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Workers' Compensation

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Workers' Compensation

Workers' Compensation; collective bargaining agreements

Labor Code § 3201.5 (new).

SB 983 (Greene); 1993 STAT. Ch. 117.

Existing law requires that a collective bargaining agreement¹ between an employer² and a labor organization³ be enforced.⁴ Existing law also requires that disputes involving benefits from workers' compensation⁵ be resolved by the Workers' Compensation Appeals Board (Board).⁶

1. See 29 U.S.C. § 158(d) (1988) (defining collective bargaining as the performance of the mutual obligation between the employer and the representative of the employees to meet and confer in good faith with respect to wages, hours, and other terms and conditions of employment).

2. See CAL. LAB. CODE § 3300 (West 1989) (defining employer for the purpose of workers' compensation as: (1) The state or state agency; (2) local governments and their agencies; (3) every person, including any public service corporation, which has a natural person in service; and (4) the legal representative of any deceased employer).

3. See *id.* § 923 (West 1989) (declaring that public policy warrants freedom of association and self-organization for workers so that they may negotiate the terms and conditions of their employment as they choose); *cf.* 29 U.S.C. § 152(5) (1988) (defining labor organization as any organization in which employees participate and which exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, and work conditions); *id.* § 157 (1988) (granting employees the right to self-organization, to form or join labor organizations, and to bargain collectively through their own chosen representatives).

4. CAL. LAB. CODE § 1126 (West 1989); see *Glendale City Employees' Ass'n v. City of Glendale*, 15 Cal. 3d 328, 339, 540 P.2d 609, 616, 124 Cal. Rptr. 513, 520 (1975) (stating that labor-management agreements in both public and private employment are treated as enforceable contracts), *cert. denied*, 424 U.S. 943 (1976); *Crowley v. City and County of San Francisco*, 64 Cal. App. 3d 450, 458, 134 Cal. Rptr. 533, 537 (1976) (suggesting that the legal principles applicable to ordinary contracts may be relevant to collective bargaining agreements); *cf.* 5 U.S.C. § 7121(a) (1988) (noting that a collective bargaining agreement will provide the procedure for the settlement of grievances). See generally Barbara J. Fick, *Negotiation Theory and the Law of Collective Bargaining*, 38 KAN. L. REV. 81 (1989) (analyzing the procedural aspects relative to collective bargaining and discussing their applicability to a general theory of negotiation); Michael K. Northrop, *Distinguishing Arbitration and Private Settlement in NLRB Deferral Policy*, 44 U. MIAMI L. REV. 341 (1989) (examining the tension in the National Labor Relations Act between the general policy favoring private adjustment of labor disputes and specific provisions defining certain labor practices as unfair).

5. See CAL. LAB. CODE § 3600 (West Supp. 1993) (providing that liability for compensation shall exist against an employer, regardless of negligence, for any injury sustained by an employee during the course of employment); *Chase Chem. Co. v. Hartford Accident & Indem. Co.*, 159 Cal. App. 3d 229, 237, 205 Cal. Rptr. 469, 472 (1984) (stating that the resolution of any claim against an employer by an employee injured in the course of employment is governed by the Workers' Compensation Act); see also CAL. LAB. CODE §§ 3200-6149 (West 1989 & Supp. 1993) (setting forth the provisions of the Workers' Compensation Act). See generally Howard A. Emmer, *Workers' Compensation—California Comparative Negligence in Industrial Accident Cases—A Historical and Practical Approach*, 7 WHITTIER L. REV. 327, 328 (1985) (observing that workers' compensation was intended to provide a system of social insurance to compensate victims of industry-related accidents).

6. CAL. LAB. CODE § 5300 (West 1989); see *id.* (maintaining that the following proceedings, *inter alia*, shall exclusively be instituted before the Board, unless exceptions apply: (1) For the recovery of compensation; (2) for the enforcement against the employer or insurer of any liability for compensation; (3) for the determination of any question as to the distribution of compensation or the entitlement of benefits; or (4) for

Chapter 117 mandates that the Department of Industrial Relations (Department)⁷ and the courts recognize as valid any provision in a collective bargaining agreement between private construction employers and a recognized or certified exclusive bargaining representative⁸ that pertains to, *inter alia*, workers' compensation in the area of alternative dispute resolution, medical treatment, or certain return-to-work programs.⁹ Chapter 117 provides that the agreement may not reduce an employee's compensation payment to an amount less than what would have been provided under existing workers' compensation law.¹⁰ In addition, Chapter 117 delineates the procedural requirements for the filing and recording of the agreement.¹¹

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the obtaining of any order that the Board is authorized to make); *see also id.* § 111(a) (West Supp. 1993) (providing that the Board shall consist of seven members vested with specified judicial powers).

7. *See id.* § 50 (West 1989) (establishing the Department of Industrial Relations); *id.* § 50.5 (West 1989) (clarifying that one function of the Department is to foster, promote, and develop the welfare of wage earners).

8. *See* 5 U.S.C. § 7103(16) (1988) (defining exclusive representative as any labor organization that is certified pursuant to 5 U.S.C. § 7111, or that was recognized by an agency immediately before the effective date of this statute).

9. CAL. LAB. CODE § 3201.5(a)(1)-(6) (enacted by Chapter 117); *see id.* (providing that a collective bargaining agreement will be recognized as valid if the agreement establishes: (1) An alternative dispute resolution system; (2) use of an agreed list of providers of medical treatment; (3) use of an agreed, limited list of qualified medical evaluators; (4) joint labor management safety committees; (5) a light duty, modified job or return-to-work program; or (6) a vocational rehabilitation program); *cf.* MASS. GEN. LAWS ANN. ch. 152, § 10C(i) (West Supp. 1993) (indicating that an employer and a representative of its employees may agree by collective bargaining to establish certain obligations that relate to workers' compensation); *School Committee of Medford v. Medford Public Sch. Custodians Ass'n*, 487 N.E.2d 540, 542 (Mass. App. Ct. 1986) (finding that the terms of a workers' compensation provision supersede the conflicting provisions of a collective bargaining agreement).

10. CAL. LAB. CODE § 3201.5(b) (enacted by Chapter 117).

11. *Id.* § 3201.5(e)-(h); *see id.* § 3201.5(e) (enacted by Chapter 117) (requiring that a copy of the agreement and the approximate number of employees to be covered by it be filed with the Administrative Director of the Division of Workers' Compensation); *id.* § 3201.5(f) (enacted by Chapter 117) (providing that the Division of Workers' Compensation will report to the Director of the Department of Industrial Relations the number of agreements received and the number of employees covered); *id.* § 3201.5(g) (enacted by Chapter 117) (mandating that the Administrative Director of the Division of Workers' Compensation will prepare a report to be made available to the Legislature upon request); *id.* § 3201.5(h) (enacted by Chapter 117) (specifying that the report will not be subject to public disclosure).

Workers' Compensation; workers' compensation reform

Insurance Code § 11752.8 (repealed and amended); § 11740 (new); §§ 676.8, 11721, 11730, 11732, 11733, 11734, 11737, 11750, 11750.1, 11751.5, 11759.1 (amended); Labor Code § 4064 (repealed and amended); §§ 62.7, 138.6, 139, 139.2, 139.3, 139.31, 139.5, 3208.3, 3217, 3600, 3701, 3762, 3820, 4060, 4061, 4062, 4600.3, 4600.5, 4614, 4614.1, 4638, 4644, 5158, 5307.1, 5307.6, 5401, 5404.5, 5813 (amended).

SB 223 (Lockyer); 1993 STAT. Ch. 1242

Labor Code §§ 124, 129, 129.5, 139.5, 3716, 4061, 4637, 4638, 4640, 4643, 4645, 4647, 4906 (amended).

SB 147 (Johnston); 1993 STAT. Ch. 1241

Insurance Code §§ 11731, 11735, 11736, 11738, 11739 (repealed and new); § 11752.8 (new); §§ 11750.3, 11751.1 (amended).

SB 30 (Johnston); 1993 STAT. Ch. 228

(Effective July 28, 1993)

Insurance Code § 11732.01, 11737.5 (repealed and new); §§ 11732.02 (new); §§ 675, 11738.5, 11752.6 (amended); Labor Code §§ 5401.5, 5401.6 (repealed); §§ 139.05, 3208.4, 4061.5, 4062.9, 4065, 4068, 4635.1, 4635.2, 5150, 5151, 5152, 5153, 5154, 5155, 5156, 5157, 5159, 5160, 5161, 5162, 5163, 5164, 5165, 5166, 5167, 5168, 5169, 5170, 5171, 5172, 5173, 5174, 5175, 5176, 5177, 5178, 5179, 5180, 5181, 5182, 5183, 5184, 5185, 5186, 5187, 5188, 5189, 5190, 5191, 5192, 5193, 5194, 5195, 5196, 5197, 5198, 5199, 5200, 5201, 5202, 5203, 5204, 5205, 5206, 5207, 5208, 5209, 5210 (new); §§ 27, 62.5, 110, 139.6, 3700, 3702.10, 3761, 4064, 4453, 4600, 4621, 4636, 4642, 4659, 4660, 5275, 5401.7, 5500, 5502, 5710, 5811, 6354, 6355 (amended).

AB 110 (Peace); 1993 STAT. Ch. 121

(Effective July 16, 1993)

Business and Professions Code §§ 730, 5499.30 (new); § 6154 (amended); Insurance Code §§ 1871.5, 1871.6, 1871.7 (new); §§ 750.4, 750.5, 1871.4, 1877.5 (amended); Labor Code §§ 3219 (new); §§ 4906, 5703 (amended); Penal Code §§ 550, 1191.10 (new); Unemployment Insurance Code § 2714 (amended).
AB 1300 (Brown); 1993 STAT. Ch. 120
(Effective July 16, 1993)

Existing law provides a system of workers' compensation to allow compensation for persons injured in the course and scope of employment.¹ These chapters make numerous revisions in the law.²

Existing law includes provisions which create the Workers' Compensation Administration Revolving Fund.³ Chapter 121 delays the repeal date of these provisions from January 1, 1994 to January 1, 1999.⁴ Chapter 1242 creates the Cal-OSHA Targeted Inspection and Consultation

1. CAL. LAB. CODE § 3201 (West 1989); *see id.* (providing the California State Workers' Compensation Act); *see also* IRENE SANCHEZ ET AL., THE CALIFORNIA WORKERS' COMPENSATION REHABILITATION SYSTEM § 110, at 2 (1981) (stating that public agitation regarding the numerous barriers inhibiting the employee's right to recover expenses prompted the enactment of employer liability statutes); *id.* § 120, at 3-4 (stating that the basic objectives of most workers' compensation programs are: (1) Income replacement; (2) restoration of earning capacity and return to productive employment; (3) industrial accident prevention and reduction; and (4) reduced litigation over industrial injuries).

2. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 110, (July 16, 1993); *see id.* (providing an overview of Chapter 121); John Jacobs, *The Puzzle: Why is Willie Brown Doing Pete Wilson So Many Favors?*, SAN DIEGO UNION-TRIB., Sept. 17, 1993, at B5 (stating that Chapter 121 was part of the state government's response to the worst California economy in 60 years); Jim Johnson, *State Surge on the Way?*, SACRAMENTO BEE, June 20, 1993, at H1 (stating that the construction industry is on the rise and the workers' compensation system needs to accommodate the increase in employees in this occupation); Hallye Jordan, *Workers' Comp System is Overhauled, Effective Now*, DAILY J., July 19, 1993, at 3 (stating that attorneys argued that it would be too difficult to immediately implement provisions in Chapter 121, except for the 7% rollback in workers' compensation insurance premiums which would take effect immediately); *Reforming Workers' Comp*, SACRAMENTO BEE, May 11, 1993, at B7 (providing a letter to the editor from the Chairman of the Board of the California Medical Association and his opinion of the new policies); Michael Remez, *Workers' Compensation Solutions Vary*, HARTFORD COURANT, Mar. 21, 1993, at C1 (comparing Connecticut's and California's problems with workers' compensation insurance); Stuart Silverstein, *Success of Workers' Compensation Overhaul Depends on Officials Whom Some Critics Call a Big Part of the Problem*, L.A. TIMES, July 25, 1993, at A3 (criticizing the judges for causing the past problems in the workers' compensation system); *The Aim of Workers' Comp Bills*, L.A. TIMES, July 17, 1993, at D1 (providing an overview of the purposes of Chapter 121); *Workers' Comp Possible at Last*, S.F. CHRON., Feb. 19, 1993, at A24 (providing an overview of Chapter 121).

3. CAL. LAB. CODE § 62.5 (amended by Chapter 121); *see id.* § 62.5(a) (amended by Chapter 121) (stating that proceeds from the fund may be distributed, upon appropriation by the Legislature, for the administration of the workers' compensation program).

4. *Id.* § 62.5(e) (amended by Chapter 121).

Fund.⁵ Furthermore, Chapter 121 establishes the Workers' Compensation Health Care Provider Organization Act.⁶ This Act is in response to an emergency in the workers' compensation system, and gives the Commissioner of Corporations authority to adopt emergency regulations in the public interest.⁷

GENERAL POLICY REQUIREMENTS

Existing law states that every insurer issuing workers' compensation insurance policies must file an annual report with a rating organization relating to the payment of dividends to policyholders.⁸ Existing law also

5. *Id.* § 62.7(a) (enacted by Chapter 1242); *see id.* (stating that the fund is a special account in the State Treasury); *id.* (stating that the fund's proceeds can be expended by the Insurance Department in order to establish a program that targets employers in the highly hazardous industries, and a program that identifies categories of occupational safety and health hazards); *see also id.* §§ 6354, 6355 (amended by Chapter 121) (stating the provisions for a program targeting employers in high hazardous industries with the highest incidence of preventable occupational injuries and illnesses and workers' compensation losses). *See generally* 29 U.S.C. § 651 (1982) (providing the language of the Occupational Safety and Health Act); JACK B. HOOD & BENJAMIN A. HARDY, JR., WORKERS' COMPENSATION AND EMPLOYEE PROTECTION LAWS 154-60 (1984) (discussing OSHA).

6. CAL. LAB. CODE §§ 5150-5210 (enacted by Chapter 121).

7. *Id.* § 5155 (enacted by Chapter 121); *see id.* §§ 5150-5156 (enacted by Chapter 121) (providing general information about the Act); *id.* § 5157 (enacted by Chapter 121) (providing the administrative outline of the Act); *id.* §§ 5158-5167 (enacted by Chapter 121) (providing the authorization guidelines for becoming a workers' compensation health care provider organization); *id.* §§ 5168-5176 (enacted by Chapter 121) (stating the provisions for solicitors under the Act); *id.* §§ 5177-5180 (enacted by Chapter 121) (stating the required standards which each organization must meet); *id.* §§ 5181-5190 (enacted by Chapter 121) (providing the regulation requirements of the organizations); *id.* §§ 5191-5194 (enacted by Chapter 121) (providing the disciplinary procedures allowed under the Act); *id.* §§ 5195-5203 (providing the punishments for willful violation of any provision under the Act); *id.* § 5204 (enacted by Chapter 121) (providing the procedure for service of process under the Act); *id.* §§ 5205-5210 (enacted by Chapter 121) (providing the miscellaneous provisions of the Act).

8. CAL. INS. CODE § 11738.5(b) (amended by Chapter 121); *see id.* (stating that the report must include information in sufficient detail to permit the rating organization to prepare for the Commissioner's review); *id.* § 11738.5(c) (amended by Chapter 121) (stating that information that is submitted by individual companies will be subject to public disclosure). Chapter 121 states that the report must be filed directly with the Commissioner who will publish an annual report accounting the premiums earned, losses incurred, and dividends paid by all companies during the preceding calendar year. *Id.* § 11738.5(b) (amended by Chapter 121); *id.* (stating that the information should be separated by premium size and loss ratio categories, as may be reasonably prescribed by the commissioners); *id.* § 11738.5(d) (amended by Chapter 121) (stating that the Commissioner must publish an annual report describing the dividend payments made by insurers issuing workers' compensation insurance policies); *see also id.* § 11759.1 (amended by Chapter 1242) (stating that every rating organization, beginning March 1, 1996, and by March 1 of each year thereafter, must notify the Governor and the Legislature that a report containing an analysis of all losses and expenses for the prior year, and of all insurers who are members of the organization, is available upon request); *cf.* FLA. STAT. ANN. § 627.914 (West 1984) (stating the requirements for Florida's annual workers' compensation insurer's report). *See generally* CAL. INS. CODE § 11738.5(c) (amended by Chapter 121) (stating that information submitted by individual companies will be subject to public disclosure); SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 110, at 2 (July 16, 1993) (discussing the effect Chapter 121 has on rating organizations).

provides that a licensed rating organization must make all policyholder information⁹ available to an employer insured under a workers' compensation policy.¹⁰ Chapter 121 requires that rating organizations establish a policyholder ombudsman, who will provide for certain policyholder rights.¹¹

Existing law provides that the Administrative Director of the Division of Workers' Compensation must establish a continuing program to provide information and assistance to employers and employees.¹² Chapter 121 specifies certain workers' compensation programs about which employees must be informed.¹³

Chapter 1242 states that any insurer¹⁴ desiring to write workers' compensation insurance must maintain or provide occupational safety and health loss control consultation services.¹⁵

9. See CAL. INS. CODE § 11752.6(b) (amended by Chapter 121) (defining policyholder information).

10. *Id.* § 11752.6(a) (amended by Chapter 121); see *id.* (stating that the organization must make the information available in writing, upon the request of the employer and after notice to the employer's insurer).

11. *Id.* § 11752.6(g) (amended by Chapter 121); see *id.* (providing the duties and responsibilities of the ombudsman); *id.* § 11752.6(h) (amended by Chapter 121) (stating the rights of the policyholder).

12. CAL. LAB. CODE § 139.6(a) (amended by Chapter 121); see *id.* (stating that the program must include information concerning rights, benefits, and obligations of the workers' compensation law).

13. *Id.* § 139.6(a)(2) (amended by Chapter 121); see *id.* (stating that the program must inform the employers and employees of their respective rights under workers' compensation law, the Americans with Disabilities Act, and the provisions of the Fair Employment and Housing Act relating to individuals with a disability); see also *id.* § 4636(a) (amended by Chapter 121) (stating that when aggregate total disability continues for 90 days, the employer must immediately provide the aforementioned information). See generally Jack Sirard, *A Costly Link of Workers' Comp and ADA*, SACRAMENTO BEE, Sept. 12, 1993, at F1 (providing an example of the relationship between the workers' compensation system and the Americans with Disabilities Act).

14. See CAL. INS. CODE § 23 (West 1993) (defining insurer).

15. *Id.* § 11721 (amended by Chapter 1242); see *id.* § 11721(b) (amended by Chapter 1242) (defining "loss control consultation services" as the conducting of workplace surveys to identify health and safety problems, reviewing employer injury records with appropriate personnel, and developing plans to improve employer health and safety loss records, including injury and prevention programs); *id.* § 11721(c) (amended by Chapter 1242) (providing that the insurer may not charge any fee in addition to the insurance premium for safety and health loss control consultation services); *id.* § 11721(d) (amended by Chapter 1242) (stating that each insurer must submit to the Director of Industrial Relations an annual loss control plan for targeting employers with the greatest workers' compensation losses and the most significant and preventable health and safety hazards); see also *id.* (amended by Chapter 1242) (describing the requirements of the plan); CAL. LAB. CODE § 6354 (amended by Chapter 121) (describing occupational safety and health consultation services).

Existing law permits private self-insurance¹⁶ by securing a certificate of consent from the Director of Industrial Relations.¹⁷ Chapter 121 permits private self-insurance or group self-insurance by employers.¹⁸

Existing law provides specific circumstances under which a workers' compensation policy may be cancelled.¹⁹ Chapter 121 states that after a workers' compensation policy is in effect, no notice of cancellation will be effective unless it complies with notice requirements²⁰ and is based upon enumerated occurrences.²¹

INSURANCE RATES

Under prior law, the Insurance Commissioner (Commissioner)²² established minimum rates for workers' compensation insurance premiums

16. See CAL. LAB. CODE § 3700.1(b) (West 1989) (defining private self-insurer).

17. *Id.* § 3700(b) (amended by Chapter 121); see *id.* § 3701(a) (amended by Chapter 1242) (stating that each year every private self-insuring employer must secure incurred liabilities for the payment of compensation and the performance of the obligations of employers by renewing the prior year's security deposit or by making a new deposit).

18. *Id.* § 3700(b) (amended by Chapter 121); see *id.* (specifying that this provision applies to individual employers or to one employer in a group of employers); *id.* § 3702.10(j) (amended by Chapter 121) (stating that the Director of Industrial Relations may authorize and encourage group self-insurance).

19. CAL. INS. CODE § 676 (West Supp. 1993); cf. ARK. CODE ANN. § 11-9-408(b) (Michie Supp. 1993) (stating the requirements that are necessary for an insurer to cancel an insurance policy); GA. CODE ANN. § 33-24-47(b) (Michie Supp. 1993) (stating the notification requirements for the termination of an insurance policy by the insurer).

20. See CAL. INS. CODE § 677 (West 1993) (stating that notices of cancellation must be in writing, mailed to the named insured at the address shown in the policy, or to the last known address, and must state the reason(s) for cancellation).

21. *Id.* § 676.8 (amended by Chapter 1242); see *id.* (specifying that a workers' compensation policy may only be canceled by the policyholder's: (1) Failure to make any payment when due; (2) failure to report payroll, or to permit the insurer to audit payroll as required by the terms of the policy, or to pay an additional premium as a result of policy terms or an audit; (3) failure to comply with federal or state safety orders of written recommendations of the insurer's designated loss control representative; (4) a material change in ownership of any change in the policyholder's business or operations that materially increases the hazard for frequency or severity of loss, requires additional or different occupational classifications for premium calculations, or contemplates an activity excluded by the insurer's reinsurance treaties; (5) a material misrepresentation by the policy holder or its agent; or (6) failure to cooperate with the insurer in the insurer's investigation of the claim).

22. See CAL. GOV'T CODE § 1001 (West 1980) (identifying the Insurance Commissioner as a civil executive officer of the state); *id.* § 82024 (West 1993) (defining the office of Insurance Commissioner as an elective state office); CAL. INS. CODE § 12900 (West Supp. 1993) (requiring that the Insurance Commissioner be elected in the same time, place, and manner and for the same term as the Governor); *id.* § 12906 (West Supp. 1993) (establishing the Department of Insurance as an independent department under the control of the Insurance Commissioner); *id.* § 12921 (West 1988) (specifying that the Insurance Commissioner shall perform all duties imposed by provisions of the insurance code and other laws regulating the business of insurance in the state, and shall also enforce the execution of such provisions and laws).

paid by employers,²³ and insurers²⁴ were prohibited from charging any less than these established minimums.²⁵ Under Chapter 1242, insurers are

23. See CAL. LAB. CODE § 3300 (West 1989) (defining employer to mean the state and every state agency; each county, city, district, and all public and quasi-public corporations and public agencies therein; every person, including any public service corporation, which has any natural person in service; and the legal representative of any deceased employer); *Empire Star Mines Co. v. California Employment Comm'n*, 28 Cal. 2d 33, 43, 168 P.2d 686, 692 (1946) (holding that, in determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired), *overruled on other grounds by People v. Sims*, 32 Cal. 3d 468, 480, 651 P.2d 321, 328, 186 Cal. Rptr. 77, 84 (1982); *id.* (holding that if the employer has authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists); *id.* (holding that the right to discharge at will, without cause, is strong evidence in support of an employment relationship); *id.* at 43-44, 168 P.2d at 692 (holding that other factors to be considered in determining if an employer-employee relationship exists are: (1) Whether the services performed constitute a distinct occupation or business; (2) whether the work is usually done under direction of the principal or by a specialist without supervision; (3) the skill required; (4) whether the principal or the worker provides the instrumentalities, tools, and place of work; (5) the length of time services are to be rendered; (6) the method of payment, whether by time or by the job; (7) whether the work is part of the regular business of the principal; and (8) whether the parties believe they are creating an employer-employee relationship); *cf. Borello & Sons, Inc. v. Department of Indus. Relations*, 48 Cal. 3d 341, 353-54, 769 P.2d 399, 406, 256 Cal. Rptr. 543, 550 (1989) (holding that for workers compensation purposes, the "control-of-work-details" test used to determine whether a person rendering service is an employee or independent contractor must be applied with deference to the intent of the protective legislation); *id.* at 355, 769 P.2d at 407, 256 Cal. Rptr. at 551 (holding that, despite farm-owner attempts to portray migrant labor cucumber harvesters as independent contractors, the indicia of their employment and consequent employee status for worker compensation purposes were compelling); *id.* at 359 n.16, 769 P.2d at 410 n.16, 256 Cal. Rptr. at 554 n.16 (distinguishing the determination of employee or independent contractor status for unemployment insurance as opposed to workers compensation purposes, and noting at least one precedent tax decision of the Unemployment Insurance Appeals Board has found cucumber harvesters to be independent contractors under similar facts).

24. See CAL. LAB. CODE § 3211 (West 1989) (defining insurer to include the State Compensation Insurance Fund and any private company, corporation, mutual association, reciprocal or interinsurance exchange authorized by state law to insure employers against liability for compensation, and any employer to whom a certificate of consent to self-insure has been issued); CAL. INS. CODE § 11770 (West Supp. 1993) (authorizing a State Compensation Insurance Fund to transact worker compensation and employer liability insurance); *see also* Sidney L. Weinstock & John R. Maloney, *History And Development Of Insurance Law In California, Introduction to WEST'S ANNOTATED CALIFORNIA CODES-INSURANCE CODE* (West 1972) (noting that the State Compensation Insurance Fund was created in 1913 to actively transact workers' compensation insurance in competition with private carriers, in order to stimulate and encourage a market for such insurance).

25. 1982 Cal. Stat. ch. 1241, sec. 2, at 4567 (amending CAL. INS. CODE § 11732.1); 1977 Cal. Stat. ch. 459, sec. 2, at 1514 (amending CAL. INS. CODE § 11732); 1977 Cal. Stat. ch. 459, sec. 3, at 1514 (amending CAL. INS. CODE § 11736); *see* 1977 Cal. Stat. ch. 459, sec. 2, at 1514 (amending CAL. INS. CODE § 11732) (requiring the insurance commissioner to issue a uniform classification of risks and premium rates, and a system of merit rating, that is adequate for all California worker compensation insurers); 1982 Cal. Stat. ch. 1241, sec. 2, at 4567 (amending CAL. INS. CODE § 11732.1) (permitting the commissioner to issue a uniform classification of risks and premium rate for employer liability insurance written incidental to and in connection with the employers worker compensation policies); 1977 Cal. Stat. ch. 459, sec. 3, at 1514 (amending CAL. INS. CODE § 11736) (prohibiting insurers from issuing, renewing, or continuing in force any workers' compensation insurance at premium rates less than the rates approved by the commissioner); *Crist v. Wal-Mart Stores, Inc.*, 664 F. Supp. 1242, 1262 (W.D. Ark. 1987) (noting that a state-mandated minimum rate removes matters such as rates, premiums, and classifications from the field of private bargaining and agreement), *aff'd in part, rev'd in part*, *Wal-Mart Stores, Inc. v. Crist*, 855 F.2d 1326 (8th Cir. 1988); *id.* (noting that a state-mandated minimum rate has a threefold purpose: (1) To protect injured workmen and their dependents by assuring the financial stability of worker compensation insurance companies, for the most part by the state's supervision of rates; (2)

free to set their own rates so long as the rates do not tend²⁶ to impair or

to protect employers against excessive rates, which is a state duty because the state compels worker compensation insurance coverage; and (3) to guard against rebates, discriminations, and favoritism in rates, the effects of which would be harmful to employers and injured workers); *Contractor's Safety Ass'n v. California Compensation Ins. Co.*, 48 Cal.2d 71, 74, 307 P.2d 626, 628 (1957) (noting that the minimum rate law was enacted in 1915 to eliminate irresponsible premium policies which developed in response to competitive conditions, and that the law's purpose was to require a premium rate which would assure adequate reserves to meet claims as they matured); *State Compensation Ins. Fund v. McConnell*, 46 Cal.2d 330, 345 n.2, 294 P.2d 440, 449 n.2 (1956) (noting that in California Governor Hiram W. Johnson's First Biennial Message to the Legislature in 1913, he called attention to the "rapacity of insurance companies" concerning worker compensation insurance); *id.* (noting that the first report of the California Industrial Accident Board to Governor Johnson in 1913 observed that employers were not voluntarily electing worker compensation insurance because of the high rates charged by insurance companies, and that to make such insurance compulsory and thus leave all employers to the mercy of insurance companies would be an injustice); *see also* Weinstock & Maloney, *supra* note 24, at lxxxii (noting that in the first two years under workers' compensation, 1913-1915, indiscriminate rate cutting threatened the solvency of private insurers writing such policies, and that the Legislature responded by enacting a minimum rate law); Dan Bernstein, *Wilson Signs Final Bills To Revamp Work Comp*, SACRAMENTO BEE, July 29, 1993, at A1 (quoting California State Senator Patrick Johnston, who referred to the minimum rate system as a "socialist system" in which businesses could shop for service but not price); Stephen Green, *Governor Signs 5 of 6 Worker's Comp Bills*, SACRAMENTO BEE, July 17, 1993, at A1 (quoting California State Insurance Commissioner John Garamendi, who contends repeal of the minimum rate as proposed would relieve insurers of practically all regulation, enabling them to insure good-risk companies while refusing to underwrite poor risks which are typically small businesses; and who asserts the proposal would permit insurers to redline employers, to discriminate in any manner they chose, and to play any underwriting and rating game they want); Jonathon Marshall, *Changes Urged To Cut Costs Of Workers' Comp More Competition Needed Among Insurers, Study Says*, S.F. CHRON., Nov. 7, 1992, at A2 (reporting that in the past, the insurance industry strongly backed the minimum rate law in order to prevent "predatory" competition, minimize the chance of insurance company failures, and provide a profit cushion for subsidizing the rates of riskier small businesses); Dan Morain, *Wilson Signs Deregulation Of Workers' Comp Rates Insurance: Bill Is The Final And Most Controversial Piece Of Reform Package*, L.A. TIMES, July 29, 1993, at A1 (reporting that Governor Wilson acknowledged that legislation to repeal the minimum rate law was flawed, that it could open the door to redlining or other types of discrimination by insurers, and that additional cleanup legislation was needed to protect against these problems); *id.* (quoting Insurance Commissioner Garamendi, who asserted that repeal of the minimum rate law "throws small business to the predatory sharks of the insurance industry," and stated that the cleanup legislation proposed by Governor Wilson is going to have to be a "mop to clean up the blood"); *id.* (quoting California Assembly Minority Leader Jim Brulte, who said he was "apoplectic" about what repeal of the minimum rate law could do to small employers); *id.* (quoting Thomas Conneely, president of the Association of California Insurance Companies, who predicts repeal of the minimum rate law will lead to "unbridled" competition); Mary Lynne Vellinga, *Workers' Comp Panel Calls For Major Reforms*, SACRAMENTO BEE, Mar. 7, 1992, at A1 (reporting that a commission established by the California Legislature, and comprised of seven university professors, recommended repeal of the minimum rate law but wanted to keep some kind of price floor because they feared insurers would engage in predatory pricing, causing themselves or other companies to go broke); Daniel Weintraub, *Assembly OKs Workers' Comp Reform Bill*, L.A. TIMES, July 13, 1991, at A1 (quoting Thomas Conneely, president of the Association of California Insurance Companies, who asserted that repeal of the minimum rate law would prompt turmoil in the industry, and warned that small businesses might find themselves in the same situation with workers' compensation that they are with health insurance, that is, unable to find coverage at a reasonable price); *id.* (quoting Richard McGavock, an official with the Oregon Department of Insurance and Finance, who described Oregon's move to more open competition as "a blood bath").

26. *See Haggerty v. Associated Farmers Of Cal.*, 44 Cal. 2d 60, 71, 279 P.2d 734, 741 (1955) (noting that tend has a well-recognized, defined meaning, that is, to be directed or have a tendency to any end, object, or purpose).

threaten the insurer's solvency,²⁷ or tend to create a monopoly²⁸ in the market.²⁹

Under prior law, the insurer's experience with other types of insurance or in other states could not be considered when determining and setting worker compensation insurance rates.³⁰ Chapter 1242 contains no such

27. See CAL. INS. CODE § 985(a) (West 1993) (defining insolvency to mean any impairment of minimum "paid-in capital" or "capital paid in" required of an insurer by statute for the class or classes of insurance which it transacts anywhere); *id.* § 988(a)(1) (West 1993) (defining impaired to mean a financial situation in which the assets of an insurer are less than the sum of the insurer's minimum required capital, minimum required surplus, and all liabilities); *Stark v. Shaw*, 155 Cal. App. 2d 171, 179, 317 P.2d 182, 187 (1957) (noting that two distinct and well-defined meanings of the word "insolvency" have generally been recognized depending on the nature and circumstances of use: (1) An excess of liabilities over assets; and (2) inability to meet one's obligations as they mature in the ordinary course of business); *id.* (noting that the latter definition of insolvency, that is, an inability to meet one's obligations as they mature, has been widely followed in the absence of controlling statutory definition).

28. See *Lowell v. Mother's Cake & Cookie Co.*, 79 Cal. App. 3d 13, 23, 144 Cal. Rptr. 664, 671 (1978) (defining monopoly as a prohibited restraint of trade, usually involving the willful acquisition of power to control prices or exclude competition from commerce in a particular geographic area with respect to a specific product); see also CAL. INS. CODE § 11732 (amended by Chapter 1242) (providing that the rates of any individual insurer, other than the State Compensation Insurance Fund, are presumed to create a monopoly in the market if the insurer has a market share, based on percentage of statewide workers' compensation premium, equivalent to 20 percent or more of the premium written by all insurers other than the State Compensation Insurance Fund).

29. CAL. INS. CODE § 11732 (amended by Chapter 1242); see *Wal-Mart Stores*, 855 F.2d at 1332 (observing that in less strictly regulated markets, the workers' compensation insurance industry was extremely competitive, and that insurers were willing to reduce premiums to obtain business); *id.* at 1333 (noting that although there has been a marked trend away from strict regulation of rates which worker compensation insurers must charge, all states require review by state authorities to prevent inadequate, excessive, or discriminatory charges); Robert B. Gunnison, *Wilson Signs Workers' Comp Bill Law Ends Guaranteed Profits For 300 Insurance Companies*, S.F. CHRON., July 29, 1993, at A19 (quoting Senator Pat Johnston, who asserted that an open market will allow California businesses to price-shop for workers' compensation coverage for the first time); Jonathan Marshall, *Changes Urged To Cut Cost Of Workers' Comp More Competition Needed Among Insurers, Study Says*, S.F. CHRON., Nov. 7, 1992, at A2 (reporting a new study by economists at Rider College that estimates more competition in the insurance market could save employers as much as 20 percent on their workers' compensation insurance premiums); *id.* (quoting Robert Kaestner, an economist, who asserted that if competition is allowed, premium prices will be bid down); *id.* (quoting H. Allan Hunt, a fellow at the Upjohn Institute, who said that after Michigan relaxed its insurance regulations in 1982, premiums went from 25 to 30 percent above average to just 6 percent above average by 1989); Dan Morain, *Wilson Signs Deregulation Of Workers' Comp Rates Insurance: Bill Is The Final And Most Controversial Piece Of Reform Package*, L.A. TIMES, July 29, 1993, at A1 (quoting Governor Pete Wilson, who said that deregulation of rates opens the workers' compensation insurance market to rate competition and lower prices for businesses both large and small, and that insurance companies will be free to be "creative and innovative" in how they provide workers' compensation coverage for California businesses); Mary Lynne Vellinga, *Workers' Comp Reform Called First Major Step Businesses Thankful For Relief, Workers For Higher Benefits*, SACRAMENTO BEE, Aug. 1, 1993, at F1 (characterizing deregulation of workers' compensation insurance rates as allowing the insurers to "basically charge what they want").

30. 1957 Cal. Stat. ch. 2317, sec. 4, at 4033 (enacting CAL. INS. CODE § 11732.2); 1981 Cal. Stat. ch. 714, sec. 292, at 2712 (amending CAL. INS. CODE § 11732.3); see 1957 Cal. Stat. ch. 2317, sec. 4, 5, at 4033 (enacting CAL. INS. CODE §§ 11732.2, 11732.3) (prohibiting consideration of an insurer's experience with other types of insurance or in other states); *State Compensation Ins. Fund v. McConnell*, 46 Cal. 2d 330, 341, 294 P.2d 440, 447 (1956) (upholding authority of the California Insurance Commissioner to consider an insurer's experience with other types of insurance and in other states when setting rates); *Weinstock & Maloney*, *supra* note 24, at lxxxii (pointing out that the 1956 decision in *McConnell* which authorized consideration of multi-line

restriction, and specifically directs the Commissioner to consider the insurer's experience in other states when determining whether proposed rates tend to impair or threaten the solvency of an insurer.³¹

Under prior law, the expense portion of the minimum rate set by the Commissioner was fixed, was uniform for all insurers, and was applied uniformly to all insured employers.³² Under Chapter 1242, the expense³³ portion of rates to be used by an insurer must reflect the operating methods of the insurer and the insurer's own actual and anticipated expense experience.³⁴ Chapter 1242 also permits rates to include a provision for contingencies and for a reasonable profit.³⁵

Under prior law, the Commissioner established a uniform classification of risks and a uniform system of merit rating³⁶ as well as uniform minimum rates.³⁷ Under Chapter 1242, the Commissioner must designate a rating organization³⁸ to develop a uniform experience rating plan,³⁹ a

and multi-state experience when setting rates, was promptly followed in 1957 with legislation specifically prohibiting such consideration).

31. CAL. INS. CODE § 11733(a) (amended by Chapter 1242).

32. 1977 Cal. Stat. ch. 459, sec. 2, at 1514 (amending CAL. INS. CODE § 11732); 1957 Cal. Stat. ch. 2317, sec. 6, at 4033 (enacting CAL. INS. CODE § 11732.4); 1989 Cal. Stat. ch. 892, sec. 2, at 2983 (amending CAL. INS. CODE § 11732.5); *see* 1977 Cal. Stat. ch. 459, sec. 2, at 1514 (amending CAL. INS. CODE § 11732) (requiring the Insurance Commissioner to establish minimum rates, to be uniform as to all insurers); 1957 Cal. Stat. ch. 2317, sec. 6, at 4033 (enacting CAL. INS. CODE § 11732.4) (prohibiting any discount by reason of a reduction in the expense provision of the minimum rate); 1989 Cal. Stat. ch. 892, sec. 2, at 2983 (amending CAL. INS. CODE § 11732.5) (specifying the exact expense provision for the years 1990 through 1992, to be uniform as to all insurers and uniformly applied as to all insured employers); *McConnell*, 46 Cal. 2d at 338-39, 294 P.2d at 445-46 (noting that rate-setting involves a consideration of losses, referred to as pure premium, as well as expenses, referred to as expense loading); *id.* (observing that the Insurance Commissioner has always reflected the expenses in the rate by means of a flat percentage loading).

33. *See* CAL. INS. CODE § 11730(c) (amended Chapter 1242) (defining expenses to mean that portion of any rate attributable to acquisition, field supervision, collection expenses, general expenses, taxes, licenses, and fees).

34. *Id.* § 11733(b) (amended by Chapter 1242).

35. *Id.* § 11733(c) (amended by Chapter 1242).

36. *See* 1981 Cal. Stat. ch. 714, sec. 290, at 2711 (amending CAL. INS. CODE § 11730) (defining merit rating to include schedule rating and experience rating); *id.* (defining schedule rating as a rating scheme wherein the rate is varied according to the physical conditions); *id.* (defining experience rating as a rating scheme wherein the California workers' compensation experience of the particular insured is used as a factor in raising or lowering the rate).

37. 1977 Cal. Stat. ch. 459, sec. 2, at 1514 (amending CAL. INS. CODE § 11732).

38. *See* CAL. INS. CODE § 11750.1(b) (amended by Chapter 1242) (defining rating organization to mean any organization which has as its primary object or purpose the collecting of rating information, the making of pure premiums and rating plans for workers' compensation and incidental employer liability insurance, and the presenting of such plans to the commissioner for approval).

39. *See id.* § 11730(c) (amended by Chapter 1242) (defining experience rating to mean a rating scheme using the past insurance experience of the individual policyholder to forecast future losses by measuring the policyholder's loss experience against the loss experience of policyholders in the same classification to produce a prospective premium credit, debit, or unity modification).

uniform statistical plan,⁴⁰ and an optional classification system⁴¹ for use by insurers.⁴² Chapter 1242 permits insurers to develop their own classification systems, so long as they are consistent with data reporting requirements of the uniform experience rating plan, uniform statistical plan, and optional classification system.⁴³ Under Chapter 1242, the designated rating organization will also assist the Commissioner in gathering, compiling, and reporting relevant statistical information.⁴⁴ Chapter 1242 further provides that the designated advisory organization shall develop and file manual rules reasonably related to the recording and reporting of statistical data, such rules being subject to the Commissioner's approval.⁴⁵

Under Chapter 1242, every insurer must record and report its workers' compensation experience in accordance with the approved uniform statistical plan and related rules.⁴⁶ Every insurer must file with the Commissioner all rates,⁴⁷ rating plans, and supplementary rate information,⁴⁸ in a form and manner prescribed by the Commissioner.⁴⁹

Under prior law, the Commissioner could suspend or revoke an insurer's certificate of authority to write liability, workers' compensation, and common carrier liability insurance for violating any of the statutory provisions pertaining to rate supervision, and violation of any such statutory provision by an insurance broker, agent, or solicitor, or by any insurer's employee, was a misdemeanor.⁵⁰ Chapter 1242 contains no

40. See *id.* § 11730(i) (amended by Chapter 1242) (defining statistical plan to mean the plan, system, or arrangement used in collecting data).

41. See *id.* § 11730(a) (amended by Chapter 1242) (defining classification or classification system to mean a plan, system, or arrangement for recognizing differences in exposure to hazards among industries, occupations, or operations of insured policyholders).

42. *Id.* § 11734(a)-(b) (amended by Chapter 1242).

43. *Id.* § 11734(b) (amended by Chapter 1242).

44. *Id.*

45. *Id.* § 11734(c) (amended by Chapter 1242).

46. *Id.* § 11734(b) (amended by Chapter 1242).

47. See *id.* § 11730(g) (amended by Chapter 1242) (defining rate to mean the cost of insurance per exposure base unit, prior to application of individual risk variations based on loss or expenses considerations, and does not include minimum premiums).

48. See *id.* § 11730(j) (amended by Chapter 1242) (defining supplementary rate information to mean any manual or plan of rates, classification system, rating schedule, minimum premium, policy fee, rating rule, rating plan, and any other similar information needed to determine the applicable premium for an insured).

49. *Id.* § 11735(a)-(b) (repealed and enacted by Chapter 228).

50. 1981 Cal. Stat. ch. 714, sec. 296, at 2712 (amending CAL. INS. CODE § 11741); 1935 Cal. Stat. ch. 145, sec. 11742, at 724 (enacting CAL. INS. CODE § 11742); see *Key Sys. Transit Lines v. Pacific Employers Ins. Co.*, 52 Cal. 2d 800, 806-07, 345 P.2d 257, 260-61 (1959) (refusing to enforce an insurance contract, based on the defense of illegality, where the agreement would do violence to provisions of the minimum rating law); *Contractor's Safety Ass'n v. California Compensation Ins. Co.*, 48 Cal. 2d 71, 76, 307 P.2d 626, 629 (1957) (refusing to enforce insurance contract on grounds of illegality, where agreement included unauthorized rebate);

similar enforcement language, but does allow the Commissioner to disapprove proposed rates after a hearing and upon formal issuance of an order that the rate be discontinued.⁵¹

Chapter 1242 provides that these rating laws become operative January 1, 1995.⁵² However, Chapter 121 provides for a 7% reduction in insurance rates that became effective on July 1, 1993, unless the Insurance Commissioner approves or issues a premium rate that is less than 7%.⁵³

INSURER INDEMNITY AND CLAIM DISPUTES

Under existing law, an insurer must notify the employer of each indemnity claim that has been filed directly with the insurer and against the employer.⁵⁴ Chapter 121 provides that an employer must also promptly notify its insurer at any time during the pendency of the claim if the employer has actual knowledge of any facts which would tend to disprove any aspect of the employee's claim.⁵⁵ Chapter 121 requires insurers to reimburse employers for premiums that the employers had previously paid. These reimbursements are intended to compensate the employer for the paid premium that had been successfully challenged.⁵⁶

id. (noting the general rule that imposition by statute of a penalty implies a prohibition of the act to which the penalty is attached, and a contract founded upon such act is void).

51. CAL. INS. CODE §§ 11737(a)-(b), 11737(d) (amended by Chapter 1242); *see* Dan Morain, *Wilson Signs Deregulation Of Workers' Comp Rates Insurance: Bill Is The Final And Most Controversial Piece Of Reform Package*, L.A. TIMES, July 29, 1993, at A1 (observing that the new workers' compensation measure will strip the insurance commissioner's office of much of its authority to oversee the workers' compensation insurance system).

52. 1993 Cal. Legis. Serv. ch. 1242, sec. 43 at 5776.

53. CAL. INS. CODE § 11732.01 (enacted by Chapter 121); *see* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 110, at 2 (July 16, 1993) (stating that the Commissioner is prohibited from approving or issuing a rate that is greater than the rate produced by the 7% reduction required by Chapter 121). *See generally* George Driver, "Hard" Market Will Alter Rules of the Game. What Can Business Owners Expect From Their Insurance Agents in the Next 12 Months?, SAN DIEGO UNION-TRIB., Aug. 24, 1993, at C4 (stating the responsibilities imposed upon the insurance agents under Chapter 121).

54. CAL. LAB. CODE § 3761(a) (amended by Chapter 121); *see id.* (specifying the procedure the insurer must follow when notifying an employer).

55. *Id.* § 3761(b) (amended by Chapter 121); *see id.* (stating that the employer must notify the insurer in writing); *id.* (stating that upon this notification, the appeals board may approve a compromise and release agreement or stipulation that provides relief to the employee only when there is proof of service upon the employer by the insurer, not less than 15 days prior to the appeals board action of notice of the hearing at which the compromise and release agreement or stipulation is to be approved); *id.* (providing an exception to the required notice).

56. *Id.* § 3761(d) (amended by Chapter 121); *id.* (stating that if an employer properly notifies its insurer and the appeals board determines that no compensation is justified, the insurer must reimburse the employer for any premium paid solely due to the inclusion of the successfully challenged payments); *id.* (stating that the employee is not required to refund the challenged payment).

Chapter 1242 provides that insurers must discuss claim files with employers.⁵⁷

Under existing law, a disputed claim may be resolved at a mandatory settlement conference provided that ten days prior to the meeting the parties each file a conference statement.⁵⁸ Chapter 121 eliminates the ten day requirement but requires that, if the claim is not resolved at the settlement conference, the parties file a pretrial conference statement which includes each party's proposed permanent disability rating.⁵⁹ Chapter 1242 further provides that one party⁶⁰ may be forced to pay any reasonable expenses⁶¹ as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.⁶²

Existing law provides that together with the last payment of temporary disability indemnity, the employer must provide the employee with a notice explaining the reasons that the employee may not be receiving permanent disability indemnity.⁶³ Chapter 1242 states that if the employer determines that permanent disability is payable, then the employer must provide the employee with a notice⁶⁴ of the amount that will be paid, the basis upon which the determination was made and whether there is a need for continuing medical care.⁶⁵

Chapter 1242 establishes provisions to resolve disputes over the compensability of any injury.⁶⁶

57. *Id.* § 3762 (amended by Chapter 1242); *see id.* (stating that the insurer must discuss all elements of the claim file with the employer and provide the employer with copies of the documents that affect the premium at the employer's expense at regular business hours); *see also id.* (stating that the insurer may not copy or discuss any document that the insurer is prohibited from disclosing to the employer under any privilege or statute).

58. *Id.* § 5502(d)(3) (amended by Chapter 121).

59. *Id.*; *see id.* § 5404.5(a)-(b) (amended by Chapter 1242) (stating that a claim may be dismissed if there is no activity in 180 days and the claims adjuster has properly served the employee).

60. *See id.* § 5813(a) (amended by Chapter 1242) (including a party, party's attorney, or both).

61. *See id.* (stating that expenses may include attorney's fees and costs, and authorizing additional sanctions not to exceed \$2,500, to be transmitted to the General Fund).

62. *Id.*

63. *Id.* § 4061(a) (amended by Chapter 1242); *see id.* § 4061(a)(2) (amended by Chapter 1242) (stating that if the employer later determines that the permanent disability indemnity is payable the employer must provide such notice, within fourteen days of the determination, to the employee).

64. *See id.* § 4061(b) (amended by Chapter 1242) (providing that the notice must contain the following language: "Should you decide to be represented by an attorney, you may or may not receive a larger award, but, unless you are determined to be ineligible for an award, the attorney's fee will be deducted from any award you might receive for disability benefits. The decision to be represented by an attorney is yours to make, but it is voluntary and may not be necessary for you to receive your benefits").

65. *Id.* § 4061(a)(1) (amended by Chapter 1242).

66. *Id.* § 4060(a) (amended by Chapter 1242); *see id.* § 4060(c) (amended by Chapter 1242) (stating that if a medical evaluation is required to determine compensability after the filing of a claim form and the employee is represented by an attorney, each party may select a qualified medical-legal evaluator to conduct a

Chapter 121 provides the procedures for investigating injuries that arise from alleged sexual harassment, sexual assault, or sexual battery.⁶⁷

PSYCHOLOGICAL INJURIES

Under existing law an employee⁶⁸ may receive compensation⁶⁹ for a psychiatric injury⁷⁰ if it is a mental disorder which causes disability or requires treatment.⁷¹ In addition, the injury must be diagnosed under the criteria set forth in section 139.2 of the California Labor Code.⁷²

Under prior law an employee had to show by a preponderance of the evidence that ten percent of causation of the injury was from actual events⁷³ of employment.⁷⁴

comprehensive medical-legal evaluation); *id.* § 4060(d) (amended by Chapter 1242) (stating that if the employee is not represented by an attorney, the employee may select a qualified medical-legal evaluator to conduct the evaluation); *see also id.* § 4060(e) (amended by Chapter 1242) (stating that the evaluations performed under this provision must address all disputed medical issues).

67. *Id.* § 3208.4 (enacted by Chapter 121); *see id.* (stating that any party seeking discovery concerning sexual conduct of the applicant with any person other than the defendant must establish specific facts which show good cause); *id.* (stating that the procedures set forth in California Evidence Code § 783 will be followed if evidence of sexual conduct of the applicant is offered to attack his or her credibility); *see also id.* (stating that opinion evidence, evidence of reputation, and evidence of specific instances of sexual conduct of the applicant with any person other than the defendant is not admissible by the defendant to prove consent by or the absence of injury to the applicant, unless the injury alleged is in the nature of loss of consortium).

68. *See id.* § 3351.5 (West 1989) (defining employee); *id.* § 3352 (West Supp. 1993) (providing the exclusions from the usual definition of employee).

69. *See id.* § 3207 (West 1989) (defining compensation as any benefit or payment conferred upon an injured employee).

70. *See id.* § 3208 (West 1989) (defining injury).

71. *Id.* § 3208.3(a) (amended by Chapter 1242). *See generally* CAL. CONST. art. XIV, § 4 (vesting the Legislature with the power to create and enforce a complete system of workers' compensation); CAL. LAB. CODE §§ 3200-6002 (West 1989 & Supp. 1993) (providing the scope and operation for California's Workers' Compensation & Insurance); 82 AM. JUR. 2D *Workers' Compensation* §§ 62-685 (1992 & Supp. 1993) (providing a comprehensive explanation of workers' compensation law); WARREN L. HANNA, 1 CAL. LAW OF EMP. INJ. § 4.69, at 4-96 to 4-102 (Patricia Knighten ed., revised 2d ed. 1993) (explaining the compensation provisions regarding psychiatric injuries); LITTLE HOOVER COMMISSION, WORKERS' COMPENSATION: CONTAINING THE COSTS, at 90 (Feb. 1993) [hereinafter HOOVER COMMISSION] (stating that California is only one of six states that allows claims for stress); *id.* (explaining that the subject of stress claims may be the most controversial issue in Workers' Compensation, and that it is the fastest growing category of claims); *id.* at 90-95 (discussing the subject of stress claims and providing various statistics regarding the increase in work-related stress claims).

72. CAL. LAB. CODE § 3208.3(a) (amended by Chapter 1242); *see id.* § 139.2(j)(4) (amended by Chapter 1242) (providing that the criteria to be used in diagnosing a psychiatric injury should follow the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, or other nationally recognized psychiatric manuals).

73. *See generally* HANNA, *supra* note 71, § 4.02(3)(b), at 4-19 to 4-21 (discussing the actual events requirement).

Chapter 1242 provides that the employee must still prove causation by a preponderance of the evidence, but it changes the causation standard to require that actual events of employment must be predominant as to all causes combined.⁷⁵ However, if the psychiatric injury results from a violent act or from direct exposure to a violent act, the employee is required to prove by a preponderance of the evidence that actual events of employment were a substantial cause⁷⁶ of the injury.⁷⁷

Prior law denied recovery for psychiatric injuries resulting from a regular and routine employment event,⁷⁸ as distinguished from a sudden and extraordinary employment condition, when the injury occurred during the first six months of employment.⁷⁹

Chapter 1242 also denies recovery under the six-month rule, but deletes the provision differentiating "regular and routine" from "sudden and extraordinary."⁸⁰ However, Chapter 1242 provides that psychiatric injuries are not compensable if substantially caused by a lawful, non-discriminatory, good-faith personnel action.⁸¹

74. 1991 Cal. Legis. Serv. ch. 115, sec. 4, at 575 (amending CAL. LAB. CODE § 3208.3); *see* CAL. LAB. CODE § 3208.3(c) (amended by Chapter 1242) (explaining that the intent of the Legislature is to establish a higher threshold of compensability for psychiatric injuries); *Review of Selected 1991 California Legislation*, 23 PAC. L.J. 512, 805-06 (1992) (discussing 1991 California Statute chapter 115, section 4); *see also* Livitsanos v. Superior Court, 2 Cal. 4th 744, 753-54, 828 P.2d 1195, 1201-02, 7 Cal. Rptr. 2d 808, 814-15 (1992) (discussing the higher threshold necessary for recovery on psychiatric claims); *Albertson's Inc. v. Workers' Compensation Appeals Bd.*, 131 Cal. App. 3d 308, 314, 182 Cal. Rptr. 304, 307-08 (1982) (holding that trial courts are to use a subjective test to determine if a psychiatric injury has occurred). *See generally* HOOVER COMMISSION, *supra* note 71, at 90-91 (explaining the prior law regarding stress claims); HANNA, *supra* note 71, § 4.02(3)(c), at 4-21 to 4-23 (discussing the ten percent threshold requirement under the old standard). Although § 3208.3 is amended by Chapter 1242, the intent of the Legislature to establish a higher threshold of compensability for psychiatric injuries remains the same. CAL. LAB. CODE § 3208.3(c) (amended by Chapter 1242); *see* HANNA, *supra* note 71, § 4.02(3)(a), at 4-18 to 4-19 (explaining the higher threshold).

75. CAL. LAB. CODE § 3208.3(b)(1) (amended by Chapter 1242). *See generally* *Review of Selected 1989 California Legislation*, 21 PAC. L.J. 333, 575 (1990) (discussing the requirement that an employee demonstrate causation by a preponderance of the evidence). Prior to passage of this evidentiary standard, the requirement was substantiality in the record as a whole. *LeVesque v. Workers' Compensation Appeals Bd.*, 1 Cal. 3d 627, 637, 463 P.2d 432, 439, 83 Cal. Rptr. 208, 215 (1970).

76. *See* CAL. LAB. CODE § 3208.3(b)(3) (amended by Chapter 1242) (defining substantial cause as at least 35-40%).

77. *Id.* § 3208.3(b)(2) (enacted by Chapter 1242).

78. *See* 1991 Cal. Legis. Serv. ch. 115, sec. 4, at 575 (amending CAL. LAB. CODE § 3208.3) (defining regular and routine as including a lawful, nondiscriminatory, good faith personnel action, such as discipline, layoff, or termination).

79. *Id.* Employment need not be continuous to fulfill the six-month requirement. *Id.*

80. CAL. LAB. CODE § 3208.3(d) (amended by Chapter 1242). *See generally* HOOVER COMMISSION, *supra* note 71, at 91 (citing statistics that approximately thirteen percent of stress claims occur within the first six months of employment).

81. CAL. LAB. CODE § 3208.3(h) (amended by Chapter 1242).

Chapter 1242 provides that, in order to recover for a psychiatric injury following notice of termination of employment or layoff,⁸² the claim must be for an injury occurring prior to the time of notice of termination or layoff.⁸³ Furthermore, in addition to a showing by a preponderance of the evidence that actual events of employment were the predominant cause of the injury, the employee must also show that one or more of the following conditions exist: (1) Sudden and extraordinary events of employment caused the injury; (2) the employer had notice of the injury prior to notice of termination or layoff; (3) employment records contain evidence of previous treatment of the psychiatric injury; (4) a finding of sexual harassment; or (5) evidence that injury occurred after notice of termination or layoff, but prior to the effective date of the termination or layoff.⁸⁴

Existing law prohibits recovery for any injury caused by certain occurrences including, but not limited to, intoxication of the employee, intentional infliction of the injury by the employee, and suicide.⁸⁵ Additionally, existing law prohibits recovery for any injury if it is caused by the commission of a felonious act by the employee for which the employee has been convicted.⁸⁶ Chapter 1242 expands this provision to include denial for injuries caused by the commission of a crime which may be prosecuted as a felony or a misdemeanor.⁸⁷

These provisions on psychological injury only apply to injuries occurring on or after July 16, 1993.⁸⁸

82. See *id.* § 3208.3(e) (amended by Chapter 1242) (stating that the layoff may also be involuntary).

83. *Id.*; see SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 119, at 2 (July 16, 1993) (explaining that existing law does not regulate claims filed after notice of termination or layoff in a manner different than other claims).

84. CAL. LAB. CODE § 3208.3(e)(1)-(5) (amended by Chapter 1242); see *id.* § 3208.3(f), (g) (amended by Chapter 1242) (defining the notice requirement).

85. *Id.* § 3600(a) (amended by Chapter 1242). See generally HANNA, *supra* note 71, §§ 4.20-4.25(b), at 4-35 to 4-53 (explaining the statutory exclusions from compensability).

86. *Id.* § 3600(a)(8) (amended by Chapter 1242). See generally HANNA, *supra* note 71, § 4.24, at 4-45 (discussing the denial of recovery for an injury caused by the commission of a felonious act by the employee).

87. CAL. LAB. CODE § 3600(a)(8) (amended by Chapter 1242); see CAL. PENAL CODE § 17 (West 1988) (classifying offenses as felonies, misdemeanors or infractions).

88. 1993 Cal. Legis. Serv. ch. 118, sec. 3, at 1042.

VOCATIONAL REHABILITATION

Existing law establishes a vocational rehabilitation unit within the Office of Benefit Determination and specifies its duties.⁸⁹ Chapter 1242 provides limits to the rehabilitation maintenance allowance payments for vocational rehabilitation programs.⁹⁰ Chapter 1242 also provides that the vocational rehabilitation maintenance allowance benefits are dependent upon the injured workers' regular and consistent attendance at, and participation in, the injured workers' vocational rehabilitation program.⁹¹ All disputed matters concerning the vocational rehabilitation of represented employees must be submitted to arbitration.⁹²

EVALUATORS

Existing law provides that the Industrial Medical Council must appoint qualified medical evaluators⁹³ for a term of two years.⁹⁴ Chapter 1242 states that the Council may only appoint, as qualified medical evaluators, physicians who have met each of the enumerated requirements, including passing the required examination.⁹⁵ Chapter 121 allows the treating physician, who is primarily responsible for the care of the injured worker,

89. CAL. LAB. CODE § 139.5(a) (amended by Chapter 1242); *see id.* § 139.5(a)(1) (amended by Chapter 1242) (providing that vocational plans that are agreed to by the employer and employee do not require approval unless the employee is unrepresented); *id.* § 139.5(a)(2) (amended by Chapter 1242) (providing circumstances under which an employee may waive the services of a qualified rehabilitation representative); *id.* § 139.5(a)(5) (amended by Chapter 1242) (stating that vocational counseling fees may not exceed an aggregate of \$4,500 and must be within the \$16,000 total fees allowed); *see also id.* § 139.5(c) (amended by Chapter 1242) (providing a list of the fees that are included in the \$16,000 aggregate); *id.* § 4642(a) (amended by Chapter 121); § 4644(d)-(e) (amended by Chapter 1242) (providing circumstances under which the \$16,000 aggregate does not apply).

90. *Id.* § 139.5(c) (amended by Chapter 1242); *see id.* (stating that maintenance allowance payments will begin when an employee's medical condition becomes permanent and stationary, upon a request for vocational rehabilitation services); *id.* (stating the allowed duration of these payments); *id.* (providing limits on vocational training expenses).

91. *Id.* § 139.5(c) (amended by Chapter 1242).

92. *Id.* § 4645(b) (amended by Chapter 1241); *see id.* § 5275(a) (amended by Chapter 121) (stating the issues that must be submitted for arbitration); *id.* §§ 5270-5278 (West Supp. 1993) (stating the provisions for arbitration for Workers' Compensation and Insurance).

93. *See* CAL. LAB. CODE § 110(e) (amended by Chapter 121) (defining qualified medical evaluator).

94. *Id.* § 139.2(a) (amended by Chapter 1242).

95. *Id.* § 139.2(b) (amended by Chapter 1242); *see id.* § 139.2(b)(1) (amended by Chapter 1242) (providing that one of the requirements is that the physician must pass a written examination for the purpose of demonstrating the physician's competence in evaluating medical issues in the workers' compensation system); *id.* § 139.2(b)(1)-(5) (amended by Chapter 1242) (specifying additional requirements that must be met); *see also id.* § 139.2(d) (amended by Chapter 1242) (providing the necessary criteria for being reappointed as a qualified medical evaluator); *id.* § 139.2(k)-(m) (amended by Chapter 1242) (stating the criteria that is considered for determining the suspension or termination of a physician to serve as a qualified medical evaluator).

to serve as the worker's qualified medical evaluator.⁹⁶ Chapter 1242 prohibits physicians⁹⁷ from referring patients for certain treatments⁹⁸ or medical-legal purposes⁹⁹ if the physician, or his or her immediate family,¹⁰⁰ has a financial interest¹⁰¹ with the person or in the entity that receives the referral.¹⁰²

Chapter 1242 also revises the provisions relating to medical-legal evaluations to provide for examinations by the treating physician and limits additional examinations.¹⁰³ Chapter 121 prohibits medical-legal examinations during the first sixty days, except at the request of the employer or as otherwise specified.¹⁰⁴ Chapter 121 also revises provisions relating to payment for each reasonable and necessary medical-legal evaluation.¹⁰⁵

Existing law provides that if the employee has notified his or her employer in writing prior to the date of the injury that he or she has a personal physician, the employee has the right to be treated by that physician for the injury.¹⁰⁶

96. *Id.* § 4061.5 (enacted by Chapter 121).

97. *See id.* § 3209.3(a) (West Supp. 1993) (defining physician).

98. *See id.* § 139.3(a) (amended by Chapter 1242) (enumerating the prohibited treatments); *see also id.* § 139.5(h) (amended by Chapter 1242) (prohibiting a referral to an education or training program in which the person making the referral has a proprietary or contractual interest); *id.* § 139.31 (enacted by Chapter 1242) (providing exceptions for the prohibitions set forth in California Labor Code § 139.3(a)).

99. *See id.* § 4620 (West 1989) (defining medical-legal expense).

100. *See id.* § 139.3(b)(2) (amended by Chapter 1242) (defining immediate family).

101. *See id.* § 139.3(b)(4) (amended by Chapter 1242) (defining financial interest).

102. *Id.* § 139.3(a) (amended by Chapter 1242); *see id.* § 139.3(g) (amended by Chapter 1242) (stating that a violation of this provision is a misdemeanor and may be subject to civil penalties of up to \$5,000 for each offense).

103. *Id.* §§ 4061(c)-(m), 4062 (amended by Chapter 1242); *see id.* § 4062.9 (enacted by Chapter 121) (stating that an additional comprehensive evaluation of the treating physician will have a rebuttable presumption that it is correct).

104. *Id.* § 4621(b) (amended by Chapter 121); *see id.* (providing that neither the employer nor the employee is liable for any expenses incurred for comprehensive medical-legal evaluations that are performed within the first 60 days after the notice of claim has been filed); *id.* (stating that some of the exceptions are those evaluations which are performed under California Labor Code §§ 4061 and 4062); *id.* § 4621(c) (amended by Chapter 121) (providing that the evaluations may be performed at any time after the claim has been filed if the employer has rejected the claim); *see also id.* § 139.2(j)(1) (amended by Chapter 1242) (stating that initial medical evaluations are to be prepared and submitted no more than 30 days after the evaluator has begun the medical evaluation procedure); *id.* § 5401 (amended by Chapter 1242) (providing the requirements for filing a claim).

105. *Id.* § 4064 (amended by Chapter 121); *see id.* § 4064(a) (amended by Chapter 121) (stating that an unrepresented employee may not obtain any additional comprehensive medical evaluations at the employer's expense); *see also id.* § 5307.6(d) (amended by Chapter 1242) (providing that no evaluator may request or accept any form of compensation in addition to the fees authorized). *See generally* HANNA, *supra* note 71, § 22.01(1)(c), at 22-6 to 22-7 (distinguishing medical treatment expenses and disability indemnity).

106. CAL. LAB. CODE § 4600 (West Supp. 1993).

Chapter 1242 provides that an employee, whose employer contracts¹⁰⁷ with at least two health care organizations,¹⁰⁸ may choose at the time of employment one of the health care organizations from which the employee will receive medical services.¹⁰⁹ Chapter 1242 increases the level of benefits and revises the provisions relating to the medical fee schedule¹¹⁰ and the medical-legal fee schedule.¹¹¹

ANTI-FRAUD

Chapter 120 provides that any person licensed pursuant to the Healing Arts Division of the California Business and Professions Code¹¹² must also obtain certification to perform a medical evaluation.¹¹³

Existing law provides that it is unlawful for an attorney or a law firm to obtain contracts for their professional services through the use of runners¹¹⁴ or cappers.¹¹⁵ Furthermore, any such contracts are void, and existing law authorizes the divestiture of compensation¹¹⁶ or fees received in violation of this law.¹¹⁷

Chapter 120 mandates that one-half of the money collected under this provision be deposited into the Workers' Compensation Fraud Account in

107. See *id.* § 4600.3(a)(2) (amended by Chapter 1242) (providing the requirements of the contract).

108. See *id.* § 4600.5 (amended by Chapter 1242) (stating the requirements for becoming a certified workers' compensation health care organization).

109. *Id.* § 4600.3(a)(1) (amended by Chapter 1242); see *id.* § 4600.3(a)(3), (b), (c) (amended by Chapter 1242) (providing the guidelines for the employee's choice).

110. See *id.* § 5307.1(a)(1) (amended by Chapter 1242) (providing for biennial revision of the medical fee schedule).

111. *Id.* §§ 5307.1(a), 5307.6(a) (amended by Chapter 1242); see *id.* § 5307.6(a) (providing for the adoption and revision of a medical-legal fee schedule).

112. See CAL. BUS. & PROF. CODE §§ 500-4998.7 (West 1990 & Supp. 1993) (establishing Division 2 of the California Business and Professions Code).

113. *Id.* § 730 (enacted by Chapter 120). A violation of this section will be considered unprofessional conduct and grounds for disciplinary action. *Id.*

114. See *id.* § 6151(a) (West Supp. 1993) (defining a capper or runner as any person, firm, or organization who solicits business for an attorney or law firm and receives consideration for doing so);

115. *Id.* § 6154(a) (amended by Chapter 120); see *Kitsis v. State Bar*, 23 Cal. 3d 857, 866, 592 P.2d 323, 329, 153 Cal. Rptr. 836, 842 (1979) (holding that an attorney may be suspended for the employment of runners or cappers); *Hutchins v. Municipal Court*, 61 Cal. App. 3d 77, 87, 132 Cal. Rptr. 158, 165 (1976) (stating that an attorney may be subject to criminal liability for the employment of runners or cappers); *Review of Selected 1991 California Legislation*, 23 PAC. L.J. 512, 710 (1992) (explaining the unlawful nature of using runners or cappers for the procurement of business). See generally Sharon Bernstein, *Six Arrested in Patient Referral Scheme*, L.A. TIMES, Mar. 19, 1993, at B1 (discussing the investigation into kickback referrals in the Los Angeles area); Stuart Silverstein, *Investigators Launch Major Workers' Comp Fraud Probe*, L.A. TIMES, Oct. 7, 1993, at D2 (describing current investigations into workers' compensation fraud regarding referrals and kickbacks).

116. See CAL. LAB. CODE § 3207 (West 1989) (defining compensation).

117. CAL. BUS. & PROF. CODE § 6154(a) (amended by Chapter 120).

the Insurance Fund¹¹⁸ for use in the investigation and prosecution of workers' compensation fraud.¹¹⁹

Existing law states that it is unlawful to make any knowingly¹²⁰ false or fraudulent material statements or representations in order to obtain workers' compensation benefits.¹²¹ Additionally, existing law declares that it is necessary to assure truthful and adequate disclosure of information regarding the filing of workers' compensation claims.¹²² Chapter 120 requires that advertising of legal services¹²³ for obtaining workers' compensation benefits include the name of at least one attorney who is associated with the advertised organization.¹²⁴

Existing law imposes criminal penalties for committing certain false or fraudulent practices within the workers' compensation system, such as making fraudulent statements, or discouraging an injured worker from filing a workers' compensation claim.¹²⁵ Chapter 120 requires the court

118. See CAL. INS. CODE § 12975.8 (West 1988) (establishing the Insurance Fund).

119. CAL. BUS. & PROF. CODE § 6154(b) (amended by Chapter 120). The other half of the money collected is distributed to the entity which brings the action: the Attorney General, a district attorney, or a city attorney. *Id.*; see Daniel T. Fitzpatrick, Comment, *Civil RICO & Antitrust Law: The Uneven Playing Field of the Workers' Compensation Fraud Game*, 25 PAC. L.J. 311, 333-34 (1994) (discussing the enactment of California Business and Professions Code § 6154). See generally CAL. CONST. art. XIV, § 4 (vesting the Legislature with the power to create and enforce a complete system of workers' compensation); CAL. LAB. CODE §§ 3200-6002 (West 1989 & Supp. 1993) (providing the scope and operation for California's Workers' Compensation & Insurance); 82 AM. JUR. 2D *Workers' Compensation* §§ 62-685 (1992 & Supp. 1993) (providing a comprehensive explanation of workers' compensation law); 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* §§ 3-4 (9th ed. 1987) (explaining the creation of the power to legislate workers' compensation under the California Constitution); HOOVER COMMISSION, *supra* note 71, at 3-17 (providing a general overview and historical background of workers' compensation in California); *id.* at 21-32 (providing statistics relating to the high costs and low benefits of California workers' compensation); Ruth Gastel, *Workers' Compensation*, INS. INF. INST. REP., Nov. 1993, available in LEXIS, Nexis Library, IABS File (providing an overview of workers' compensation systems around the country); *id.* (stating that workers' compensation costs in California are among the nation's highest, but benefits are among the lowest); *id.* at vii-viii (discussing the high incidence of fraud within the California workers' compensation system, and stating that some critics believe that 30% of the cost of workers' compensation is wasted through fraud).

120. See CAL. PENAL CODE § 7 (West 1988) (defining knowingly).

121. CAL. INS. CODE § 1871.4(a)(1) (amended by Chapter 120); see CAL. PENAL CODE § 550(a)(11) (amended by Chapter 120) (providing that it is unlawful to make false or fraudulent statements relating to workers' compensation benefits).

122. CAL. LAB. CODE § 5431 (West Supp. 1993); see *id.* § 5432 (West Supp. 1993) (establishing the requirement that advertisements soliciting workers' compensation claimants must contain a warning regarding the unlawful nature of workers' compensation fraud); cf. *Review of Selected 1992 California Legislation*, 24 PAC. L.J. 593, 1085-87 (1993) (discussing advertising provisions of the California Labor Code relating to workers' compensation).

123. See CAL. BUS. & PROF. CODE § 5499.30(b) (enacted by Chapter 120) (defining legal services to include any service for the referral of clients to attorneys).

124. *Id.* § 5499.30(a) (enacted by Chapter 120). Violation of this provision is a misdemeanor. *Id.* § 5499.30(c) (enacted by Chapter 120).

125. CAL. INS. CODE § 1871.4(a)(1)-(4) (amended by Chapter 120).

to order restitution¹²⁶ for fees or compensation collected in violation of this section.¹²⁷ Additionally, if a person is convicted of workers' compensation fraud,¹²⁸ he or she will be ineligible to receive or retain compensation for services rendered as a result of the fraud.¹²⁹

Under existing law, it is illegal to employ runners, cappers, or steerers,¹³⁰ or to obtain clients, patients, services, or benefits relating to workers' compensation.¹³¹ In addition to the existing criminal penalties, Chapter 120 provides for civil penalties for a violation of this section.¹³²

Existing law sets forth the provisions dealing with insurance fraud.¹³³ Chapter 120 removes liability in a cause of action of any kind, for any insurer,¹³⁴ or authorized governmental agency¹³⁵ that assists in good faith in the investigation of suspected workers' compensation fraud.¹³⁶

Under prior law, physicians and attorneys were exempt from the law prohibiting rebates or consideration for referrals for workers' compensation services.¹³⁷ Chapter 1242 abolishes the exemption.¹³⁸

126. See BLACK'S LAW DICTIONARY 1313 (6th ed. 1990) (defining restitution as an equitable remedy to restore one's original position).

127. CAL. INS. CODE § 1871.4(b) (amended by Chapter 120). The court is to determine the amount of restitution and the person or persons to whom it should be paid. *Id.* See generally *id.* §§ 1871-1877.5 (West 1993) (creating the Insurance Frauds Prevention Act); Ruth Gastel, *Insurance Fraud*, INS. INF. INST. REP., Oct. 1993, available in LEXIS, Nexis Library, IIABS File (discussing insurance fraud throughout the country, and explaining California's new comprehensive workers' compensation package).

128. See CAL. INS. CODE § 1871.4 (amended by Chapter 120) (defining workers' compensation fraud).

129. CAL. INS. CODE § 1871.5 (enacted by Chapter 120); see also CAL. LAB. CODE § 3820(a) (amended by Chapter 1242) (declaring that the intent of the Legislature in enacting § 1871.5 is to eliminate fraud in the workers' compensation system). See generally *California Cracks Down on Workers' Comp. Fraud*, FED. & STATE INS. WEEK, July 5, 1993, at No. 27 (stating that over 150 search warrants were served by California officials in order to seek evidence of workers' compensation fraud); Mack Reed, *To Catch a Cheat*, L.A. TIMES, Sept. 5, 1993, at B1 (providing statistics that statewide workers' compensation fraud claims increased from 1,865 in 1991 to 8,342 in 1992); Ray Sotero, *Workers' Compensation*, GANNETT NEWS SERV., July 16, 1993, available in LEXIS, Nexis Library, GNS File (quoting Governor Wilson as saying that California's fraud-ridden workers' compensation system has been a significant impediment to job creation).

130. See BLACK'S LAW DICTIONARY 1413 (6th ed. 1990) (defining a steerer as a person who gains another's confidence in order to lead him or her).

131. CAL. INS. CODE § 1871.7(a) (enacted by Chapter 120).

132. *Id.* § 1871.7(b) (enacted by Chapter 120); see *id.* (stating that the amount of the penalty should be no less than \$5,000, and no more than \$10,000, plus an additional amount equaling no more than three times the amount of each claim for compensation).

133. *Id.* §§ 1871-1871.3, 1872-1876.5 (West 1993); § 1871.4 (amended by Chapter 120).

134. See *id.* § 1877.1(c) (West 1993) (defining insurer as someone admitted to transact workers' compensation insurance in California).

135. See *id.* § 1877.1(a) (West 1993) (defining an authorized governmental agency as the district attorney of any county, the office of the Attorney General, the Department of Insurance, the Department of Industrial Relations, and any other licensing agency regulated under the California Business and Professions Code).

136. *Id.* § 1877.5 (amended by Chapter 120).

137. 1991 Cal. Legis. Serv. ch. 116, sec. 27, at 587-88 (enacting CAL. LAB. CODE § 3217). It was the intent of the Legislature under the prior law to exempt physicians and attorneys because such conduct was covered by other provisions of law. *Id.* at 588.

Chapter 120 further provides that any person who offers any rebate, refund, commission, preference, patronage, dividend, discount, or other consideration to any adjuster of claims as an inducement or reward for the referral or settlement of a claim, is guilty of a felony.¹³⁹ Additionally, any adjuster of claims who accepts any such consideration is guilty of a felony.¹⁴⁰ This subdivision also applies to contracts for professional services secured by health care providers.¹⁴¹ Therefore, any such contract is void, and Chapter 120 requires the divestiture of any fees collected.¹⁴²

Under Chapter 1242, it is unlawful to: (1) Willfully¹⁴³ misrepresent a fact in order to obtain workers' compensation insurance at a lower rate; (2) present knowingly false or fraudulent statements¹⁴⁴ in support of, or in opposition to, any compensation claim; (3) knowingly receive compensation for referring clients or patients, unless doing so is expressly allowed under the Rules of Professional Conduct of the State Bar; (4) knowingly operate in a service that, for profit, refers clients or patients to obtain medical or medical-legal services; or (5) knowingly conspire with any person who engages in any unlawful act under this section.¹⁴⁵ Any violation of this section will result in the imposition of a civil penalty.¹⁴⁶

Chapter 1241 further requires that the employee, insurer, employer, and attorneys for each party must sign a statement, under penalty of

138. CAL. LAB. CODE § 3217 (amended by Chapter 1242).

139. *Id.* § 3219(a)(1) (enacted by Chapter 120). *See generally* Stuart Silverstein, *Unusual Fraud Probe Focuses on Insurers' Side of Workers' Comp*, L.A. TIMES, Aug. 4, 1993, at D1 (discussing a recent investigation into illegal kickbacks paid to insurance administrators by a medical referral firm in Los Angeles).

140. CAL. LAB. CODE § 3219(a)(2) (enacted by Chapter 120).

141. *Id.* § 3219(b) (enacted by Chapter 120).

142. *Id.* Funds collected under this subdivision are split between the Workers' Compensation Fraud Account, and the entity which brings the action. *Id.* § 3219(c) (enacted by Chapter 120).

143. *See* CAL. INS. CODE § 11750.1(d) (West 1988) (defining willfully as having actual knowledge or belief that the act will constitute a violation).

144. *See* CAL. LAB. CODE § 3820(c) (amended by Chapter 1242) (defining statements to include any proof of injury, a bill for services, hospital records, x-rays, and test results).

145. *Id.* § 3820(b) (amended by Chapter 1242).

146. *Id.* § 3820(d) (amended by Chapter 1242). In assessing a civil penalty the court may use discretion, and should consider the nature and seriousness of the conduct, the length of time the conduct occurred, the willfulness of the conduct, and the defendant's assets, liabilities, and net worth. *Id.* § 3820(g) (amended by Chapter 1242). All money collected under this act will be deposited into the Workers' Compensation Fraud Account to be used in the investigation and prosecution of workers' compensation fraud. *Id.* § 3820(h) (amended by Chapter 1242). It is the intent of the Legislature to fund the anti-fraud program entirely through civil money penalties for workers' compensation fraud. *Id.*; *see* CAL. INS. CODE § 1871(d), (e) (West 1993) (setting forth the findings of the Legislature relating to workers' compensation and the high cost of workers' compensation insurance).

perjury,¹⁴⁷ that they have not offered, given, or received any consideration for a referred examination or evaluation.¹⁴⁸

Existing law sets forth the types of reports that are admissible as evidence at an appeals board hearing.¹⁴⁹ Chapter 120 specifies that in order to admit a report of an attending or examining physician, the physician must make his or her statements under penalty of perjury.¹⁵⁰

Under existing law, it is a crime to make false or fraudulent insurance-related claims, including claims made for health-care benefits.¹⁵¹ Chapter 120 expands the definition of claim to include a claim for payment of workers' compensation health benefits.¹⁵²

Finally, Chapter 120 adds a new definition of victim to the California Penal Code and includes any insurer or employer who was the victim of workers' compensation fraud for purposes of appearances and statements at sentencing proceedings.¹⁵³

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147. See CAL. PENAL CODE § 118 (West Supp. 1993) (defining perjury).

148. CAL. LAB. CODE § 4906(g) (amended by Chapter 1241).

149. *Id.* § 5703 (amended by Chapter 120); see *id.* § 3205.5 (West 1989) (defining the appeals board as the Workers' Compensation Appeals Board of the Division of Industrial Accidents).

150. *Id.* § 5703(a)(1)-(2) (amended by Chapter 120).

151. CAL. PENAL CODE § 550(a)(1)-(10) (amended by Chapter 605). The amendments made to § 550 by Chapter 120 are also included in Chapter 605. 1993 Cal. Legis. Serv. ch. 605, sec. 3, at 2625-27 (amending CAL. PENAL CODE § 550).

152. CAL. PENAL CODE § 550(a)(11) (amended by Chapter 605).

153. *Id.* § 1191.10 (enacted by Chapter 120).