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Martin Jensen

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Protecting Injured or Ill Peace Officers: Mandating Advanced Disability Payments

Martin Jensen

Code Section Affected

Labor Code § 4850.4 (new).

AB 1982 (Bogh); 2002 STAT. Ch. 189.

I. INTRODUCTION

Peace officers who suffer an injury or an industrial illness on the job are fully compensated for a maximum period of one year.¹ For many injured or ill peace officers, the time allotted is sufficient to fully recover and provides adequate compensation while injured.² However, after the end of the one-year period, the employer would decide whether or not to continue compensating the injured or ill peace officer until the disability retirement claim was resolved.³ Many claims were not decided within the one-year period, so many officers were left without compensation after a year.⁴ As a result, peace officers may have exhausted all of their temporary disability time.⁵ The impetus for section 4850.4 of the California Labor Code arose from this critical time period. Supporters of section 4850.4 of the California Labor Code believe that this situation can be resolved through the enactment of this legislation because it mandates employers to make advanced disability payments.⁶

1. CAL. LAB. CODE § 4850 (West 1989 & Supp. 2003).

2. *Id.*

3. CAL. LAB. CODE § 4850.3 (West 1989 & Supp. 2003).

4. See Letter from Pat McNamara, President, Riverside Sheriffs' Association, to Tom Calderon, Assemblymember (Apr. 9, 2002) [hereinafter McNamara Letter I] (on file with the *McGeorge Law Review*) (providing detailed examples of typical delays in processing disability applications).

5. *Id.*

6. See Letter from Pat McNamara, President, Riverside Sheriffs' Association, to Russ Bogh, Assemblymember (Feb. 27, 2002) (on file with the *McGeorge Law Review*) (stating that section 4850.4 of the California Labor Code will provide immediate support to injured or ill peace officers after temporary disability benefits have ended); Letter from Willie L. Pelote, Sr., Political and Legislative Director, American Federation of State and County Municipal Employees, to Tom Calderon, Assemblymember (Mar. 11, 2002) (on file with the *McGeorge Law Review*) (same); Letter from Wayne J. Quint, Jr., President, California Coalition of Law Enforcement Associations, to Russ Bogh, Assemblymember (Apr. 26, 2002) (on file with the *McGeorge Law Review*) (same); Letter from Randy A. Perry, Legislative Advocate, Police Officers Research Association of California, to Russ Bogh, Assemblymember (Apr. 23, 2001) (on file with the *McGeorge Law Review*) (same); Letter from Timothy H.B. Yaryan, Legislative Counsel and Advocate, L.A. County Probation Officers Union, to Russ Bogh, Assemblymember (Feb. 28, 2002) (on file with the *McGeorge Law Review*) (same); Letter from Timothy H.B. Yaryan, Legislative Counsel and Advocate, Association for Los Angeles Deputy Sheriffs, Inc., to Russ Bogh, Assemblymember (Feb. 28, 2002) (on file with the *McGeorge Law Review*) (same); Letter from Mitzi Grasso, President, Los Angeles Police Protective League, to Russ Bogh, Assemblymember (Feb. 28, 2002) (on file with the *McGeorge Law Review*) (same); Letter from Gilbert E. Stein, President, California Applicants' Attorneys Association, to Tom Calderon, Assemblymember (May 3, 2002) (on file with the *McGeorge Law Review*) (same).

II. LEGAL BACKGROUND

A. Time Frame and Compensation

Injured or ill peace officers are entitled “to leave of absence pay, in the amount of their full salary, in lieu of temporary disability payments, for up to one year.”⁷ For that period of time, the employee receives full tax-sheltered compensation.⁸ The result is a higher salary for the officer during the period that the officer is ill or injured because the officer is no longer paying taxes on his base salary.⁹

When the temporary disability period ends, the employer may elect to make advanced disability payments to any officer that is approved for a disability allowance and covered under section 4850 of the California Labor Code.¹⁰ If the employer elects to make the advanced disability pension payments, the payments must amount to at least fifty percent of the highest compensation earnable by the peace officer for the three consecutive years of employment prior to the date of the disability retirement, or meet the optional settlement that is available in the permanent disability retirement application process.¹¹ The advanced disability pension payments are also tax sheltered.¹² Any compensation that the employer makes to the injured peace officer is fully reimbursed by the Public Employees’ Retirement System.¹³ Problems began to emerge as employers opted not to make advanced disability pension payments, and processing of disability retirement claims took months or even years to resolve, often leaving the injured or ill peace officer in a dire financial position.¹⁴

B. Covered Entities

Under existing law, entities that are members of the Public Employees’ Retirement System, County Employees Retirement Law of 1937, or the Los Angeles City Employees’ Retirement Systems could elect to make advanced disability payments only to injured peace officers who had exhausted all of their

7. ASSEMBLY COMMITTEE ON INSURANCE, COMMITTEE ANALYSIS OF AB 1982, at 3 (May 1, 2002); CAL. LAB. CODE § 4850 (West Supp. 2003).

8. See Letter from Steve Keil, California State Association of Counties & Amy Brown, League of California Cities, to Members, Senate Committee on Labor and Industrial Relations (June 6, 2002) [hereinafter Keil & Brown Letter] (on file with the *McGeorge Law Review*) (stating the tax-sheltered nature of temporary disability payments may provide an incentive to stay off duty because take home salary may be higher).

9. *Id.*

10. CAL. LAB. CODE § 4850.3 (West 1989 & Supp. 2003).

11. *Id.*

12. See *id.* (stating that “[a]dvanced disability pension payments shall not be considered a salary”).

13. *Id.*

14. See McNamara Letter 1, *supra* note 4 (describing the lengthy disability retirement claim process and the financial hardships that are imposed on an injured or ill peace officer if there is not a quick resolution to his disability retirement claim).

temporary disability time.¹⁵ Public safety employees covered by this legislation “includ[e] police officers; firefighters; sheriffs; district attorney and State Department of Justice law enforcement personnel, members of the Highway Patrol, probation officers, . . . specified” peace officers, harbor and airport law enforcement, and certain lifeguards employed on a full time basis.¹⁶ Chapter 189 does not change who is covered under the Labor Code.¹⁷ These officers, should they be injured or become ill while on the job, remain eligible for temporary disability payments.¹⁸

III. CHAPTER 189

A. Requirements

Chapter 189 adds section 4850.4 to the California Labor Code which requires covered employers to make advanced disability pension payments to an injured or ill peace officer upon the expiration of the temporary disability benefit time.¹⁹ Payments are to begin no later than thirty days after the employee’s last regular paycheck, including the expiration of all temporary disability time and sick leave.²⁰ The advanced disability payments will continue until there has been a final determination by the employer on the disability retirement claim of the injured or ill peace officer.²¹ In addition, the State will reimburse the employer for the advanced payments even if the disability retirement claim is denied.²²

B. Exemptions and Withholdings

An employer does not need to make advanced disability payments if a physician determines that the peace officer is not injured or ill, if the employee suffers an injury outside the course of employment, or if there is proof of fraud surrounding the employee’s claim.²³ Additionally, the payment of advanced disability benefits may be temporarily withheld if the employee does not comply

15. CAL. LAB. CODE § 4850.3.

16. SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF AB 1982, at 1-2 (June 12, 2002); CAL. LAB. CODE § 4850 (West Supp. 2003).

17. See SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF AB 1982, at 1 (June 12, 2002) (listing the categories of peace officers that qualify for section 4850 benefits).

18. See CAL. LAB. CODE § 4850.3 (West 1989 & Supp. 2003) (allowing employers to provide advanced disability benefits at their discretion).

19. *Id.* § 4850.4(a) (enacted by Chapter 189).

20. *Id.* § 4850.4(b) (enacted by Chapter 189).

21. *Id.* § 4850.4(c) (enacted by Chapter 189).

22. See SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF AB 1982, at 4 (June 12, 2002) (acknowledging the opponents claim that the advance disability payments are reimbursable, but pointing out that the program is still not funded at this time).

23. ASSEMBLY COMMITTEE ON INSURANCE, COMMITTEE ANALYSIS OF AB 1982, at 1 (May 6, 2002).

with certain conditions.²⁴ First, if the employee fails to file an application for disability retirement at least sixty days before the beginning of advanced disability payments, then the employer does not have to begin to make payments until the employee files the application.²⁵ Second, if the employee fails to provide medical information or attend required medical examinations and evaluations the employer may withhold advanced disability benefits until the employee complies.²⁶ Lastly, the payment can be withheld until the employee fully cooperates with the evaluation process of the retirement plan.²⁷

IV. ANALYSIS

A. *Shifting the Financial Burden*

By enacting Chapter 189, the Legislature is attempting to shift the financial burden placed on peace officers that become ill or are injured on the job to the employer and the State.²⁸ Chapter 189 is aimed at eliminating cases of injured or ill peace officers facing bankruptcy because employers have opted not to provide advanced disability benefits upon the expiration of temporary disability benefits.²⁹

Supporters of Chapter 189 feel it is appropriate to shift the burden of paying the benefits because “[i]t is within the power of the employer to make a determination on the employee’s retirement claim, and as a result the employer should compensate the employee if [the employer has] been dilatory in processing the disability retirement claim.”³⁰ “The injured or ill peace officer should not be prejudiced by the employer’s lack of diligence in resolving the disability retirement claim in a timely manner.”³¹ In addition, “[t]he employer has the financial resources to make advanced disability benefits to an injured or ill peace officer so it may be more fair and equitable to have the employer bear the

24. *Id.* at 1-2.

25. *Id.*

26. *Id.*

27. *Id.*

28. *See* Telephone Interview with Timothy H.B. Yaryan, Legislative Counsel and Advocate, Riverside Sheriffs’ Association, L.A. County Probation Officers Union, Association for Los Angeles Deputy Sheriffs Inc., Los Angeles Police Protective League (July 11, 2002) [hereinafter Yaryan Interview] (notes on file with the *McGeorge Law Review*) (explaining that the genesis of section 4850.4 of the California Labor Code emerged after injured or ill peace officers faced bankruptcy after temporary disability payments had ended because employers did not make advanced disability payments and were dilatory in processing employees disability retirement claims).

29. *See id.* (advocating section 4850 of the California Labor Code as an effective method of eliminating financial hardship faced by injured or ill peace officers after temporary disability benefits expire); SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF AB 1982, at 3 (June 13, 2002) (noting a need for AB 1982 to provide adequate benefits to ill or injured peace officers between time of injury and a final determination of permanent disability).

30. Yaryan Interview, *supra* note 28.

31. *Id.*

financial burden while the employee awaits a determination on the disability claim.”³² Furthermore, the risk imposed on the employer, as opposed to the employee, is minimal because all advanced disability payments are fully recoverable by the employer through the Public Employee’s Retirement System.³³ The risk imposed on the employer pales in comparison to the employee’s risk of losing everything if he must make ends meet on his own until a determination is made on the disability retirement claim.³⁴

However, due to the current economic crisis faced by public local and state agencies, this may not be the right time for this measure to be enacted.³⁵ The time frame for when advanced disability payments will be reimbursed by the State is indeterminate, and it may take months or years to be repaid, leaving the employer to absorb the cost in the meantime.³⁶ Even though employers are fully compensated for advanced disability payments, the initial costs that public, local and state agencies face may place an unfair burden on them during this fiscally constrained time.³⁷

B. *Expediting Disability Retirement Claims*

Another expected benefit of Chapter 189 is that it will expedite the processing of injury claims filed by peace officers.³⁸ Prior to Chapter 189, employers could intentionally delay the processing of disability retirement claims.³⁹ By requiring employers to make advanced disability payments, Chapter 189 provides an incentive for the employer to quickly process the employee’s claim in order to avoid making unnecessary payments.⁴⁰ By the same token,

32. *Id.*

33. See SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF AB 1982, at 2 (June 13, 2002) (stating that advanced disability payments made to an employee are fully reimbursed to the employer); Yaryan Interview, *supra* note 28 (same).

34. See McNamara Letter I, *supra* note 4 (describing disability retirement claims that resulted in financial hardship for the injured peace officers).

35. See ASSEMBLY COMMITTEE ON INSURANCE, COMMITTEE ANALYSIS OF AB 1982, at 4 (May 1, 2002) (noting current budgetary shortfall may result in increased hardships faced by state affiliated employers as they must absorb the up-front costs of any advanced disability payments).

36. Telephone Interview with Amy Brown, Legislative Coordinator, League of California Cities (July 11, 2002) [hereinafter Brown Interview] (notes on file with the *McGeorge Law Review*).

37. *Id.*; see ASSEMBLY COMMITTEE ON INSURANCE, COMMITTEE ANALYSIS OF AB 1982, at 4 (May 1, 2002) (highlighting that due to current budgetary constraints it may be an “inappropriate” time to enact section 4850.4 of the California Labor Code).

38. See Yaryan Interview, *supra* note 28 (stating that section 4850.4 of the California Labor Code provides an incentive for employers to make a determination on disability retirement claims and this in turn will expedite the disability retirement claims process).

39. McNamara Letter I, *supra* note 4.

40. See Yaryan Interview, *supra* note 28 (claiming there has always been an incentive for a quick resolution of a disability retirement claim for an ill or injured peace officer, and that section 4850.4 of the California Labor Code will now provide an incentive for employers to expeditiously settle disability retirement claims).

employees must fully comply with the provisions of the measure or the advanced disability benefits will be denied or withheld until the employee complies.⁴¹ The process of requiring all injured or ill employees to provide information and mandating employers to make advanced disability payments will make certain that all information is collected in a timely manner allowing the disability claim to be processed quickly.⁴² As a result, both employers and employees have a vested interest in ensuring that information is gathered and the claim is processed promptly.⁴³

However, Chapter 189 may not provide enough information for retirement systems to make a determination on the disability retirement claim.⁴⁴ Chapter 189 requires that advanced disability payments be made as long as employees provide medical information in accordance with existing statutory provisions.⁴⁵ However, existing statutory requirements are not well constructed and do not provide enough medical information.⁴⁶ As a result, there is not enough information to process the disability retirement claim in a timely manner.⁴⁷ Furthermore, Chapter 189 does not require examining physicians to have any training in industrial medicine, which may further impede the collection of information and slow the determination of a disability claim.⁴⁸

Nonetheless, Chapter 189 is aimed at securing the full employee cooperation regarding required medical information.⁴⁹ Chapter 189 states that an injured or ill peace officer must fully cooperate with existing law related to medical information in order to receive advanced disability payments.⁵⁰ If the employee fails to fully cooperate, advanced disability benefits could be cancelled or

41. SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF AB 1982, at 2 (June 13, 2002); ASSEMBLY COMMITTEE ON INSURANCE, COMMITTEE ANALYSIS OF AB 1982, at 1-2 (May 1, 2002).

42. See Yaryan Interview, *supra* note 28 (claiming that section 4850.4 of the California Labor Code ensures that information is within the employer's control in a timely manner, resulting in a quicker determination on disability retirement claims).

43. *Id.* (stating that employees already have a financial incentive to provide relevant information in a timely manner, and that AB 1982 gives employers an incentive as well).

44. See Telephone Interview with Steve Keil, Legislative Coordinator, California State Association of Counties (July 11, 2002) [hereinafter Keil Interview] (notes on file with the *McGeorge Law Review*) (stating that the established provisions of the California Labor Code do not provide adequate information to make an expeditious determination on a disability retirement claim).

45. CAL. LAB. CODE § 4850.4(d)(2) (enacted by Chapter 189).

46. See Keil & Brown Letter, *supra* note 8 (contending that existing "statutory framework" does not provide enough medical information).

47. See Keil Interview, *supra* note 44 (pointing out that section 4850.4 of the California Labor Code should require the injured or ill peace officer to submit all medical information that the employer requires to make a determination on a disability retirement claim).

48. Keil & Brown Letter, *supra* note 8.

49. See SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF AB 1982, at 2 (June 13, 2002) (noting that section 4850.4 of the California Labor Code requires that employees fully cooperate with an employer with regards to statutorily required medical information requests, or risk temporarily losing or completely losing advanced disability payments).

50. *Id.*

withheld until the employee is willing to cooperate.⁵¹ Supporters argue that these provisions will calm the concern that employees will not provide needed information to make a determination on the disability retirement claim.⁵²

C. Increased Utilization and Cost

After the enactment of Chapter 189 the utilization rate, meaning the number of people on advanced disability payments, may increase because employers are required to make advanced disability payments that will have an overall fiscal effect.⁵³ Mandating advanced disability payments may not lead to more efficient claim determinations, but it may lead to greater costs to employers through increased advanced disability payments made to employees.⁵⁴ Also, the tax-free nature of advanced disability payments may provide an incentive for employees to remain off the job.⁵⁵ Opponents of Chapter 189 support this contention by claiming that injuries deemed compensable under section 4850 of the California Labor Code take almost twice the time to heal compared to Worker's Compensation disability injuries.⁵⁶

However, the payment of advanced disability benefits is a wholly controllable cost if disability retirement claims are settled in a timely manner.⁵⁷ Chapter 189 encourages employers to efficiently manage the disability retirement claims process and penalizes the employer, and ultimately the State, if the disability retirement claim is not settled expeditiously.⁵⁸ In addition, encouraging efficiency in the resolution of disability retirement claims is sound public policy.⁵⁹ Furthermore, there is no incentive for an injured or ill peace officer to remain off the job because he would be missing out on valuable overtime pay, which could be more lucrative than the tax-sheltered pay received while on temporary or advanced disability benefits.⁶⁰

51. *Id.*

52. See Yaryan Interview, *supra* note 28 (stating there is a strong financial incentive for injured or ill peace officers to cooperate with the information requests of employers).

53. See Keil & Brown Letter, *supra* note 8 (describing the various fiscal effects, such as expanding the opportunity for tax-sheltered benefits, huge costs borne initially by local public agencies, and state reimbursement).

54. Keil Interview, *supra* note 44; Brown Interview, *supra* note 36.

55. Brown Interview, *supra* note 36.

56. Keil & Brown Letter, *supra* note 8.

57. Yaryan Interview, *supra* note 28.

58. *Id.*

59. *Id.*

60. *Id.*

V. CONCLUSION

Chapter 189 mandates the payment of advanced disability benefits to an injured or ill peace officer after all temporary benefits have expired.⁶¹ Chapter 189 should alleviate the financial strain placed upon an employee who has exhausted all temporary disability payments while awaiting a decision on a disability retirement claim.⁶² In addition, Chapter 189 may expedite the disability retirement claims process.⁶³ However, Chapter 189 may lead to an increase in the utilization and cost of advanced disability benefits unless employers can efficiently make a determination on the employees disability retirement claim.⁶⁴ Chapter 189 also causes an initial out-of-pocket expense for the employer, and the indefinite status on the repayment of those advances to the employer may result in financial hardship for cities and counties.⁶⁵ However, this seems to be a small price to pay to ensure that the people who lay their lives on the line everyday for the residents of California can be adequately provided for if they suffer an injury or become sick while on the job.

61. CAL. LAB. CODE § 4850.4 (enacted by 189).

62. SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF AB 1982, at 3 (June 13, 2002).

63. *Id.*

64. Yaryan Interview, *supra* note 28.

65. Brown Interview, *supra* note 36.