

Workers' Compensation Webinar: Legislative Landscape in 2024 and 2025

Presented by
GILSON DAUB





About the Presenter

Julio E. Martinez

Julio is Managing Partner in the San Clemente office of Gilson Daub and handles all aspects of Workers' Compensation defense. He has been handling Workers' Compensation claims since becoming an attorney in 2007. He previously worked representing injured workers in Workers' Compensation and employment-related matters, so Julio is well-versed and understands the applicant's position to effectuate the best legal defense for his clients.

Julio is a member of the Orange County Bar Association and the Hispanic Bar Association of Orange County. Julio also received the prestigious designation of Certified Litigation Management Professional (CLMP) from the CLM's Litigation Management Institute. Julio is also Board Member of the Hispanic Insurance & Risk Management Association (HIRMA) as their Director of Legal Affairs.

About the Presenter

Danielle C. Cervantes



Danielle is a Managing Partner of Gilson Daub and works out of the Fresno office. She has been a workers' compensation defense attorney since 2004, which also included a period of time where she represented injured workers. She believes the best defense for a claim starts with excellent communication between the employer, claims representative, and herself.

Danielle is a Certified Legal Specialist in Workers' Compensation Law through the State Bar of California.

Agenda

- SB 553 – Workplace Violence
- Temporary Disability and SB 1205
- Workers' Compensation Settlements
- Resignations/Confidentiality Agreements
- 1542 General Releases

Agenda (Cont'd)

- LC 3550/3551 – Workplace Notices
- AB 1870 – Right to Counsel
- PTP/QME/AME Final Reports
- Interactive Process/RTW Offers
- SDJB Voucher

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California Senate Bill 553: Workplace Violence Prevention

- Purpose:
 - To enhance workplace safety by mandating specific measures for preventing workplace violence.
 - Applies to all employers in the state of California.
 - Effective date: July 1, 2024

CA Senate Bill 553: Key Provisions

- Workplace Violence Prevention Plans: Employers must develop, implement, and maintain a comprehensive violence prevention plan.
- Training Requirements: Employers must provide training to employees on identifying, avoiding, and responding to workplace violence.
- Record-Keeping: Documentation of incidents, training, and compliance must be maintained.
- Reporting Obligations: Employers must report certain incidents of workplace violence to the Division of Occupational Safety and Health (Cal-OSHA).

Impact and Implications of SB 553

- Impact on Employers:
 - Increased Responsibilities: Employers are required to take proactive measures to ensure workplace safety.
 - Potential Costs: Additional costs may arise from training, plan development, and compliance measures.
- Benefits:
 - Enhanced Safety: Aims to reduce incidents of workplace violence and improve employee well-being.
 - Legal Protection: Compliance with SB 553 can provide a defense against potential liability for workplace violence incidents.

Impact and Implications of SB 553

- Challenges:
 - Compliance Burden: Smaller businesses may face challenges in meeting the requirements.
 - Employee Privacy Concerns: Balancing safety measures with respect for employee privacy.
- Best Practices for Employers:
 - Engage with Employees: Involve employees in developing and implementing the violence prevention plan.
 - Regular Training: Ensure continuous and updated training sessions.
 - Monitor & Update: Regularly review and update the workplace violence prevention plan to address new risks.

Steps for Employers to Comply with SB 553

- Develop a Workplace Violence Prevention Plan
 - Risk Assessment: Identify potential risks and vulnerabilities in the workplace.
 - Policies & Procedures: Establish clear policies for reporting and responding to incidents of workplace violence.
 - Incident Response Plan: Develop a protocol for responding to violent incidents, including evacuation procedures and emergency contacts.
- Employee Training & Education
 - Initial Training: Provide comprehensive training on workplace violence prevention, including identifying warning signs and de-escalation techniques.
 - Ongoing Training: Regularly update training programs to reflect new risks, regulations, and best practices.

Steps for Employers to Comply with SB 553

- Incident Reporting & Record-Keeping
 - Reporting System: Establish a clear and accessible system for employees to report incidents of violence or threats.
 - Documentation: Maintain detailed records of all incidents, training sessions, and compliance efforts.
 - Confidentiality: Ensure the confidentiality of employees reporting incidents to encourage reporting and protect privacy.
- Regularly Review and Update the Plan
 - Annual Review: Conduct at least an annual review of the workplace violence prevention plan to ensure it remains effective and up-to-date, including analyses after any incidents.
- Collaborate with External Experts
 - Consultants: Engage safety consultants or legal experts to assist with compliance and implementation.
 - Law Enforcement: Build relationships with local law enforcement for support and guidance.

Temporary Disability Benefits in California

Overview of Temporary Disability (TD) Benefits:

- Current Law:
 - Benefit Amount: Typically two-thirds of the worker's average weekly wage, subject to minimum and maximum limits.
 - Duration: Up to 104 weeks within five years from the date of injury.
 - Waiting Period: Benefits usually begin after a three-day waiting period.

Senate Bill 1205: Potential Impact on Temporary Disability Benefits

- Key Provisions of SB 1205 (May 2024):
 - Increased Benefit Amount: The bill proposes adjusting the calculation method to provide higher compensation, potentially raising the cap on weekly benefits.
 - **Allows for an extension beyond the current 104-week limit for severe or prolonged injuries, subject to medical review.**
 - Elimination of the Waiting Period: Proposes removing the current three-day waiting period before benefits commence, providing immediate financial support to injured workers.

Senate Bill 1205: Potential Impact on Temporary Disability Benefits

- Key Provisions of SB 1205 (as Amended 6/27/24, 8/19/24, 8/26/2024 – INACTIVE):
 - **Removed** requirement entitling an employee to receive reasonable expenses and/or temporary disability indemnity for receiving treatment.
 - Employee, when possible, must make reasonable efforts to schedule treatment outside of work hours.
 - **Added**: employer is required to allow a leave during work hours unless business necessity requires treatment at a different day/time.
 - However, if an employer denies an employee's request to attend scheduled treatment during regular work hours, that denial could be seen as a *misdemeanor.

*Existing law makes it a misdemeanor for an employer to discriminate, threaten, and/or discharge an employee for claiming, filing, and/or receiving a settlement.

California Workers' Compensation Settlements

- Overview of Settlement Types:
 - Stipulations with Request for Award (Stips):
 - Permanent disability benefits paid over time.
 - Future medical care left open for work-related injuries.
 - Compromise and Release (C&R):
 - Lump-Sum Payment: Full and final payment for all claims related to the injury.
 - Finality: No future claims for medical treatment or disability.

California Workers' Compensation Settlements

- Factors to Consider:
 - Medical Needs: Future medical expenses and care; this also includes a Medicare Set-Aside (MSA).
 - Financial Considerations: High claim exposure anticipated versus limited exposure/future treatment.
 - Claim evaluation for the nature and extent of injuries, potential future medical costs, other legal issues that benefits the employer to C&R versus a Stip.
 - Employee “likeability” – do you want this employee back to work?

Compromise and Release (C&R) Issues

- Common Issues:
 - Adequacy of Compensation: Ensuring the lump-sum amount is sufficient.
 - Judicial Review: A workers' compensation judge must approve the C&R to ensure fairness and adequacy.
 - Pro per (pro se): judge review is even more strict.
- Avoid C&R Mistakes:
 - List all body parts per medical evidence, not just what is pled.
 - Make to sure to settle ALL prior claims, if possible; even medical-only claims.
 - Fully complete the C&R forms; leave no blanks (benefits paid, issues, etc.)

Voluntary Resignations & Confidentiality Agreements

- Voluntary Resignation: Ends the employment relationship as part of a C&R settlement.
 - Bar of Future Employment: This limitation is no longer allowed in CA; an employer cannot prohibit and/or hinder the “future employment” of an employee.
- Confidentiality Agreements: To prevent disclosure of settlement terms and conditions
 - Generally agreed to, but it depends on CA region and/or applicant’s attorney.

****CAVEAT: NEITHER OF THESE FORMS SHOULD BE PRESENTED ALONG WITH THE C&R TO A WC JUDGE!!****

California Civil Code §1542

- Purpose: Protects against waiving unknown claims by including a general release clause that does not resolve claims not known to the employee.
- 1542 Waiver – aka “General Release”
 - The employee waives all rights to future claims known and/or not known at the time of a settlement.

§1542 Issues:

Workers' Compensation Matters

- Workers' Compensation claims are an administrative law process - not civil. WC Judges will not make a "ruling" on 1542 releases, and thus a Release should not be presented to them at time of settlement approval.
- Legal Consultation: Employee has the right to consult with a competent attorney to review the release language. Most Applicant's attorneys are not versed in civil law and thus will not agree.
- Is the Release enforceable?
 - Are known and unknown claims specifically listed?
 - Is there consideration being paid?
 - Is the release ambiguous or overbroad?

California Workplace Notices

Labor Code § 3550

- Labor Code § 3550: Employers subject to the workers' compensation system are required to post an easily understandable Notice in the workplace advising employees of their rights when they sustain a work-related injury.
- The Notice must be posted in English and Spanish, if Spanish-speaking employees are present.
- The Notice must be in a conspicuous location and where it can be easily read by employees during the hours of the workday.
- Failure to post the Notice automatically permits an employee to be treated by his/her personal physician for an injury occurring during that failure.

California Workplace Notices

Labor Code § 3551

- Labor Code § 3551: Every employer subject to the workers' compensation system shall give every new employee, at the time of hire or by the end of the first pay period, written notice of the information contained in § 3550. The content of the notice shall be prescribed by the Administrative Director.
- The Notice must be easily understandable and available in English and Spanish.
- In addition to the content required under Labor Code § 3550, this Notice must also include: 1) how to obtain medical care for a job injury; 2) role and function of the PTP; and 3) a form to be used by the employee to notify of their personal physician or chiropractor.
- You may access the DWC sample Time of Hire Notice (not yet updated to reflect AB 1870 changes) at: <https://www.dir.ca.gov/dwc/DWCPamphlets/TimeOfHireNotice.pdf>

Employees Right to Counsel (Assembly Bill 1870)

- No party is required to have an attorney for workers' compensation proceedings.
- AB 1870 amends Labor Code §3550 (*effective 01/01/2025*): The posted workplace Notice must be amended to add information regarding an employee's right to consult a licensed attorney to advise them of their rights under workers' compensation laws. The Notice must also state that in most instances, the attorney's fees will be paid from the injured employee's recovery.

Final Medical Report (PTP/PQME/AME)

- 8 CCR § 10682 outlines what should be included in a physician's report (even if not a final report) for it be considered substantial medical evidence and to be admissible at trial.
- A “final” medical report generally includes:
 - MMI/P&S finding
 - Nature, extent and duration of disability and work limitations
 - If P&S for all body parts treated, the Physician's Return-to-Work and Voucher report should also be completed
 - Treatment indicated (including past, continuing and future medical care)
 - Whether PD/impairment has resulted from the injury, including discussions on causation and apportionment

Medical Information is Limited to Employer

- Labor Code § 3762(c): An insurer or TPA are prohibited from disclosing to an employer any medical information about an employee who has filed a workers' compensation claim, subject to 2 exceptions:
 1. Diagnosis of the mental/physical condition for which workers' compensation is claimed and the treatment provided for the condition; and/or
 2. Medical information that is necessary for the employer to have in order for the employer to modify the employee's work duties.
- Most information conveyed to an employer comes from a work status report or Physician's Return-to-Work and Voucher report.

Final Medical Report Received by Employer: Interactive Process

- Assess whether the stated work restrictions/limitations can be accommodated for at least 12 months.
- If it is not clear whether work can be accommodated or will be accommodated, initiate the interactive process, which is required under 2 CCR 11069(b) when:
 1. Employee with known physical/mental disability or medical condition requests reasonable accommodations;
 2. Employer becomes aware of the need for an accommodation through a 3rd party or by observation; or
 3. Employer becomes aware of the possible need for an accommodation because the employee with a disability has exhausted leave under the California Workers' Compensation Act, under CFRA and/or FMLA, or other leave provisions, and the employee or their health care provider indicates further accommodation is still necessary.

Final Medical Report Received by Employer: Interactive Process

- If the disability is not obvious, generally the employee must make a specific request for an accommodation.
- Employer obligations during the process include (but not limited to): 1) Initiate discussion with the employee regarding accommodation and/or reasonable medical documentation; 2) Analyze essential functions of the job to assess a requested accommodation; 3) Consider the preference of the employee to be accommodated; and 4) Request educational qualifications and/or work experience to help find suitable alternative positions.

Final Medical Report Received by Employer: Offer of Work

- An offer of work follows a permanent and stationary report finding permanent partial disability.
- If regular, modified or alternative work can be offered to the injured worker, it must be made on the proper form (DWC-AD form 10133.35) no later than 60 days after receipt of the report by the claims administrator.
 - Regular work: usual occupation engaged in at time of injury, and offers wages equal to those paid at the time of injury.
 - Modified work: regular work modified to employee has the ability to perform all the functions of the job and offers wages that are at least 85% of those paid at the time of injury.
 - Alternative work: Work the employee has the ability to perform that offers wages that are at least 85% of those paid at the time of injury.

Final Medical Report Received by Employer: Offer of Work

- The offer of work must be for employment lasting at least 12 months.
- All forms of work must be located within a reasonable commuting distance of the employee's residence at the time of injury, unless waived by the employee.
 - Deemed waived if the employee accepts the work offer and does not object to the location within 20 days of being informed of the right to object.
- The workers has 30 *calendar days* from receipt of the offer of work to accept or reject, unless:
 - 1) Cannot perform the essential functions of the job; 2) the job is not a regular position lasting at least 12 months; 3) Wages/compensation are less than 85% paid at time of injury; or 4) job is beyond a reasonable commuting distance.

Supplemental Job Displacement Benefits (“Voucher”)

- Labor Code § 4658.7(b): An injured employee is entitled to a supplemental job displacement benefit unless the employer makes an offer of work.
- The supplemental job displacement benefit shall be offered to the employee *within 20 days* after the expiration of the time for making the work offer.
- The benefit shall be in the form of a voucher redeemable up to an aggregate of \$6,000.
- The voucher may be applied to any expenses as listed in 4658.7(e).
- The voucher expires 2 years after issues or 5 years from date of injury, whichever is later.

Eligibility for the Voucher

- The employer is not liable for the supplemental job displacement benefit if: (LC § 4658.6)
 - Within 30 days of TD termination, the employer makes an offer of modified or alternative work that the employee rejects or fails to accept.
- An employee may receive a voucher if: (8 CCR 10133.56(b))
 1. The injury causes permanent partial disability, AND
 2. The employer does not offer modified or alternative work within 30 days of termination of TD, AND
 3. The employee does not return to work for the employer within 60 days of the termination of TD, OR
 4. If the employee is seasonal and cannot return to work within 60 days of the termination of TD because the season ended, and does not return to work on the next available work date of the next season.

Eligibility for the Voucher

- Multiple Dates of Injury
 - Labor Code § 4658.6 and 8 CCR 10133.56(b)(1) refer to “the injury” as it relates to eligibility for the voucher, and if the requisite criteria are met, the employee “shall be eligible” for the benefit.
 - When an employee has two distinct injuries with separate dates of injury, the employee is entitled to a voucher at the applicable value for each injury sustained.
- Termination for Cause
 - The appeals board has held both ways about whether an injured worker can be eligible for the voucher after being terminated for cause. They look at whether the employer offered modified/alternative work before the termination, whether the employee returned to work, and evidence of ongoing accommodations.

Takeaways

- SB 553: Effective 7/1/2024 – ensure you have a plan in place!
- Temporary Disability: no major changes since SB 1205 inactive.
- Settlements: Stip vs. C&R - ensure documents are thorough, fully complete and explains the basis for settlement.
- Resignations/Confidentiality Agreements: generally acceptable.
- 1542 Release: rarely agreed-upon; WCAB has no jurisdiction over these.

Takeaways (Cont'd)

- Workplace Notices: must be in English and Spanish, in a conspicuous location, and also given at time of hire.
- Right to Counsel: effective as of 1/1/2025, and notice to employee required.
- Final Reporting: MMI/P&S report from a PTP/QME/AME.
- Interactive Process: meeting with employee must happen; employer required to make reasonable accommodations, if possible.

Takeaways (Cont'd)

- RTW Offer: must be in writing; 12-month in duration; provide 85% of pre-injury salary.
- SJDB Voucher: employee is eligible for voucher benefit if no timely RTW written offer is made; employee entitled to a voucher for each distinct date of injury.

THANK YOU!

EPIC Upcoming Webinars

Benefits Curve: Transformative Wellbeing: Turning Employee Health into a Productivity Powerhouse

- Thursday, October 24, 2024 11:00 AM PT

Compliance Webinar: Mental Health Parity Final Rules

- Thursday, November 21, 2024 11:00 AM PT

Employment Law Updates

- Wednesday, December 4, 2024 9:00 AM PT

