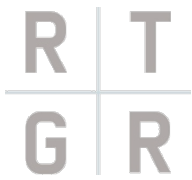


# CA WORKERS' COMP HOT TOPICS

All the Answers to Your Hardest  
Questions



# Your Presenters



Owen Fennern, Partner

Owen's practice focuses on the defense of Workers' Compensation matters, in which he defends carriers, self-insured entities, and employers from a broad spectrum of industries. He counsels clients on issues such as AOE/COE, benefits propriety, and Return to Work, and is involved in all phases of litigation.

Owen's experience includes several years of civil employment litigation at a major law firm where he represented employers in state and federal courts in cases involving discrimination, breach of contract, and trade secret misappropriation.



Chantal Thomas, Partner

Chantal Thomas is a firm partner who supervises litigation in Southern California. She is a Certified Specialist in Workers' Compensation Law by State Bar of California's Board of Legal Specialization.

Chantal has a wide-range of experience at trial, negotiating settlements and resolving high-exposure lien claims. She has drafted and won Petitions for Reconsideration and also drafted and filed Petitions for Writ of Review with the California Court of Appeal.



## Disclaimer...

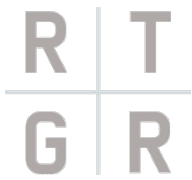


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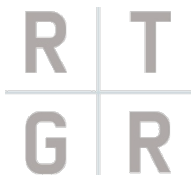
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# Agenda



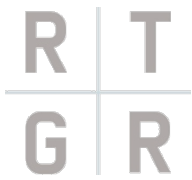
- Affirmative Defenses
- Terminating Medical Benefits
- Terminating Employees
- Return to Work
- Resignations
- Denying CT Claims
- Psyche/132a Claims Intertwined
- Employer Subpoenas



# Affirmative Defenses



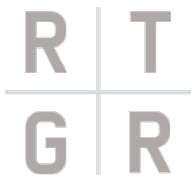
- Intoxication
- Initial Physical Aggressor
- Post-Termination
- Horseplay
- Going and Coming Rule



# Intoxication



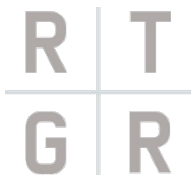
- An injury is not compensable when it is "caused by the intoxication, by alcohol or the unlawful use of a controlled substance, of the injured employee."
  - LC 3600(a)(4)
- 3 part inquiry
  - Ingested alcohol or unlawfully used controlled substance.
  - Was intoxicated.
  - Cause-and-effect between intoxication and injury.



# Intoxication



- Estoppel
  - If ER allows use of intoxicant (e.g. alcohol at Friday happy hour).
- Marijuana?
  - Unlikely to prove unlawful use as now legal for adults 21+ in CA.
  - Lack of reliable tests to determine intoxication.

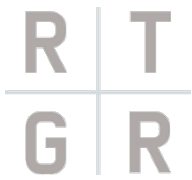


# Initial Physical Aggressor



- No liability if the injury arises out of an altercation in which the injured employee was the initial physical aggressor.
  - ▣ LC 3600(a)(7)
- Initial physical contact not necessarily required.
  - ▣ Clenching a fist or brandishing a weapon may be sufficient to convey a present and apparent threat of physical injury, making the person the initial physical aggressor without being the first to physically attack. *Matthews v. WCAB*, 37 Cal. Comp. Cases 124 (1972)

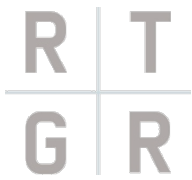




# Post Termination



- Purpose is to protect ER from retaliatory or fraudulent claims made by employees who have been terminated or laid off.
  - ▣ CJS Co. v. WCAB (Fong) (1999) 64 CCC 954
- ER's burden to show claim filed after notice of termination and that alleged injury occurred prior to the notice.
- Once ER makes this showing, it is applicant's burden to rebut by proving an exception by a preponderance of the evidence.

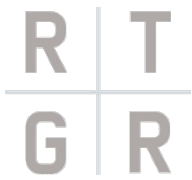


# Post Termination



## □ Exceptions

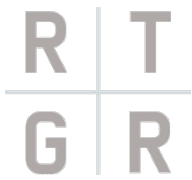
- ER aware of injury before the notice.
- Evidence of injury in medical records in existence prior to the notice.
- CT with a date of injury after termination.
- Specific injury subsequent to the notice, but prior to effective date of termination.
- "Sudden and extraordinary" events of employment (psych).
- Sexual or racial harassment (psych).



# Horseplay



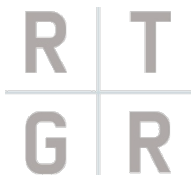
- Not defined in Labor Code.
- Think rowdy or unruly behavior.
  - Jumping off a third-floor balcony into a swimming pool.
  - Performing a "wheelie" on a motorcycle.
- "Minor" horseplay may not qualify.
  - Grabbing handrails and swinging feet off ground while descending stair.
  - Climbing on top of something to take a picture.



# Horseplay



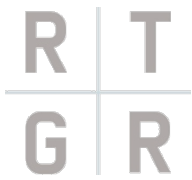
- Injury to participant compensable if ER allows or encourages activity.
- Injury to non-participating EE is compensable.
- A participant can become a non-participant by passage of time.
  - ▣ E.g. injured 30 minutes later by subsequent horseplay by another employee.



# Going and Coming Rule



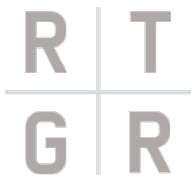
- Injury during commute not compensable.
- Does not apply to an employee who has arrived at his or her workplace.
- “Premises line rule” - property owned or controlled by the employer.
- Includes parking lot and interior of large ER campuses.



# Going and Coming Rule



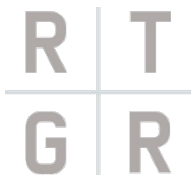
- Many Exceptions!
- Commuting in a company car.
- Wages paid during commute (*Kobe v. IAC* ).
- Traveling Between Multiple Job Sites.
- Uniformed Public Safety Officers.



# Going and Coming Rule



- And More Exceptions
- Commercial Traveler
  - All time spent away on a business trip is within the scope of employment.
- Special Mission
  - Example: picking up office supplies on the way into work.
  - Can be unrelated to regular work duties: walking a boss's dog, going to pick up a manager's lunch, parking your boss' car.

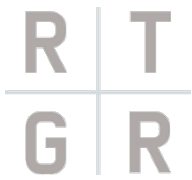


# Can ER terminate medical benefits?



- Follow ER policy that is equally applied whether an employee is off due to work injury or non-industrial condition.
- Health insurance continues for EEs on protected leave (FMLA/CFRA/pregnancy disability).
- After protected leave expires, additional leave may be provided under ER policy or as a reasonable accommodation.
  - Health insurance plan document will specify when an employee on leave becomes ineligible

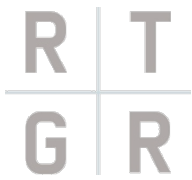




# Terminating Employees With WC Claims



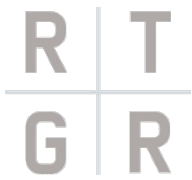
- Can ER terminate/lay off an employee while on workers' comp?
  - The short answer is yes. An employee can be terminated while on workers' comp.
  - Employment in California is at-will.
  - You cannot fire *because* of a workers' compensation claim under Labor Code section 132(a).
  - Termination/layoff does not necessarily terminate WC benefits. Generally, WC benefits are not affected.



# *E&J Gallo Winery*



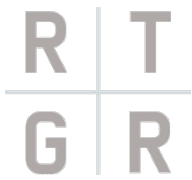
- Garcia worked for Gallo and filed three claims for injury to her neck, right shoulder and low back. She was awarded 12% PD and returned to work for Gallo with restrictions.
- After returning to work, she refused to work overtime due to a flare up in her right shoulder. She told her employer she was returning to see her PTP.
- Due to a scheduling conflict, she did not see the PTP that day.
- Gallo terminated her in 2006 for not working overtime and for misleading them about the medical appointment.
- The PTP provided a medical note explaining that she was not able to work overtime that day.
- In 2007, her case was reopened and she had surgery. Gallo paid TD from 2007 until 2008 when she was P&S, but no TD was paid from 2006-2007 because she had been terminated “for cause.”
- The court held that Gallo presented no evidence termination was caused by anything other than the employer’s refusal to accommodate the admitted injuries.



# Return to Work



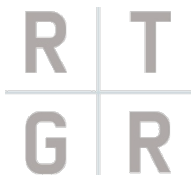
- If an Applicant is released to temporary modified work or permanent modified work is a formal letter always recommended?
  - Yes
- Things to include in letter
  - Position's start and end dates,
  - Hours the employee will work,
  - Logistical details,
  - Work restriction to be observed,
  - Description of the tasks to be performed in the modified duty position.



# Resignations



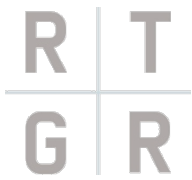
- Can a lump sum settlement include an employee's resignation?
  - The employer can ask the employee to voluntarily resign at the time the WC claim is being negotiated.
  - In California, a no re-apply/re-hire clause is prohibited. They used to be allowed, but on 1/1/20 Assembly Bill 749 was enacted (Code of Civil Procedure §1002.5)
  - CCP 1002.5 subsection (b)(1)(A) provides that parties can still have an agreement to “[e]nd a current employment relationship.”
  - Best to keep a voluntary resignation separate from the settlement documents submitted to WCAB.
  - If the person re-applies, ER can decline to re-hire based on legitimate non-discriminatory or non-retaliatory reason CCP 1002.5(b)(2).



# *Denise Kennedy v. MUFG Union Bank*



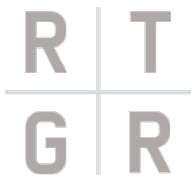
- Kennedy filed a civil action against her employer. She alleged harassment and took a leave. While on leave, her position was eliminated as part of a regionwide restructuring, but she remained an employee and was notified that when her leave was over she would be eligible for consideration to fill alternative positions.
- Later in 2015, she initiated a workers' compensation claim. She settled this claim in July 2016 and agreed to submit a voluntary resignation from employment as part of that settlement.
- In this case, the California Court of Appeal found it was legal for an employer to request a voluntary resignation as part of a workers' compensation settlement.



# Resignations In Practice

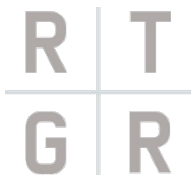


- Many TPAs/Insurance carriers see this as outside of the WC claim and will not handle it. In that case, the voluntary resignation would need to be done separately (between employer/DA and AA)
- A voluntary resignation is a simple statement of resignation. If you want a general civil release, not just a simple resignation, they should be negotiated separately and have consideration (\$) separate from the workers' compensation settlement.
- A general release is not within the jurisdiction of the WCAB. A general release in California must comply with California Civil Code Section 1542, must be voluntary and must be in exchange for valuable consideration.



# Can CT claim be denied immediately?

- Immediate denial is typically reserved for situations where the claim is not compensable regardless of medical evidence (e.g., applicant never worked for employer).
- Otherwise, investigation is recommended.
- 8 CCR 10109 “claims administrator must conduct a reasonable and timely investigation.”
- At least start the process to seek medical evidence before deadline to accept/deny claim.

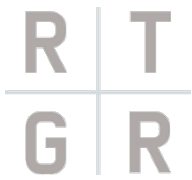


# LC 132a Claim



- Issues may intertwine (e.g. stress claim and LC 132a claim).
- Settlement of WC claim often includes resolution of 132a claim, but not always.
- Insurance company has responsibility to consider insured's interests, but can settle without including 132a claim.
- Keep in touch with carrier/claims administrator and request they include 132a in their settlement.
- Separate counsel may be needed.

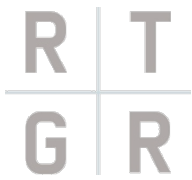




# Employer Subpoenas



- What should an employer provide to the subpoena service when a subpoena is received?
  - Carefully review document requests to determine what would be “responsive” (only provide what is asked for).
  - Never provide documents protected by legal privilege.
  - If document requests are excessive, can object as irrelevant or unreasonable.
    - E.g., all pay stubs for an employee’s 30-year career.
  - There may be technical deficiencies such as lack of personal service.



# Employer Subpoena Compliance



## DO PROVIDE

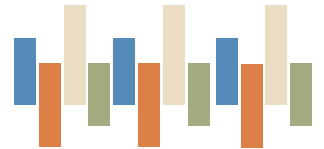
- Application/resume
- New hire paperwork
- Copies of Postings (e.g. DWC 7 Notice)
- Job descriptions
- Attendance records
- Performance reviews
- Job promotion/demotion
- Pay stubs
- Incident report
- Work status notes
- Interactive process docs
- WC benefit notices

## DON'T PROVIDE

- Non-responsive docs
- Attorney-client communications
- Attorney work product
- Investigations directed by attorney
- Trade secrets
- Personnel files of other EEs

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# QUESTION AND ANSWER





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

We resolve these matters quickly and cost-effectively.

- **Workers' Compensation**
- **Labor Code §132a Discrimination**
- **Serious and Willful Misconduct**
- **Employer Counseling**

~ ~ ~

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THANK YOU.

# NEW RESOURCE

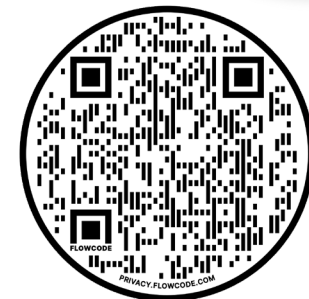
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Curated by EPIC’s [Wellbeing & Health Management](#) team, the 2024 Mental Health Toolkit includes a wealth of evidence-based tools, exercises, and insights. The focus is on promoting self-care, fostering resilience, and breaking down stigma – all to equip you with the knowledge and skills needed to create a culture of wellness and compassion in any setting.



### What’s Inside?

- Suggested communications calendar and national year-round observances
- Weekly email communication templates
- Mental health tools and resources
- Mental health fact sheet with some astounding statistics



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