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Workers' Compensation

University of the Pacific; McGeorge School of Law

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Workers' Compensation: domestic workers

Insurance Code §§108.1, 11590, 11591, 11592, 11593, 11720 (new); §7046 (amended); Labor Code §§3354, 3355, 3356, 3358.5, 5704.5 (repealed); §§3354, 4453.1, 5500.6 (new); §§3351, 3352, 3713, 4453, 5500.5 (amended).
AB 469 (Ralph); STATS 1975, Ch 1263
(Effective January 1, 1977)

This legislation has amended and repealed several aspects of the workers' compensation law pertaining to the exclusion of several categories of persons from its coverage. The persons previously excluded from such coverage included: (1) any person engaged in household domestic service, unless employed by one employer for more than 52 hours per week [CAL. LABOR CODE §§3352(e), 3358.5]; (2) any person engaged as a part-time gardener in connection with a private dwelling unless the number of hours devoted to such work for any individual employer exceeded 44 hours per month [CAL. LABOR CODE §3352(g); and (3) any person whose employment was both casual and not in the course of the trade, business, profession, or occupation of the employer [CAL. LABOR CODE §3352(a)].

Section 3351(d) has been added to the Labor Code by Chapter 1263 to now include within the category of employees covered by workers' compensation persons employed by the *owner* of a private dwelling whose duties are incidental to the ownership, maintenance, or use of the dwelling, including the performance of household domestic service. The care and supervision of children in a private residence is included in this category. Further, to bring other Labor Code provisions into conformity with this change, Chapter 1263 has repealed Section 3358.5 to eliminate the requirement that the domestic employee work a minimum of 52 hours per week, and amended Section 3352(e) to remove domestic workers from the category of employees excluded from workers' compensation coverage. In addition, Section 3352(a) has been amended to expressly exclude from the domestic employee provisions of Section 3351(d) (*supra*), and thereby from workers' compensation coverage,

a person employed as a domestic employee by his or her parent, spouse, or child. Moreover, Section 5704.5 of the Labor Code, which previously stated that a written contract for household domestic service created a rebuttable presumption that the hours stated were those actually worked, has been repealed by Chapter 1263. Therefore, those employees covered by Section 3351(d) (hereinafter referred to as *domestic employees,* are now included within the coverage of workers' compensation law.

Section 3713 previously required all employers subject to compensation provisions to post a notice, in a conspicuous location, indicating either the name of the compensation insurance carrier or the fact that the employer was self-insured. Failure to do so constituted a misdemeanor and was *prima facie* evidence of non-insurance. Section 3713, as amended by Chapter 1263, however, now expressly relieves employers of domestic employees from the duty of posting such a notice. Additionally, Section 3354 exempts such employers from certain penalties, included within Sections 3710, 3710.2, and 3711, imposed for failure to secure the payment of workers' compensation benefits. Therefore, although Chapter 1263 has included domestic employees within the scope of the benefit provisions of the workers' compensation laws, the penalty provisions imposed upon their employers have been made less strict.

Section 4453 provides the general formula for computing average annual earnings for determining workers' compensation benefits. Section 4453.1 has been added by Chapter 1263 to provide a change in the general formula as it pertains to domestic employees and employees engaged in vending, selling, offering for sale, or delivering directly to the public, any newspaper published at least weekly.

Section 5500.5 of the Labor Code describes the procedures to be followed by the courts when the occupational disease or cumulative injury arises out of more than one employment. Section 5500.6 has been added by Chapter 1263 to vary these procedures for domestic employees. In the case of these employees, only the employers for whom such worker actually worked during the last day of the employment in which the worker was exposed to the hazards of the employment shall be liable, or, if no such employer possessed compensation coverage, the last employer for whom such employee actually worked shall be liable. Generally, liability for such cumulative injury or occupational disease shall not be apportioned to prior employers. However, evidence of previously compensated disabilities or disabilities due to non-work-related causes may be admissible for purposes of apportionment.

Insurance Code Section 108.1 has been added to allow insurers admitted to transact liability insurance to transact workers' compensation insurance covering domestic employees. No policy providing comprehensive personal liability insurance may be issued, amended, or renewed on or after January 1, 1977 unless it contains a provision to cover a domestic employee, and any such policy in effect on or after this date, whether or not it contains such a provision, shall be construed as if such a provision was contained therein [CAL. INS. CODE §11590]. An employer may delete the coverage required by Section 11590 by making a written request of the insurer certifying that the insured employs no employee included under workers' compensation [CAL. INS. CODE §11592]. This section also requires insurance agents, brokers and solicitors to inform the insured, prior to the execution of any sale of comprehensive personal liability insurance, of the nature of the coverage, and of the right to reject it and execute a rejection form upon a certification of lack of domestic employees. Section 11593 requires the cost of coverage under Section 11590 to be separately stated from other charges in the policy.

The exclusion of part-time (under 44 hours per month per employer) gardeners from the category of employees [CAL. LABOR CODE §3352 (g)] has been amended by Chapter 1263, deleting all reference to gardeners from this section. The effect is to place gardeners on the same footing as other employees. Furthermore, Section 3352(a) has been amended by Chapter 1263 to remove the exclusion of any person, whose employment was both casual and not in the course of the trade, business, profession or occupation of the employer, from the category of employee, thus eliminating any requirement that the employment be more than "casual" for the worker to be considered an employee for workers' compensation purposes.

COMMENT

Chapter 1263 has removed from the purview of Section 3352 of the Labor Code "domestic employees," who were previously excluded from workers' compensation coverage. These include persons engaged in household domestic service (e.g., maids, babysitters, and gardeners). Furthermore, there is no longer any minimum number of hours which these employees must work in order to be covered. Moreover, Chapter 1263 requires that any policy of insurance providing comprehensive personal liability coverage must also include coverage for workers' compensation unless the insured certifies to the insurer that there are no domestic employees.

If an employer fails to provide workers' compensation insurance, the domestic employee must elect between an action at law for damages (a right which has always been available to a domestic employee) and a workers' compensation claim [CAL. LABOR CODE §3715]. If the domestic employee elects to make a workers' compensation claim and the uninsured employer fails to pay the award, Labor Code Section 3716 provides that the Uninsured Employer's Fund will pay it. Unfortunately, the Uninsured Employer's Fund does not presently contain adequate funds to pay the established claims against it [CONTINUING EDUCATION OF THE BAR, CALIFORNIA WORKMEN'S COMPENSATION PRACTICE §9.6 (Supp.) (May, 1975)]. Additionally, Chapter 1263 has removed from the Director of Industrial Relations the power to enforce certain penalties against an employer of domestic employees who fails to secure these payments; including the powers to attach an employer's property, and to force the employer to deposit fines in the Uninsured Employer's Fund. Likewise, Chapter 1263 has removed the criminal penalty of a misdemeanor for failure to provide payments. As a result, an action at law, where feasible, would probably be the most effective strategy against an uninsured employer who refuses to provide benefits to a domestic employee. However, if an action at law is not feasible (e.g., the employer is not at fault), then a domestic employee is left, practically speaking, to the uncertain remedy of the Uninsured Employer's Fund, to his or her ability to enforce those provisions now unenforceable by the Director of Industrial Relations, or, finally, to the goodwill of the employer.

See Generally:

1) 2 WITKIN, SUMMARY OF CALIFORNIA LAW, *Workmen's Compensation* §§106, 107 (8th ed. 1973) (excluded employments and relationships).
2) CONTINUING EDUCATION OF THE BAR, CALIFORNIA WORKMEN'S COMPENSATION PRACTICE, §§3.10, 3.13 (1973) (occupations and persons excluded).
3) Bohlen, *Casual Employment and Employment Outside of Business*, 11 CAL. L. REV. 221 (1923).

Workers' Compensation; notice by employer

Labor Code §138.3 (new); §5402 (amended).
AB 899 (Wilson); STATS 1975, Ch 1099
Opposition: California Self-Insurers Association

Section 138.4 of the Labor Code requires the Administrative Director of the Division of Industrial Relations to issue administrative rules and regulations for the serving of reports by the employer upon the employee, dealing with the payment or non-payment of benefits. The regu-

lations promulgated pursuant to this section require the employer to notify the employee of possible entitlement to workers' compensation benefits [8 CAL. ADMIN. CODE §§9816, 9817, 9859]. Chapter 1099 has added Section 138.3 to the Labor Code to expressly require the Administrative Director to prescribe reasonable rules and regulations requiring the employer to serve notice on the injured employee that he or she may be entitled to benefits, and thereby has codified these administrative rules. Previously, Labor Code Section 5402 provided that an employer was required to have knowledge of the injury, or, in the alternative, be served with notice in writing of the injury pursuant to Section 5400, before he or she could be considered served with notice of the injury. As amended by Chapter 1099, Section 5402 additionally requires that after the employer acquires knowledge of the injury, he or she must notify the employee, within the time period, and in the manner prescribed by the Administrative Director, of possible entitlement to benefits. Such notice is not required where an application for benefits has already been filed.

In *Reynolds v. Workers' Compensation Appeals Board* [12 Cal. 3d 726, 527 P.2d 631, 117 Cal. Rptr. 79 (1974)], the court penalized the employer for his failure to comply with the administrative rules requiring notification by estopping the employer from asserting the one year statute of limitations [CAL. LABOR CODE §5405] as an affirmative defense [12 Cal. 3d at 728-30, 527 P.2d at 632-33, 117 Cal. Rptr. at 80-81]. In addition, if it is found that the employer is uninsured or has failed to secure the payment of compensation, a further penalty is assessed pursuant to Labor Code Section 3722. These sanctions would appear to be unaffected by the changes made by Chapter 1099.

See Generally:

1) 2 WITKIN, SUMMARY OF CALIFORNIA LAW, *Workmen's Compensation* §244 (8th ed. 1973) (estoppel to plead statute of limitation).
2) CONTINUING EDUCATION OF THE BAR, CALIFORNIA WORKMEN'S COMPENSATION PRACTICE §4.35 (1973) (estoppel to assert statute of limitation).
3) *Employer's Duty to Give Notice of Possible Benefits*, 2 CALIFORNIA WORKMEN'S COMPENSATION REPORTER 220 (M. Witt ed.) (1974).

Workers' Compensation; choice of physician

Labor Code §§4601, 4603 (repealed); §§4601, 4603, 4603.2, 4603.5 (new), §4600 (amended).
AB 1287 (Foran); STATS 1975, Ch 1259

Employers have a statutory duty to provide all medical, surgical, and hospital treatment reasonably required to cure or relieve an employee from the effects of an employment related injury [CAL. LABOR CODE

§4600]. Furthermore, Labor Code Section 4600 also provides that the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment when the employer neglects or seasonably refuses to provide the care. As amended by Chapter 1259, this section now also provides that 30 days or more after the injury is reported, the employee may be treated by a physician of his own choice or at a facility of his own choosing within a reasonable geographic area.

Previously Section 4601 allowed an employee to request his or her employer to make one change of physician. In addition, in any serious case, Section 4601 entitled an employee to use the services of a consulting physician or chiropractor of his or her choice at the expense of the employer. Although this section has been repealed, a new Section 4601 has been added by Chapter 1259 which retains these provisions, and in addition provides that the employer or insurance carrier has a maximum of five working days from the date of the request to provide the employee with an alternative physician, or, if requested by the employee, a chiropractor.

Section 4603.2 has been added to require that after the employee has selected a physician pursuant to Section 4600, either the employee or the physician must notify the employer immediately. The physician must submit reports to the employer within five days of the initial examination and at regular intervals thereafter. Also, the employer must then make payment to the physician after receiving the required reports.

Section 4603 previously stated that the provisions regarding change of physicians did not apply in the case of an employer who maintained a hospital and staff for his or her employees. This section has been repealed, and a new Section 4603 added to the Labor Code, deleting this exception and thereby making provisions regarding change of physicians applicable to all employers. Finally, Section 4603, as added by Chapter 1259, allows an *employer* who desires a new physician for the employee to petition the Director of the Division of Industrial Accidents for such a change. Upon a showing of good cause, the Director may order the employer to provide a panel of five physicians, or, if requested by the employee, four physicians and a chiropractor, and the employee must select a new doctor or chiropractor from this panel.

See Generally:

1) 2 WITKIN, SUMMARY OF CALIFORNIA LAW, *Workmen's Compensation* §§164-67 (8th ed. 1973) (failure of employer to render medical care).
2) CONTINUING EDUCATION OF THE BAR, CALIFORNIA WORKMEN'S COMPENSATION PRACTICE §§14.34, 14.35, 14.38-14.42 (1973) (control of medical treatment, self procured medical treatment).
3) Note, *Right to Control Medical Treatment Under California's Workmen's Compensation Law*, 21 HAST. L.J. 700 (1970).