

Trovillion, Inveiss & Demakis

Trovillion, Inveiss & Demakis, APC has grown in reputation as one of Southern California's premier law firms specializing in representation of employers, insurance carriers and third party administrators in workers' compensation litigation.

SAN DIEGO

LOS ANGELES

ORANGE COUNTY

INLAND EMPIRE

WWW.TIDLAW.COM

AUGUST 2016

OFFICES THROUGHOUT SOUTHERN CALIFORNIA

SAN DIEGO

1455 Frazee Rd, Ste 650

San Diego, CA 92108

Phone: 619-232-7181

Fax: 619-232-8423

ORANGE COUNTY

1851 East 1st St, Ste 410

Santa Ana, CA 92705

Phone: 714-547-4450

Fax: 714-547-3355

LOS ANGELES

131 North El Molino Ave, Ste
200

Pasadena, CA 91101

Phone: 626-247-1180

Fax: 626-247-1184

POST-TERMINATION DEFENSE AND ITS EXCEPTIONS

Post-termination provisions are found in Section 3600(a)(10) of the Labor Code. This section sets forth certain requirements for compensability of a claimed industrial injury, where the injury is alleged to have occurred before termination or layoff from employment, and the claim is made after termination or layoff. The affirmative defense of post-termination is intended to bar retaliatory claims by terminated employees.

This defense does not apply to scenarios where the employee voluntarily quits or retires. *CJS Co. v. WCAB (Fong)* (1999) 64 Cal. Comp. Cases 954; *Montgomery Ward v. W.C.A.B. (Payne)* (1996) 61 Cal. Comp. Cases 1311. Although, section 3600 does bar claims that are filed after voluntary lay-offs, wherein individuals volunteer to be laid off in an employer-initiated reduction in force. *CJS Co. v. W.C.A.B. (Fong)* (1999) 64 Cal. Comp. Cases 954.

Unless an employee can demonstrate one of the following exceptions to the post-termination claim, the claimed injury is not compensable:

(1) The employer has notice of the injury before notice of termination or layoff. Caution: The notice of termination must be actual for this defense to apply, and constructive notice is insufficient. *North County Transit Dist. v. WCAB (Lerma)* (1996) 61 Cal. Comp. Cases 727. The reporting of an injury to a co-employee

INLAND EMPIRE

420 N. McKinley St, Ste 111,
PMB 614

Corona, CA 92879

Phone: 951-300-9011

Fax: 951-300-9014



:: www.TIDLAW.COM ::

does not constitute notice to the employer. *Reynaga v. W.C.A.B.* (1997) 62 Cal. Comp. Cases 380.

(2) The employee's prior medical records contain evidence of the injury. Caution: The existence of pre-termination medical records showing an injury is sufficient, even if the records do not establish industrial causation. *Marquez Auto Body v. W.C.A.B. (Kafka)* (1996) 61 Cal. Comp. Cases 408.

(3) The date of injury pursuant to Labor Code Section 5411 is subsequent to the date of notice, but before the date of termination or layoff. This exception applies to specific injuries (i.e. neither cumulative trauma nor occupational) that occurred before the effective date of termination or lay-off.

(4) The date of injury pursuant to Labor Code Section 5412 is subsequent to the date of notice of termination or layout. This exception applies when the injury is a cumulative trauma or occupational disease that occurred before the notice of termination or layoff. Pursuant to Labor Code Section 5412, the date of injury is the date when the employee first suffered disability and either knew or should have known that it was caused by employment. In this scenario, the employee must demonstrate that, prior to the termination, he or she did not know (or should not have known) that the condition was caused by work.

(5) The termination or lay-off did not follow within 60 days after notice, or employer frequently issued notices of termination or layoff.

PRACTICE TIP

The employee has the burden of proof, by preponderance of the evidence, to establish that one or more of the exceptions listed above bars the post-termination defense. Aggressive and diligent discovery at the outset of the case, including deposing the employee, subpoenaing records, obtaining the personnel file, and immediately identifying those individuals who can serve as potential defense witnesses, can lead to valuable discovery in support of a post-termination defense at an early stage. Carefully scrutinize the medical records, witness statements and the deposition transcripts to identify any inconsistencies in the employee's statements regarding the onset of symptoms, mechanism of injury, and reporting to management. Because the employee has the burden of proof, by identifying inconsistencies

in his statements, you will be able to discredit him as a witness, which will in turn bolster the post-termination defense.

Disclaimer: This newsletter is provided to share knowledge and expertise with our colleagues with the goal that all may benefit. The content of this newsletter is for general informational purposes only and is not intended to serve as legal advice or as a guarantee, warranty, or prediction regarding the outcome of any particular legal matter. Nothing contained within this newsletter should be used as a substitute for legal advice and does not create an attorney-client relationship between the reader and Trovillion, Inveiss & Demakis. Legal advice depends on the specific facts and circumstances of each individual's situation. You should not rely on this newsletter without first consulting with a qualified, licensed attorney.