



RETALIATION FOR FILING A WORKERS' COMPENSATION CLAIM IN CALIFORNIA

California law protects injured employees who file a workers' compensation claim from being fired, demoted, or otherwise punished for it.

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California law generally requires employees to seek recovery for work-related injuries through the workers' compensation system. In many cases, employees cannot sue their employer for unintentional acts that may have caused their injury.¹ Instead, California law permits employees to pursue a workers' compensation claim for their work-related injuries, regardless of whether their employer is at fault.²

Many employers dislike workers' compensation claims. Some even actively discourage employees from filing them. Importantly though, California law prohibits discrimination or retaliation against workers who are injured on the job.

This article explains the scope of an injured employee's right to be free from retaliation for filing a workers' compensation claim.

Overview of Workers' Compensation Claims



The State of California has adopted a set of laws called the **Workers' Compensation Act**.³ It provides a comprehensive program for paying employees that have been injured in the workplace.⁴

In many cases, the Workers' Compensation Act is the “sole and exclusive remedy” for claims against an employer when an employee has been injured.⁵ This means that employees in difficult financial situations might have no choice but to file a workers' compensation claim against their employer.

Under most circumstances, injured workers can seek compensation without regard to whether their employer was at fault for their injury.⁶ This gives employers an incentive to maintain a safe workplace, and assures the efficient compensation of employees for those injuries.⁷

An employer's insurance rates can be affected by workers' compensation claims. So, many employers dislike these issues and some even attempt to retaliate against employees who pursue workers' compensation benefits.

California Law Protects Injured Workers from Discrimination



Under California law, it is the state's policy “that there should not be discrimination against workers who are injured in the course and scope of their employment.”⁸ California courts have interpreted this policy to protect employees from retaliation for filing a workers' compensation claim.⁹

The broad nature of that policy favors employees who are fired or treated unfairly as the result of a job-related injury.¹⁰ As such, there are many types of retaliatory conduct that might be unlawful.

Prohibited Reasons for Retaliation



California law forbids employers from discharging or threatening to discharge an employee because the employee:

- ✓ Submits a workers' compensation claim to the employer,
- ✓ Files an application to have California's Division of Workers' Compensation decide a claim,
- ✓ Announces an intent to file a claim or application for workers' compensation benefits,
- ✓ Obtains a disability rating from a physician,
- ✓ Settles a workers' compensation claim with the employer, or
- ✓ Wins an award of workers' compensation.¹¹

Employers are also prohibited from firing or threatening to fire employees who testify on behalf of another employee in a workers' compensation proceeding.¹²

California courts have held that it is also unlawful to retaliate against an employee for missing work due to a work-related injury. As the California Supreme Court explained:

[A]n employer may not discharge an employee because of the employee's absence from his job as the consequence of an injury sustained in the course and scope of employment.

— *Judson Steel Corp. v. Workers' Comp. Appeals Bd.*
(1978) 22 Cal.3d 658, 669



Likewise, when an injury results in a disability, California law prohibits discrimination based on the disability.¹³

Employers are also prohibited from firing or penalizing their employees for participating in rehabilitation services that are offered as a workers' compensation benefit.¹⁴ In some cases, job retraining can be offered as a rehabilitation service.¹⁵

Prohibited Acts of Retaliation

California law prohibits employers from *penalizing* their employees for having a work-related injury or for making a workers' compensation claim in connection with that injury.¹⁶ This protection extends further than mere firings.

More specifically, an employer unlawfully discriminates or retaliates against an employee when the employer engages in conduct that is detrimental to the worker as the result of an employment-related injury.¹⁷

EXAMPLE

An employee is injured while at work and takes a leave of absence to recover. When they return, they find out that their employer took away their seniority because of their absence from work.

The employer's actions penalized the employee for being injured. The employer therefore engaged in unlawful discrimination and retaliation.¹⁸

Of course, not every act that might be detrimental to a worker is necessarily retaliatory. Employers are often permitted to adopt policies that apply to all workers, regardless of their disability.¹⁹

For example, employers are permitted to require injured workers to use sick leave when taking time away from work to visit a doctor, so long as the same requirement is imposed on workers needing to treat injuries that are not work-related.²⁰

If the worker who suffered an injury on the job is treated differently from other workers, detrimental treatment may be viewed as retaliatory.

Reinstatement of Employees



The refusal to reinstate an employee to a former job may be the functional equivalent of firing that employee.²¹ In two circumstances, however, a refusal to reinstate an injured employee will not be regarded as discriminatory.

5.1 Permanent Disability

Employers are not required to return an employee to a job that the employee can no longer perform.²² A worker's *permanent* disability, if found by a compensation judge, may justify the conclusion that the employee will not recover sufficiently to permit a return to work.²³

However, the fact that an employee's job performance will be impaired by an injury does not necessarily justify the failure to reinstate the employee.²⁴

Depending on the nature of the job and the degree of impairment, an employer may have an obligation to accommodate a disability caused by the injury.²⁵

5.2 Job Not Needed

California law does not require employers to hold open a job indefinitely when the job is one that the employer no longer requires.²⁶

Also, business realities may compel the employer to replace the worker and the unavailability of the position may preclude reinstatement.²⁷

In some cases, employers mask their discriminatory intent by making a false claim that work is unavailable or that it would be unsafe to return an employee to employment. In those cases, employees can prove a discriminatory motivation by showing that the employer's claim is false.²⁸

EXAMPLE

An employer claims that no work is available that the employee can do without risking further injury. If the employee presents evidence that he or she is capable of performing the job safely, it is fair to infer that the employer is discriminating against the employee because of the employee's injury.

That inference justifies a finding of discrimination unless the employer can overcome it with proof that the medical evidence justified its decision not to reinstate the employee.²⁹

Whether an employee is no longer capable of performing the job and whether an employee's former position was eliminated as a matter of business necessity are questions that can only be resolved by considering the specific facts of the case.

Remedies for Retaliation

In addition to reinstatement, employees are entitled to reimbursement for lost wages and work benefits caused by retaliatory acts of their employer.³⁰

Employers that engage in unlawful retaliation may also be obligated to pay employees a penalty. The penalty consists of a 50% increase in the employee's workers' compensation award, up to a maximum of \$10,000, together with costs and expenses of up to \$250.³¹

The penalty can be awarded even if the retaliation did not cause the employee to suffer a financial loss.³²

Other remedies might also be available. While the workers' compensation system provides the exclusive remedy for job-related injuries, it is not necessarily the only remedy for an unlawful termination or for other retaliatory acts.³³

Remedies for disability discrimination, including those provided by California's Fair Employment and Housing Act, might be available.³⁴ An employee might also be entitled to obtain compensation for wrongful termination under the common law of California.³⁵ Because section 132a's increased compensation is capped, these civil claims can offer a broader recovery, and an injured worker who is fired or demoted may have more than one claim worth pursuing.

Filing a Section 132a Claim

7.1 The Workers' Compensation Appeals Board Decides the Claim

A claim for retaliation under section 132a is not filed in an ordinary civil court. Instead, the employee pursues it by filing a petition with the Workers' Compensation Appeals Board (WCAB), which has full authority to decide the increased compensation, reinstatement, and reimbursement described above, subject to judicial review.³⁶

The same conduct is also a misdemeanor. The Appeals Board cannot decide that criminal charge; suspected criminal violations may instead be referred to the Division of Labor Standards Enforcement or to the public prosecutor.³⁷

7.2 One-Year Deadline

A section 132a petition must be brought within one year of the discriminatory act or the date of the employee's termination. An employee who waits longer than one year may lose the right to pursue the claim.³⁸

References

- 1 *Yau v. Allen* (2014) 229 Cal.App.4th 144, 161 [“Physical and emotional injuries sustained in the course of employment are preempted by the workers’ compensation scheme and generally will not support an independent cause of action.”].
- 2 *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 16 [“[T]he legal theory supporting such exclusive remedy provisions is a presumed ‘compensation bargain,’ pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort.”]; Labor Code, §§ 3600–3602.
- 3 Labor Code, § 3200, et seq.; *Charles J. Vacanti, M.D., Inc. v. State Compensation Insurance Fund* (2001) 24 Cal.4th 800, 810 [“Article XIV, section 4 of the California Constitution gives the Legislature ‘plenary power . . . to create, and enforce a complete system of workers’ compensation.’ Pursuant to this authority, the Legislature enacted the WCA—a comprehensive statutory scheme governing compensation given to California employees for injuries incurred in the course and scope of their employment.”].
- 4 *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354 [“The Act intends comprehensive coverage of injuries in employment.”].
- 5 Labor Code, § 3602.
- 6 Labor Code, § 3600, subd. (a) [“Liability for the compensation provided by this division . . . shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of

and in the course of the employment and for the death of any employee if the injury proximately causes death . . .”].

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- 7 *Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 708 [“The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort.”], quoting *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 16.
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- 8 Labor Code, § 132a.
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- 9 *Raven v. Oakland Unified Sch. Dist.* (1989) 213 Cal.App.3d 1347, 1364.
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- 10 *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 666–667.
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- 11 Labor Code, § 132a.
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- 12 Labor Code, § 132a, subd. (3).
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- 13 *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1147 [“Labor Code section 132a . . . prohibits employers from discriminating against employees 'who are injured in the course and scope of their employment.' When an injury of this kind results in disability, we have held that section 132a prohibits discrimination based on the disability.”].
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- 14 *Barns v. Workers' Compensation Appeals Board* (1989) 216 Cal.App.3d 524, 537 [“To hold that [an employee]’s participation in rehabilitation services warranted a forfeiture of employment rights would subvert the fundamental policy of section 132a by authorizing discrimination against employees based solely on the exercise of statutory rights under the workers’ compensation laws.”].
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- 15 *California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 1528, 1539, fn. 9 [“Vocational rehabilitation maintenance allowance is a benefit due to a worker engaged in job retraining after the worker has become medically permanent and stationary.”].
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- 16 *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 667.
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- 17 *Barns v. Workers' Compensation Appeals Board* (1989) 216 Cal.App.3d 524, 531 [“[A] worker proves a violation of section 132a by showing that

as the result of an industrial injury, the employer engaged in conduct detrimental to the worker.”].

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- 18 *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 667.
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- 19 *Department of Rehabilitation v. Workers' Compensation Appeals Board* (2003) 30 Cal.4th 1281, 1300 [“By prohibiting 'discrimination' in section 132a, we assume the Legislature meant to prohibit treating injured employees differently, making them suffer disadvantages not visited on other employees because the employee was injured or had made a claim.”].
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- 20 *Department of Rehabilitation v. Workers' Compensation Appeals Board* (2003) 30 Cal.4th 1281, 1300.
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- 21 *Barns v. Workers' Compensation Appeals Board* (1989) 216 Cal.App.3d 524, 534 [discussing principles that govern “the right to discharge, or the duty to reinstate, disabled workers”].
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- 22 *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 667 [“Section 132a does not compel an employer to ignore the realities of doing business by 'reemploying' unqualified employees . . . ”].
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- 23 *Barns v. Workers' Compensation Appeals Board* (1989) 216 Cal.App.3d 524, 534.
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- 24 *Dyer v. Workers' Comp. Appeals Board* (1994) 22 Cal.App.4th 1376, 1381 [“The judge concluded that it was discriminatory for the employer not to take steps to accommodate Dyer's disability and that her ability to perform to the standards established by the employer should not have been measured when her ability to perform was affected by her injury.”].
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- 25 Gov. Code, § 12940, subd. (m).
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- 26 *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 667 [“Section 132a does not compel an employer to ignore the realities of doing business by 'reemploying' unqualified employees or employees for whom positions are no longer available.”].
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- 27 *Barns v. Workers' Compensation Appeals Board* (1989) 216 Cal.App.3d 524, 531 [“[A] worker proves a violation of section 132a by showing that as the result of an industrial injury, the employer engaged in conduct

detrimental to the worker. If the worker makes this showing, the burden shifts to the employer to show that its conduct was necessitated by the realities of doing business. . . . [T]he employer must demonstrate that its action was 'necessary' and 'directly linked to business realities.'”].

28 *Western Electric v. Workers' Comp. Appeals Board* (1979) 99 Cal.App.3d 629, 644–645.

29 *Western Electric v. Workers' Comp. Appeals Board* (1979) 99 Cal.App.3d 629, 644–645.

30 Labor Code, § 132a.

31 Labor Code, § 132a.

32 *Dyer v. Workers' Comp. Appeals Board* (1994) 22 Cal.App.4th 1376, 1385 [“The civil penalty is a 50 percent increase in the employee's compensation award, up to \$10,000. That penalty applies without regard to proof of actual loss or damage or of any other showing beyond that of discrimination itself.”].

33 See, e.g., *Sunline Transit Agency v. Amalgamated Transit Union, Local 1277* (2010) 189 Cal.App.4th 292, 305 [refusal to allow injured employee to return to work “fell outside the scope of the workers' compensation bargain”].

34 *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1158. Note, however, that an employee might be disabled within the meaning of the Workers' Compensation Act but not within the meaning of the Fair Employment and Housing Act. *Ibid.* Whether a disability discrimination claim should be made under the Workers' Compensation Act, the Fair Employment and Housing Act, or any other law will depend upon an employment attorney's evaluation of the worker's medical condition in addition to other relevant facts.

35 *Charles J. Vacanti, M.D., Inc. v. State Compensation Insurance Fund* (2001) 24 Cal.4th 800, 814 [“Courts have also allowed an employee to recover economic damages on a wrongful termination claim because the damages arose out of the act of termination—and not out of an injury to the employee's person.”].

36 Labor Code, § 132a.

37 Labor Code, § 132a.

38 Labor Code, § 132a.
