



IDR Update

PARMA 2015

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Dave Thomas joined the Riverside Office of Hanna Brophy in June 2003.

He represents employers, public entities, insurance carriers and adjusting companies in workers' compensation matters, civil subrogation lawsuits, and employment discrimination cases including ADA and FEHA disability discrimination. He specializes in S&W and 132a cases, subrogation cases, PERS IDR defense, as well as OSHA and white collar criminal defense matters.

Dave is licensed to practice before all State and Federal courts within California and Maryland, as well as the U.S. Court of Appeals for the Armed Forces. He is currently a Major in the U.S. Army Reserve.

Services

Workers' Compensation Defense
Cal OSHA Defense
Insurance Defense & Workers'
Compensation Subrogation
Labor Code Section 132a &
Serious and Willful Misconduct

Education


University of California, Los
Angeles School of Law, J.D.
Princeton University

Admissions

State Bar of California

02/2014

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"Desire is the key to motivation, but it's determination and commitment to an unrelenting pursuit of your goal that will enable your success."

Brenna Hampton is the Managing Partner of the firm's San Diego office. She graduated from the University of California San Diego with a degree in Political Science, theory and debate. In 2005, she was admitted to the California State Bar after obtaining a Juris Doctorate from California Western School of Law in San Diego where she earned special distinction as a Distinguished Advocate on the Client Counseling and Negotiation teams and served double tenure as President of the Women's Law Caucus.

She joined Hanna Brophy in 2006 and defends insurance carriers, third party administrators and self-insured employers in all areas of workers' compensation law with an emphasis on creative problem-solving.

professional activities

- Frequently lectures and speaks at continuing education classes for claims professionals at state and national companies on SB 863 and on a variety of cutting-edge topics including negotiations strategies, utilization review trends, aggressive lien handling, and intelligent use of investigation in litigation.
- 3-time presenter at the annual PARMA conference
- Speaker at CWCMA (California Workers Compensation Defense Attorneys Conference)

Services

Workers' Compensation Defense
 Labor Code Section 132a &
 Serious and Willful Misconduct
 Industrial Disability Retirement
 (IDR) & Public Employee's Rel.
 System
 Insurance Defense & Workers'
 Compensation Subrogation

Education

California Western School of Law,
 J.D.
 UC San Diego Political Theory and
 Debate

Admissions

American Bar Association
 San Diego County Bar Association
 State Bar of California and its
 Association
 California Workers' Compensation
 Defense Attorney's Association

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Public Retirement Systems

- **Public Employees' Retirement System (PERS)**
 - **GC 20000 et seq.**
- **State Teachers' Retirement System (STERS)**
 - **EC 22000 et seq.**
- **County Employees' Retirement Law of 1937**
- **(CERL / '37 Act)**
 - **GC 31450 et seq.**
- **City Plans**
 - **GC 45300 et seq.**

CalPERS (PERS)

Public Employees Retirement System

CalPERS is growing...

- 1.68 million (total retirement plan members)
- Over 3,000 employers
 - 1581 public agencies
 - 1500+ school districts
- \$12.7 billion in benefits paid
 - Investment dollars (67%)
 - \$299.4 billion market fund value, 18.4% return in 2013
 - CalPERS employers (21%)
 - CalPERS members (12%)

~ Figures as of 6/30/13, www.calpers.ca.gov

PERS IDR: Benefits

- **Benefits to Local Safety Officers**
 - 50% of salary, tax free.
 - More than 50% if have the requisite years of service, but only the first 50% is tax free.
 - 3% at 50 yrs; up to 90+% salary.
 - Medical plan continues.
 - Can exceed \$1,000,000 over lifetime

PERS IDR: Legal Standard

- “Incapacitated for the performance of duty as the result of an industrial disability”

PERS IDR: “Industrial”

- “Disability or death as a result of injury or disease arising out of and in the course of his or her employment”
 - GC 20046
- Causation of *Injury* vs. Causation of *Disability*

PERS IDR: “Incapacity”

- “Disability of permanent or extended and uncertain duration . . . On the basis of competent medical opinion”
 - GC 20026
- “Substantial Incapacity” – i.e., Substantially unable to perform the usual duties of his/her position
 - *Mansperger v. PERS*, Cal.App.3d 873 (1970)

PERS IDR: Application

- ER's must file IDR for eligible member
“believed to be disabled”

➤ *Govt. Code 21153*

Reinstatement

- Re: mental disabilities, the choices are:
 - Reinstatement, or
 - Hold a competency hearing, or
 - Provide STRS disability retirement benefits, unless the disability was not caused by work (in which case STRS retirement [not *disability* retirement] may apply)

CERL / 1937 Act Counties

“Permanent Incapacity” CERL / 1937 Act Counties

- Any member permanently incapacitated from the performance of duty shall be retired for disability regardless of age if, and only if:
 - (a) Incapacity is a result of injury or disease arising out of and in the course of the member’s employment, and such employment contributes substantially to such incapacity,
OR
 - (b) Five years of service, AND
 - (c) The member has not waived retirement in respect to the particular incapacity or aggravation thereof.

- G.C. 31720

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Competent Medical Evidence Required

- In determining eligibility for disability retirement, the board shall not consider medical opinion unless it is deemed competent.

- G.C. 31720.3

Different from the medical on which TTD is based!

Conflict of Laws

When a charter conflicts with the general law on a matter of local concern, the charter prevails.

City of Los Angeles v. I.A.C.; Fraide (1965)

63 C.2d 242, 46 C.R. 97, 30 C.C.C. 243

Board's Independent Review

- Under '37 Act, the Board of Retirement is not bound by a decision of the W.C.A.B. finding the employee's condition to be industrial.
 - *Kimbrough v. Oakland Police & Fire Retirement System* (1984) 161 C.A.3d 1143, 208 C.R. 112
- Contrast this to PERS IDRs where the issue of causation must be submitted to the WCAB. - G.C. 21016 et seq.

IDR Benefits

Types of Filings / Retirement

- **Service retirement**
 - Retiring for reasons unrelated to disability after reaching the age/experience required under ER's retirement system
- **IDR**
 - Industrial-based injury is the reason for retirement, regardless of age/experience.
- **Service, pending IDR?**
 - Gets out now under service retirement provisions, but simultaneously files an Application for IDR

Date of Retirement

- Established by agreement or application
- Watch for retroactive dates of retirement to prevent overpayment of benefits!
 - *Follett v City of Glendale*, 2010 Cal. Wrk. Comp. P.D. LEXIS 284 (2010).

Retirement Benefit

- CalPERS is a “prefunded, defined benefit retirement plan (Oden v Bd. Of Admin. (1994) 23 Cal. App. 4th 194, 198).
- Formula for a member’s retirement benefit considers:
 - Years of service
 - Percentage based on age on date of retirement
 - “final compensation”
 - GC 20037) 21350, 21352, 21354; City of Sacramento v PERS (1991) 229 Cal..App.3d 1470, 1479)

“Final Compensation”

- The remuneration paid out of funds controlled by the employer in payment for
- member’s services performed during working hours or
- For time during which the member is excused due to holiday, sick leave, industrial disability leave, vacation, compensatory time off, and leave of absence.
- BUT, “compensation” shall not exceed compensation earnable (pay rate plus “special compensation.”)

“Special Compensation”

- Does include:
 - Uniform allowance
 - \$\$ value of employer-provided uniforms
 - Holiday pay
 - Premium pay for hours worked in normal/regular schedule in excess of max workweek

“Special Compensation”

- **Does not include:**
 - Final settlement pay
 - Payment for additional services outside of normal working hours
 - “other payments not affirmatively determined to be special compensation” (GC 20636)

Compensation vs “Salary”

- **Craig F. Woods v Tahoe-Truckee Sanitation Agency**
 - The Board upheld CalPERS denial of increased pay related to automobile allowance and monthly payments under deferred compensation plan.
 - Reason: These benefits were “final settlement pay” which is specifically exempt and does not apply to increase salary for the purpose of determining CalPERS retirement benefits.

Backpay & Permanent Disability Benefits

- Reinstatement requires full backpay from the time of “unlawful discharge.”
 - Ex: Denial of reinstatement without a hearing
 - *Raven* (1989)
- Backpay can be offset by permanent disability benefits under workers’ compensation
 - Policy: Prevent double recovery

4850 + TTD Methodology

- **Step 1:** Is the EE unable to work because of an industrial injury?
- **Step 2:** If yes, determine EE's salary amount. EE gets up to one year at this amount per LC 4850
- **Step 3:** After max of 1 year of 4850, EE may get additional TTD benefits depending on date of injury, limited by Knittel decision.
- **Step 4:** Determine whether EE has retired in a way that precludes further indemnity (varies by system)

4850 + TTD Methodology

- **Note!**
 - TTD indemnity generally ends when doctor finds condition MMI / P&S, **BUT**
 - LC4850 benefit may continue if EE is not brought back to work.
 - Subject to municipal MOU
 - TTD post-retirement is possible, varies by retirement system (PERS vs '37 Act/CERL)

Labor Code 4853

- "Whenever such disability of any such officer or employee continues for a period beyond one year, such member shall thereafter be subject as to disability indemnity to the provisions of this division other than Section 4850 during the remainder of the period of said disability or until the effective date of his retirement under the Public Employees' Retirement Act [PERS], and the leave of absence shall continue."

Not Exceeding One Year – 4850 *plus...* (TTD per LC4656)

- For injuries occurring on or after **4/19/04-12/31/07**:
 - *after* one year of full salary employee is entitled to up to 104 weeks of temporary disability from the date of commencement of temporary disability
 - (LC 4656(c)(1); *County of Sacramento v. Workers' Comp. Appeals Bd. (Taylor)* (2007) 72 Cal.Comp.Cases 854 (writ denied).

- For injuries occurring after **1/1/08**:
 - *after* one year of full salary employee is entitled to up to one year of temporary disability.
 - (LC 4656(c)(2); *County of Alameda v. Workers' Comp. Appeals Bd. (Knittel)* (2013) 213 Cal.App.4th 278.)

Effect of PERS Retirement on TTD

- EE has filed for PERS retirement and is receiving benefits (LC4853)
 - *or until that earlier date as he or she is retired on permanent disability pension, and is actually receiving disability pension payments, or advanced disability pension payments pursuant to Section 4850.3*
- BUT, Keegan (2014) held that 4853 only applies to cut off TTD if the EE filed an IDR, but not when EE filed for a service retirement.
 - Keegan v Mtn View Fire Dept., 2014 Cal. Wrk. Comp. P.D. LEXIS 200 (2014, panel decision)

Effect of PERS Retirement on TTD

- Date of retirement is important and you may be able to obtain a credit for overpayment of TTD.
- In Hoffman defendant was entitled to credit against permanent disability indemnity owing to applicant/police officer with 4/14/2008 back injury for overpayment of temporary disability from the date he obtained an industrial disability retirement (effective 9/29/2010), thereby terminating defendant's obligation to pay temporary disability benefits. The WCAB found that allowance of credit was equitable since defendant cooperated with applicant in effort to return him to work.
 - *Bryan Hoffman v City of El Cerrito*, 2014 Cal. Wrk. Comp. P.D. LEXIS 97
- Compare to Richardson where credit was denied because Court found no good faith basis existed for overpayment of TTD.
 - *Thomas Richardson v County of Los Angeles*, 2012 Cal. Wrk. Comp. P.D. LEXIS 253

Advanced Disability Retirement

PERS, LC4850.3

- [An ER in a PERS system] *may* make advanced disability pension payments to any local safety officer who has qualified for benefits under Section 4850 and is approved for a disability allowance.
- ...If a local agency has an adopted policy of paying for any accumulated sick leave after the safety officer is eligible for a disability allowance, the advanced disability pension payments under this section may only be made when the local safety officer has exhausted all sick leave payments.

Advanced Disability Retirement PERS, LC4850.3

- All advanced disability pension payments made by a local agency with membership in the Public Employees' Retirement System shall be reimbursed by the Public Employees' Retirement System
 - GC 21293.1

Advanced Disability Retirement

PERS, LC4850.4

- A city, county, special district, or harbor district that is a member of the Public Employees' Retirement System, is subject to the County Employees Retirement Law of 1937, or is subject to the Los Angeles City Employees' Retirement Systems, shall make advanced disability pension payments in accordance with Section 4850.3 unless any of the following is applicable:
 - (1) After an examination of the employee by a physician, the physician determines that there is no discernable injury to, or illness of, the employee.
 - (2) The employee was incontrovertibly outside the course of his or her employment duties when the injury occurred.
 - (3) There is proof of fraud associated with the filing of the employee's claim.

Advanced Disability Retirement

PERS, LC4850.4

Timing of advanced disability retirement payments

- shall make the payments commencing no later than 30 days from the date of issuance of the last disbursed of the following:
 - (1) The employee's last regular payment of wages or salary.
 - (2) The employee's last payment of benefits under Section 4850.
 - (3) The employee's last payment for sick leave.

Advanced Disability Retirement

PERS, LC4850.4

- advanced disability payments shall continue until the claimant is approved or disapproved for a disability allowance pursuant to final adjudication as provided by law.

Advanced Disability Retirement

PERS, LC4850.4

- An employer described in subdivision (a) shall be required to make advanced disability pension payments only if the employee does all of the following:
 - (1) Files an application for disability retirement at least 60 days prior to the payment of benefits pursuant to subdivision (a).
 - (2) Fully cooperates in providing the employer with medical information and in attending all statutorily required medical examinations and evaluations set by the employer.
 - (3) Fully cooperates with the evaluation process established by the retirement plan.

LC4853 and CERL / '37 Act

- LC4853 does not apply to '37 Act retirement system
- Where '37 Act EE can show intent to continue working but for the industrial injury, EE may be entitled to LC4850 post-retirement.
 - *Lawrence Moore v County of Orange*, 2010 Cal. Wrk. Comp. P.D. LEXIS 370 (2010).

Benefits

CERL / 1937 Act

- As of the date on which the retirement allowance commences.
 - G.C. 31705
- However, the EE may elect to defer CERL retirement allowance if EE moves to another County / retirement system.
 - GC 31700 *et seq.*

Advanced Disability Benefits

CERL / '37 Act

30 days from the date of issuance of the last disbursed of the following:

- (1) The employee's last regular payment of wages or salary.
- (2) The employee's last payment of benefits under Section 4850.
- (3) The employee's last payment for sick leave.

Advanced Disability Benefit CERL / '37 Act

If the EE does all of the following, ER shall make advanced disability payments:

- (1) Files an application for disability retirement at least 60 days prior to the payment of benefits pursuant to subdivision (a).
- (2) Fully cooperates in providing the employer with medical information and in attending all statutorily required medical examinations and evaluations set by the employer.
- (3) Fully cooperates with the evaluation process established by the retirement plan.

Advanced Disability CERL / '37 Act

****ER's obligation to commence Advanced payments within 30-days shall be tolled by EE's failure to comply with these requirements.**

Advanced Disability CERL / '37 Act

Advanced Payments shall continue until the claimant is approved or disapproved for a disability allowance pursuant to final adjudication as provided by law.

- Ie: All appeals exhausted

Temporary Disability CERL / 1937 Act

- Benefits in lieu of temporary disability when Safety member is off work due to an industrial injury. (LC 4850)
- If the industrial injury is the reason for the retirement, temporary disability indemnity is payable after retirement (unless CalPERS)
 - USC v WCAB (Miller), 48 Cal. Comp. Cases 477 (1983)
 - Moore v Cty. of Orange, 2010 Cal.Wrk.Comp. P.D.LEXIS 370

Termination for Cause

Haywood v. Amer. River Fire (1998)

- Firefighter terminated for cause following disciplinary actions
- No valid claim before termination
- Can't claim IDR after separation from employment if there is no potential for reinstatement.
- Termination for cause severed employer/employee relationship

➤ *67 Cal.App.4th 1292 (1998)*

Termination for Cause

Smith v. City of Napa (2004)

- Employee terminated for reasons:
 - Not resulting from disabling medical condition
 - Not for purpose of preventing retirement
- On date disability claim was denied, officer was no longer an employee
- Cites *Haywood* with approval

➤ *120 Cal.App.4th 194 (2004)*

Termination for Cause

- ***Vandergoot v CA Dept. of Forestry and Fire Protection (2013)***
 - Facts: Employee signed stipulation & settlement to avoid termination
 - Result: CalPERS Board upheld determination that Vandergoot was not entitled to an IDR
 - His right to an IDR had not yet vested
 - Although he was not formally terminated, his employment relationship was severed as a result of pending disciplinary action.

GC 21192

- **The Board of Administration of the Public Employees' Retirement System may require any recipient of a disability retirement who is under the minimum age for voluntary retirement to undergo medical examination in considering a petition for reinstatement from retirement.**

GC 21193

- If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

Questions?



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