



# NAVIGATING WORKERS' COMPENSATION: PERTINENT ISSUES AND BEST PRACTICES FOR EMPLOYERS

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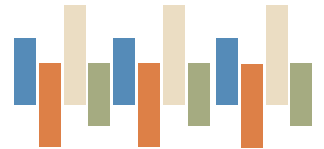


# Agenda

- Claims Involving Independent Contractors
- Employer's Responsibility When An Injured Worker Reaches Maximum Medical Improvement With Restrictions
- Best Practices for Communicating with Injured Workers
- Review Defense Strategies for CT/Stress Claims
- Review Subpoena Response - DOs and DONTs



# CONTRACT WORKERS: *THE INS & OUTS*





## *What is an independent contractor?*

- Under Labor Code 3357, any person rendering service for another, other than an independent contractor, is presumed to be an employee
- An independent contractor is a self-employed individual.
- The person for whom an independent contractor works is a “principal.”
- An independent contractor must provide workers' compensation coverage for his or her own employees.



# Federal Independent Contractor Test

## □ Six Factors

- ▣ The degree to which the employer controls how the work is done.
- ▣ The worker's opportunity for profit or loss.
- ▣ The amount of skill and initiative required for the work.
- ▣ The degree of permanence of the working relationship.
- ▣ The worker's investment in equipment or materials required for the task.
- ▣ The extent to which the service rendered is an integral part of the employer's business.

- Contractual language, the worker's title or label, and common law factors evaluated in isolation do not define the relationship.



# California Independent Contractor Tests

## □ *Borello* test

- ▣ California Supreme Court explained that the common law emphasis on the employer's control over the work details is the most important consideration in whether a person was an independent contractor.
- ▣ It is not the actual exercise of control that is important in determining whether an employer-employee relationship exists, but rather the right or potential power of control that is important.
- ▣ Other factors that should be considered: Contractual language, the worker's title or label, and common law factors evaluated in isolation do not define the relationship.

# California Independent Contractor Tests



- *Dynamex* and codified by AB 2257: ABC Test
  - In 2018, the Supreme Court issued a different test to determine whether a person is an employee or an independent contractor for the purposes of California wage orders adopted by the Industrial Welfare Commission
  - (A) the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) the worker performs work that is outside the usual course of the hiring entity's business; and (C) the worker customarily is engaged in an independently established trade, occupation or business of the same nature as the work performed for the hiring entity



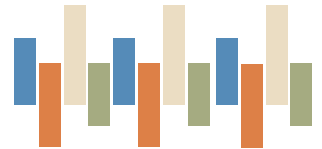
# Employee vs. Independent Contractor: Labor Code 2775

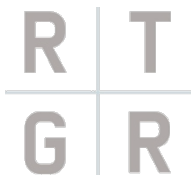


- Under LC 2775, a person providing labor or services for remuneration is considered an employee rather than an independent contractor unless the hiring entity demonstrates all of these:
  - ▣ The person is free from the control and direction of the hiring entity in connection with the performance of the work.
  - ▣ The person performs work that is outside the usual course of the hiring entity's business.
  - ▣ The person is customarily engaged in an independently established trade, occupation or business.
- The subsequent Labor Code sections then exempt certain occupations from the application of *Dynamex*.



*NOT AN EMPLOYEE; NOT AN INDEPENDENT  
CONTRACTOR—BUT STILL A RISK*





# Statutory Employment



## □ Unlicensed Contractor

- Labor Code 2750.5 adds that "any person performing any function or activity for which a license is required ... shall hold a valid contractors' license as a condition of having independent contractor status."
- The California Supreme Court has declared, "[B]y stating that a license is a condition of the status, the Legislature has unequivocally stated that the person lacking the requisite license may not be an independent contractor."
- In other words, Labor Code 2750.5 creates a conclusive presumption that an unlicensed person performing work requiring a license is an employee which is not rebuttable by the criteria established in LC 2750.5(a)(b)(c).

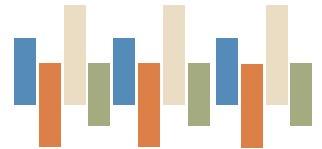
## *General vs. Specific Employer*

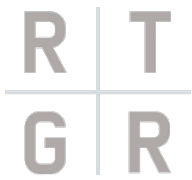


- An employee may have multiple employers for the purposes of workers' compensation in cases involving general and special employment.
- If a special employment relationship is found to exist, both employers are jointly and severally liable for any injuries to the employee.
- The employee generally is limited to workers' compensation remedies for injuries received in the course of employment with the special employer, and may not bring a separate tort action against either employer.
- If someone in the chain of employment is under or uninsured, the liability goes “up the chain.”



# *MMI WITH RESTRICTIONS: THE DOS AND DONTs*





## Under FEHA

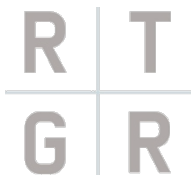
- The regulations require an employer to initiate the interactive process when certain conditions are established (Title 2 CCR 11069(b)). They are:
  - when an employee with a known physical or mental disability or medical condition requests reasonable accommodations;
  - when the employer becomes aware of the need for an accommodation through a third party or by observation; or
  - when the 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; for the employee's own serious health condition under the CFRA and/or the FMLA or other federal, state, employer or other covered entity leave provisions, and the employee or the employee's health-care provider indicates that further accommodation is necessary for recuperative leave or to perform the essential functions of the job.



# Interactive Process

Under the regulations (Title 2 CCR 11069(c)), these are the employer's obligations to engage in the interactive process:

- It must grant the employee's requested accommodation or reject it after due consideration, and initiate discussion with the employee regarding alternative accommodations.
- When the disability or need for reasonable accommodation is not obvious, and the employee has not provided the employer with reasonable medical documentation confirming the existence of the disability and the need for reasonable accommodation, the employer may require the employee to provide such documentation.



## Interactive Process (Continued)

- When the employer has received reasonable medical documentation, it must not ask the employee about the underlying medical cause of the disability, but may require medical information and second opinions from other health-care providers.
- If information provided by the employee needs clarification, the employer must specify what further information is needed, and allow the employee a reasonable time to produce it.
- The employer must analyze the essential functions of the job involved to assess a requested accommodation or to advance the interactive process.





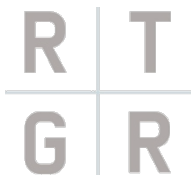
## Interactive Process (Continued)

- The employer may consult experts to assess a requested accommodation or to advance the interactive process.
- In consultation with the employee, the employer must identify potential accommodations and assess the effectiveness each would have in providing an equal opportunity for him or her to participate in the application process and to be considered for the job; or for the employee to perform the essential function of the position held or desired; or to enjoy equivalent benefits and privileges of employment compared with nondisabled employees.



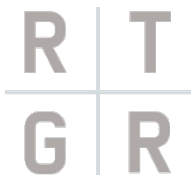
## Interactive Process (Continued)

- The employer must consider the preference of the employee to be accommodated, but has the right to implement an accommodation that is effective in allowing him or her to perform the essential functions of the job.
- If reassignment to an alternate position is considered as an accommodation, the employer may ask the employee to provide information about his or her educational qualifications and work experience to help it find a suitable alternative position.



# Medical Confidentiality

- Medical information and/or records obtained during the interactive process must be maintained on separate forms, and in medical files separate from the employee's personnel file, and must be kept confidential (CCR 110069(g)).
- The information, however, may be disclosed to:
  - inform supervisors and managers of restriction(s) on the work or duties of employees with disabilities and necessary reasonable accommodations;
  - inform first aid and safety personnel, when appropriate, that the condition may require emergency treatment; and
  - provide government officials investigating compliance with relevant information on request.

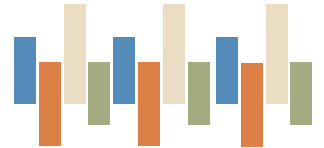


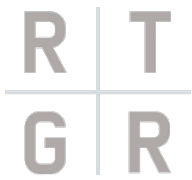
## In a workers' compensation lens:

- If you follow the civil rules of the interactive process, you have sufficiently met the burden of trying to accommodate any permanent restrictions.
- Tips:
  - ▣ Keep everything in writing. If a meeting is verbal, follow up with an email and/or letter
  - ▣ If you need clarification of a restriction, request it as soon as possible. Avoid delays.
  - ▣ Have a written policy in place regarding permanent accommodations



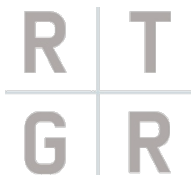
*COMMUNICATION: THE KEY IS DOCUMENTATION*





# BEST PRACTICES

- Keep all conversations with IWs very professional even if the IW does not.
- Refrain from making any statements that could be construed as retaliatory or discouraging them from filing a claim.
- The phone is your friend
  - ▣ If you expect a difficult conversation – do it over the phone. Do not put anything in writing
  - ▣ Assume the IW may be recording the convo without your knowledge.
- Written Communication: Assume every communication is subject to subpoena
- If you are unsure about any legal aspects of communicating, consult with your attorney first. Easier to prevent than to clean up.



# DOCUMENTATION KEYS TO SUCCESS

- Respond Promptly: Respond within required timeframes (usually 20 days) to reasonable requests for information.
- Follow Proper Channels: Avoid ex parte communications and ensure all parties are included in relevant communications.
- Provide a timely DWC-1
- Document all conversations with IWs
  - ▣ Only what is necessary to capture date, time, and impressions. Be objective in your impressions.
- Document your reasonable efforts to get IW back to work within the IWs restrictions.
- Provide your attorney information on any personnel issues, the personnel file, and wage statements.



# POOR COMMUNICATION CAN COST YOU



## PENALTIES AND SANCTIONS

- Sanctions under LC § 5813 for bad faith actions or tactics
  - Failing to turn over required documentation
  - Not responding to reasonable requests for information
  - Engaging in unnecessary delays due to poor communication
- Penalties under LC § 5814 for unreasonable delays
- penalties up to 25% or \$10,000 can be imposed under LC § 5814 for unreasonable delays caused by communication failures.
- Contempt Citations For Serious violations
- Tolling of statute of limitations when required notices are not provided



# POOR COMMUNICATION CAN COST YOU CONT'D

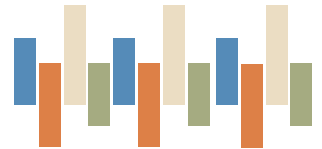


## PENALTIES AND SANCTIONS CONT'D

- Contempt Citations For Serious violations
- Tolling of statute of limitations when required notices are not provided
  - *Reynolds v. Workmen's Comp. Appeals Bd* - (1974) 12 Cal. 3d 726 - The Supreme Court held that an employer's failure to provide an employee with notice of workers' compensation rights estopped it from raising the statute of limitations as a defense.
  - *California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd. (Carls)* (2008) 163 Cal. App. 4th 853 - an employer must prove that an employee has "actual knowledge" of his or her right in order to end the tolling of the statute of limitations



# *CT/STRESS CLAIMS: DEFENSE STRATEGIES*



# PURE v COMPENSABLE CONSEQUENCE.

## WHATS THE DIFFERENCE



- Pure (Direct) Psych claims – The IW is alleging direct psych injury from an industrial event
  - ▣ Can result in PD based on a GAF score
- Compensable Consequence – The IW is alleging psych injury from physical injury
  - ▣ Only treatment unless applicant can prove it resulted from a violent act or catastrophic injury
- Typical Claims
  - ▣ Unreasonable workload
  - ▣ Sexual harassment
  - ▣ Discipline leading to or not leading to discipline
  - ▣ Exposure to traumatic incidents

# DEFENSES



- **OVERALL APPROACH**— In depth analysis whether applicant has satisfied their burden of proof and whether one or more affirmative defenses applies.
- **PREDOMINANT CAUSATION**—The actual events of employment were at least 50% of the cause of the mental disorder.
  - ▣ Assume IW has prior longstanding psych conditions and then start digging to find them.
  - ▣ Interview/depose employer witnesses early in the claim
    - Gets the employer active in defending the claim.
    - Witnesses are often a repository of information that would not otherwise come out during discovery.
    - It is our job as claims examiners/defense counsel to gather and then provide the doctor with as much accurate and pertinent information so that a proper determination about causation can be made.

# AFFIRMATIVE DEFENSES – CT CLAIMS



## □ Affirmative Defenses:

### □ Post-Termination

- Theory: Applicant Files CT Claim After being Terminated – You Deny The Claim Under 3208.3(3)(e)
- Standard of Proof: Applicant has to show predominant causation (almost guarantees a QME) and that an exception applies.
  - “Sudden and Extraordinary event”
  - Awareness of Employer of Claimed Injury before Notice of Term
  - Medical records showing treatment prior to Term or Layoff
  - Sexual or racial harassment by trier of fact
  - The date of Injury under LC5412 is subsequent to notice of term but before effective date. Not relevant if fired immediately.
- Deposition is Key: Focus on:
  - What activities the applicant was doing
  - Which ones were causing psychological injury
  - Whether he had any clue the work-related activities might be injuring him.

# GOOD FAITH PERSONNEL DEFENSE

## □ What is it?

- The defense to a psychiatric claim arising from the acts of an employer resulting from employment decisions.
- Must show, using expert medical evidence, that a personnel action (or actions) was at least a “substantial cause” (35 to 40%) of the psychiatric injury lawful, nondiscriminatory and done in good faith.

### ■ Strategies:

- 1) Document how what you did was sincere, fair, and without intent to mislead, deceive, or defraud.
  - Consider how things will be interpreted in Court years later
- 2) Provide your attorney the full personnel file
  - Include a list of all witnesses, their contact information and what they will testify to.
- 3) Draft a detailed letter to the QME identifying all work-related events and requesting a *Rolda* analysis.

# WHAT YOU CAN AND CANNOT DO



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## Can't do

- Scream – Yell – and Lose your Cool
- Los Angeles Unified School District v. W.C.A.B. (Ramirez) (2001) 66 Cal.Comp.Cases 645 (Writ Denied), Yelling at the applicant over sick and vacation pay is not a good faith personnel action under Labor Code section 3208.3(h).
- Impose unreasonably harsh, unfair, and discriminatory discipline  
Crockett v Verizon – 2013 Cal. Wrk. Comp P.D. Lexis. Personnel decision was, in part, due to supervisor not liking applicant

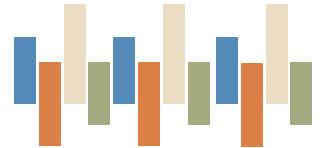
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## Can do

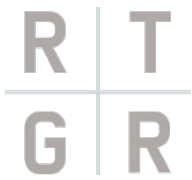
- Counsel/Coach - County of Alameda et al., v. W.C.A.B. (Kan) (2006) 71 Cal.Comp.Cases 827 (Writ Denied), Does not involve discipline or a threat of discipline.
- Transfer to another job location - Townsend v. W.C.A.B. (2001) 66 Cal.Comp.Cases 663 (Writ Denied)
- Increase workload - Kaiser Foundation Hospital v. W.C.A.B. (Berman)
- Give an unfavorable review and letter of reprimand - Garbers v. W.C.A.B.(1999) 64 Cal.Comp.Cases 250 (Writ Denied)

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## *SUBPOENA: INS AND OUTS*







# What to Do When you First Get a Subpoena

- Deal with It Immediately – Strict Time Limits
- Identify what documents or materials are being requested, the party or entity requesting the document, and the deadline for production of the documents sought.
- Evaluate for:
  - ▣ Vague Description
  - ▣ Protected from Disclosure (Privileged, Attorney work product)
  - ▣ Overbroad i.e. “entire claim file”
- If any doubt, send to counsel for review and response



# Challenging AAs Subpoena duces tecum –

## □ Types of challenges

- Objection – Vague, Overbroad, Requests privileged or irrelevant documents, No Just Cause
- Motion to Quash – Can't settle a subpoena dispute informally
- Protective Order - To protect any party or other person from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.

## □ Objections

- Provide non-privileged non-objectionable records responsive along with your objection.
- Raise your objection timely or else....
- Offer to Meet and Confer in your objection

# Challenging AAs Subpoena duces tecum (Cont'd)

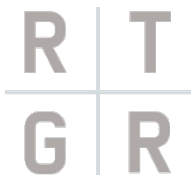


## □ Motion to Quash

- Must assert a specific legal right – such as a right to privacy
- Frequently used when a subpoena is served on a medical provider, and the party wants to prevent the provider from disclosing the records
- Should be filed quickly (within 10 days of subpoena date)
- Reference your meet and confer – May allow WCJ to issue an order quashing without need for a hearing
  - Many WCJs will just set a status conference

## □ Motion for Protective Order

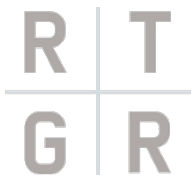
- Limit or prevent burdensome and duplicative depositions of employer witnesses or QMEs.
- Applicant's will use them to limit the production of confidential records such as public safety personnel records
- Must be made “promptly” – Best practice is to meet and confer no more than 20 days from subpoena date with motion to be filed at least 5 days prior to date set for compliance.



# Best Practices



- Challenging Subpoenas
  - Act quickly (within 10 days)
  - Serve all relevant parties
  - Document attempts at informal resolution
  - Consider meet and confer requirements
- Issuing Subpoenas
  - Have the employer representative who is producing records responsive to the subpoena sign the declaration of custodian of records
  - Ensure application for adjudication is on file
  - Use correct forms
  - Include ADJ number
  - Serve all parties concurrently
  - File a motion to compel if applicant attorney objects and meet and confer is unsuccessful



# Subpoena Sanctions



- May be imposed for unsuccessful motions to compel
- Unsuccessful opposition to motions
- Bad-faith actions
- Frivolous tactics
- Unnecessary delays



## SUBPOENA RESPONSE

**\*\*IF IN DOUBT, CHECK WITH COUNSEL\*\***

### What to Provide

### What Not To Provide

Medical Records	Attorney Client Communications (Communications with counsel)
<b>Claim Examiner Notes:</b> (If not protected by Attorney-client privilege, work product doctrine). Includes notes of personal observations of the claims adjuster	Attorney Work Product (attorney's impressions, conclusions, opinions, or legal research or theories)
<b>Statements prepared by witness – Witness Statements taken by employer or claims adjuster not at direction of counsel</b>	Witness statements from interview by attorney or her agent
<b>Subrosa</b> – Intended for litigation Rules are complex – <ul style="list-style-type: none"> <li>• May hold until applicant's depo</li> <li>• Provide before QME exam</li> <li>• Applicant must have “reasonable time” to rebut</li> </ul> <b>Investigatory Reports to be used in litigation –</b> Reports obtained before defense counsel retained are not Attorney work-product	Subrosa and Investigatory Reports that will not be used for litigation
<b>Personnel File, Wage Documents</b>	Tax Returns, Third Party records



# Q&A



# RTGR Law: Who We Are



**RTGR Law tackles your most challenging claims and controversies.**

We resolve these matters quickly and cost-effectively.

- **Workers' Compensation**
- **Civil Subrogation**
- **Employer Damages Defenses**

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By winning for our clients, we help them achieve their core missions: teaching, serving and caring for people, creating jobs, building communities and moving California forward.





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June 18 at 9:30 a.m.

## **Benefits Curve Webinar**

**Blueprint for 2026: Transforming Your Benefits Ecosystem**

April 17, 2025, at 1:00 p.m.

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