of Mr. Ek filed a civil wrongful death lawsuit against See's Candies.

Background of See's Case

- The Plaintiffs alleged that:
  - the assembly environment required workers to be in proximity with one another,
  - coronavirus safety mitigation efforts were lax, and
  - together, this increased the known and foreseeable risk that workers would become infected with COVID-19, and then take the illness home, thereby transmitting the disease to others, like Mr. Ek.

Background of See's Case

- Defendant See's filed a motion to dismiss the lawsuit contending that the plaintiffs' claims were preempted by the Workers' Compensation Act (WCA) under the "derivative injury doctrine," arguing that Workers' Compensation was the exclusive remedy available to the plaintiffs.
- Plaintiffs filed an opposition to the motion.

Derivative Injury Doctrine

- This doctrine establishes Workers' Compensation as the exclusive remedy for all claims that are derivative of an employee's workplace injury, including certain third-party claims deemed collateral to the employee's injury.
- If See's were to prevail on the motion, the plaintiffs would not be allowed to proceed with the wrongful death suit. Instead, their remedy would be limited to any benefits awarded to Mrs. Ek in the Workers' Comp system.

Trial Court Outcome

- Following a hearing, the trial court denied See's motion to dismiss the case.
- The trial court rejected our common understanding of what qualifies as a "derivative injury."
- The court found that any injury to Mrs. Ek was "irrelevant" to the late Mr. Ek's claims because "that injury is not the injury upon which Plaintiffs sue."

Transmittal Without Illness is Key

- If Plaintiffs had claimed remedies from Mrs. Ek's illness, because they lost income or missed out on her companionship while she was sick, for example, a different outcome would result, the court said.
- The trial court explained that Mrs. Ek did not have to become ill herself for Plaintiff's injury to occur.

Court of Appeal

- After the trial court rejected the demurrer, See's petitioned for a writ of mandate asking the California Court of Appeal to overrule and grant the motion to dismiss.
- However, the Court of Appeal agreed with the trial court and found that the derivative injury doctrine does not apply.
  - See's Candies, Inc. v. Superior Court, 73 Cal.App.5th 66, 288 Cal. Rptr. 3d 66

Separate Physical Injuries Excluded

- The Court reasoned that derivative injuries are "based on losses arising simultaneously from the employee's work injury—the directly injured party is disabled or killed, which in turn deprives close relatives of the injured party's support and companionship."
- This limiting derivative injury definition does not cover separate physical injuries sustained by non-employees, even when an employee's injury was part of the causal chain leading to those injuries.

Court of Appeal Holding

- "Take Home" COVID contraction by non-employee third parties as a result of contact with employees who got COVID at work is a "separate physical injury" and therefore, the "derivative injury doctrine" does not apply, Worker's Comp is not the exclusive remedy, and injured family members and roommates can sue the employer.

"Duty of Care" Not Addressed

- The Court of Appeal did not address whether See's Candies owed Mr. Ek or the rest of the Ek family a "duty of care" or whether plaintiffs can demonstrate that anyone contracted COVID-19 because of any negligence in defendant's workplace, as opposed to another source during the COVID-19 pandemic.
- How far does the duty of care extend beyond an employer's place of business?

Runaway Liability for "Take Home" COVID?

- This decision exposes California employers to an untold number of lawsuits from individuals and estates.
- Anyone who can claim to trace their COVID-19 illness back to a family member, friend, neighbor, or stranger they meet on the street.
- Almost anyone may be able to sue employers they don't work for, claiming damages when they get sick with COVID.

Meanwhile, Federal Courts Weigh In

- In *Kuciemba v. Victory Woodworks*, Robert Kuciemba worked for Victory Woodworks Inc. in San Francisco. He alleges that the company knowingly transferred infected workers from a construction site with an outbreak to the location where Robert was working. He soon contracted COVID-19 that he brought home.
- His wife tested positive for COVID-19 and was hospitalized for more than a month and kept alive on a respirator.

Federal Court = Opposite Result

- The Kuciembas sued Victory, alleging that the company violated a local health order.
- The federal District Court for Northern California granted a motion to dismiss, holding the derivative injury doctrine barred the wife's claims and that alternatively, Victory didn't owe her any duty of care.

9th Circuit Appeal

- The Kuciembas' appealed to the US 9th Circuit Court of Appeal.
- On April 21, 2022, the US Appeals Court noted the conflict between the *Kuciemda* and *See's Candies* cases.
- Court says if either the derivative injury rule applies or if there is no duty of care, the complaint must be dismissed.

Limits on "Duty of Care"

- 9th Circuit notes that by statute, everyone in California "is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill." Cal. Civ. Code § 1714(a).
- For reasons of public policy, however, California's courts have occasionally read exceptions into this general duty of care to limit "the otherwise potentially infinite liability which would follow from every negligent act." *Bily v. Arthur Young & Co.*, 834 P.2d 745, 761 (Cal. 1992).

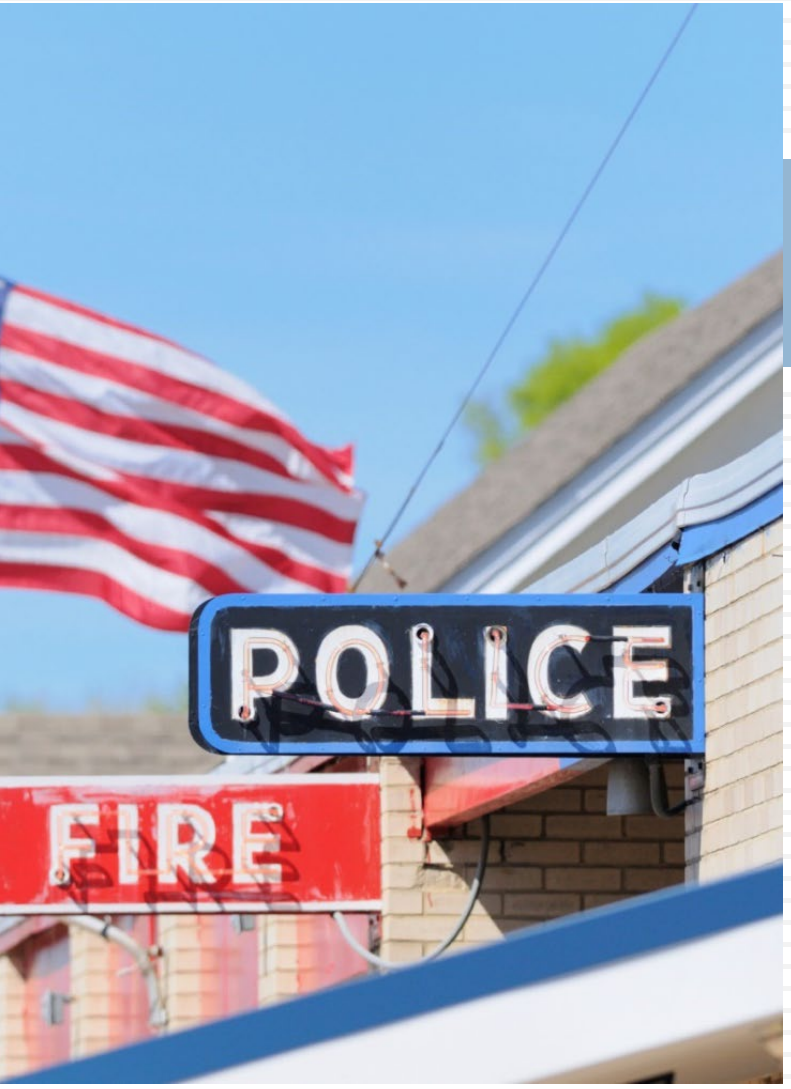
9th Circuit Punts to the CA. Supreme Court

- 1. If an employee contracts COVID-19 at his workplace and brings the virus home to his spouse, does California's derivative injury doctrine bar the spouse's claim against the employer?

- 2. Under California law, does an employee owe a duty to the households of its employees to exercise ordinary care to prevent the spread of COVID-19?

What's Next?

- Watch what the CA Supreme Court does next.
  - On 6/22/2022, the Court granted review and will hear the case (after originally turning down See's appeal from the state Court of Appeal)
  - As of 11/16/2022, the case is fully briefed, including numerous amicus briefs by the U.S. Chamber of Commerce and others.
- KUCIEMBA v. VICTORY WOODWORKS Case Number S274191



SB1127: Police/Fire Presumptions

SB1127: Police/Fire Presumptions

- SB1127 has been signed into law by California's Governor, after many amendments.
- The law raises the TD cap for certain cancer injuries and shortens claims investigation time limits.
- Originally, it applied to all claims but was narrowed in the legislature after significant opposition before it passed.

SB1127 Raises TD cap

- SB1127 changes the 4850/TD benefits cap for police and firefighter **cancer** injuries under Labor Code section 3212.1.
- Those are extended from 104 weeks (2 years) to **240 weeks** (over 4 years).
- Applies only to "a single injury" occurring on or after **January 1, 2023**.

SB1127 Raises TD cap

- 4850 pay would still be capped at 52 weeks, so the additional weeks payable under this law are all TD benefits.
- This means that each safety officer cancer claim that falls under Labor Code section 3212.1 is entitled to up to 52 weeks of 4850 pay followed by up to 188 weeks of TD (rather than only 52 weeks of TD as usually allowed).

SB1127 Shortens Denial Deadline

- As originally proposed, SB1127 would have shortened the deadline to deny or accept *ANY* Workers' Comp claim from 90 days to 60 days. That proposal did not pass.
- Instead, the claim denial investigation period for most claims remains unchanged at 90 days.

SB1127 Shortens Denial Deadline

- However, for safety officers' presumptive injury claims, the time limit is reduced from 90 to ***75 days***.
- Applies to all presumptive injuries covered by Labor Code Sections 3212 through 3212.85, and Sections 3212.9 to 3213.2, inclusive.

75-Day Denial Deadline

- Covered presumptive injuries subject to the new **75-day** investigation limit include:
  - Hernia
  - Heart trouble
  - Pneumonia
  - Cancer
  - PTSD
  - Tuberculosis
  - MRSA
  - Meningitis, and
  - low back injuries for some police officers.

75-Day Denial Deadline

- The new **75-day** investigation limit is added as Labor Code Section 5402(b)(2), which did not become effective until January 1, 2023.
  - Therefore, it clearly applies to all injuries occurring on or after 01/01/2023.
  - May apply to denial decisions occurring on/after 01/01/2023, regardless of the date of injury.
  - When in doubt, deny within 75 days just to be safe.

75-Day Denial Problems

- The 75-day time limit may be unworkable under the current Workers' Compensation scheme, especially for those claims that need medical-legal input as part of any sound investigation.
  - It can frequently take 90 days or more just to get a QME exam report determining whether a claimed injury or illness is work-related.
  - Under this law, provisional denials of claims despite due diligence, for lack of a QME exam or other investigatory reasons, may increase.

SB1127 $50,000 Penalty

- The penalty cap for "unreasonable" denial of any of these presumptive injury claims is increased to five times the amount of benefits unreasonably delayed due to rejection of liability, not to exceed fifty thousand dollars (**$50,000.00**), down from the original $100,000 penalty proposed in the bill.
- This new penalty provision for police and fire presumptive claim denials applies to all dates of injury – regardless of whether the injury occurred before the enactment of LC 5414.3

COVID presumptive claims excluded

- COVID-19 presumptive claims, however, are excluded from the **75-day** limit. Those are covered by separate 30 and 45-day time limits.

Four (4) Claim Denial Timeframes

- **30-day:** Labor Code § § 3212.86 and 3212.87: Pre-07/06/2020 COVID claims, and any Peace Officers, Firefighters, and certain Healthcare COVID-19 claims on or after 07/06/2020.
- **45-day:** Labor Code §3212.88: Any other worker diagnosed with COVID-19 during an "outbreak" on or after 07/06/2020.
- **75-day:** Labor Code §5402(b)(2): most safety officer presumption claims.
- **90-day:** Labor Code §5402(b)(1): If employee does not fall under any of the above, the usual investigation period applies.

Bills that did NOT become Law in 2022

- **AB 399:** Existing law permits a medical provider to request an independent bill review (IBR) for disputes relating to the amount of payment and authorizes the imposition of fees for this purpose.
- This bill would have limited the IBR fee to determine the eligibility of a request to $50. If IBR finds that an employer owes the medical provider, the bill would have required the independent bill review organization to bill the employer for the additional review fees.
- If the employer is found to not owe the medical provider, the bill would require the independent bill review organization to bill the provider for the additional review fees.
- The bill would have required employers to pay any additional amounts found owed within 30 days of the final determination.
- ***The bill did <u>not</u> pass in the Legislature this year.***

Bills that did NOT become Law in 2022

- **AB 2614:** This bill would have required the study of alleged widespread Workers' Compensation premium-shifting tactics used by staffing agencies or labor contractors to shift responsibility away from those employers who control job-sites, among other things.
- ***The bill did <u>not</u> pass in the Legislature this year.***

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Multi-State Paid Family & Medical Leave: What's New & What to Do in 2023

- February 23, 2023 @ 9:00 AM PST

Series Webinar: Compliance Considerations for Moving to a Self-Funded Plan

- March 16, 2023 @11:00 AM PST

Workers Compensation 101 – 2023 Rebooted

- March 16, 2023 @9:30 AM PST

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