

CALIFORNIA BUSINESS FRONTLINE



Employment
Law Issue

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Avoiding Workplace Discrimination Claims

Avoiding Workplace Discrimination Claims

By Aldon L. Bolanos, Esq.



It has been observed that as more Major League hitters don body armor and crowd the plate, the natural result is more hit batsmen. A similar trend is taking place in the workplace: legislative reform of workers' compensation law in favor of controlling the cost of claims has led to a reactionary surge in discrimination claims by injured workers against their employers. If ultimately found liable, the consequences to employers can be severe.

California's public policy that "there should not be discrimination against workers who are injured in the course and scope of their employment," is codified in California Labor Code §132a. If found liable under this section, an employer may be found guilty of a criminal misdemeanor, may be ordered to pay a penalty of up to \$10,000, and may be ordered to reinstate a terminated employee and provide back pay and benefits. Because discrimination against injured workers has proven difficult for courts to define but very easy for injured workers to allege, California employers

must take preemptive measures to insulate themselves from potential liability.

In most cases, businesses are exposed to a discrimination claim whenever they treat injured workers differently than other employees. For example, violations of §132a have been found where an employer reduces a workers' seniority due to industrially related absences. Other clear violations include firing an injured employee on the day of an industrially related back surgery, or treating the worker with hostility when he returns to

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Roxborough, Pomerance & Nye LLP is a leading employer rights law firm serving businesses throughout California.

This newsletter is informational only. Readers should view articles as a summary of the law and not as a substitute for legal consultation in a particular case. We welcome your comments and questions.

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Many times people have mistaken me for a workers' compensation attorney. While I have respect for the workers' compensation bar and have worked with, opposed and socialized with many fine workers' compensation attorneys, I am not one and that is not Roxborough, Pomerance & Nye (RPN).

So why do people often ask me if I'm "that workers' compensation attorney?"

Granted, RPN's name comes up often in the context of workers' compensation. We are constantly quoted in workers' compensation journals and news briefings. Any legal database search of

"workers' compensation" and Roxborough will generally yield any number of results. But what we

do is not "workers' compensation law." We are not in the trenches at the Workers' Compensation Appeals Board fighting over PD rates or average weekly wages.

In fact, our specialties are much more closely aligned with "employment law" than with workers' compensation. After all, what is more germane to you as an employer than ensuring that your employees are provided all the benefits they are entitled to for a workplace injury while at the same time looking out for your interests? "Your interests" include ensuring that the carrier lives up to its contractual obligations, negotiating policies, terms, renewals and collateral reviews and, if necessary, litigating matters on your behalf before the Superior and Administrative Courts.

Our services do not stop there. We also offer California businesses a wide variety of workers' compensation cost containment services, such as the services of our audit team. Recently, RPN has been expanding to assist clients with national market interests in multiple states and working with the employer community at large to sponsor and support legislation that benefits our clients. Our corporate division assists those same clients in fashioning strategies that fit our "cost containment" model.

Overall, we are truly with California businesses "every step of the way."

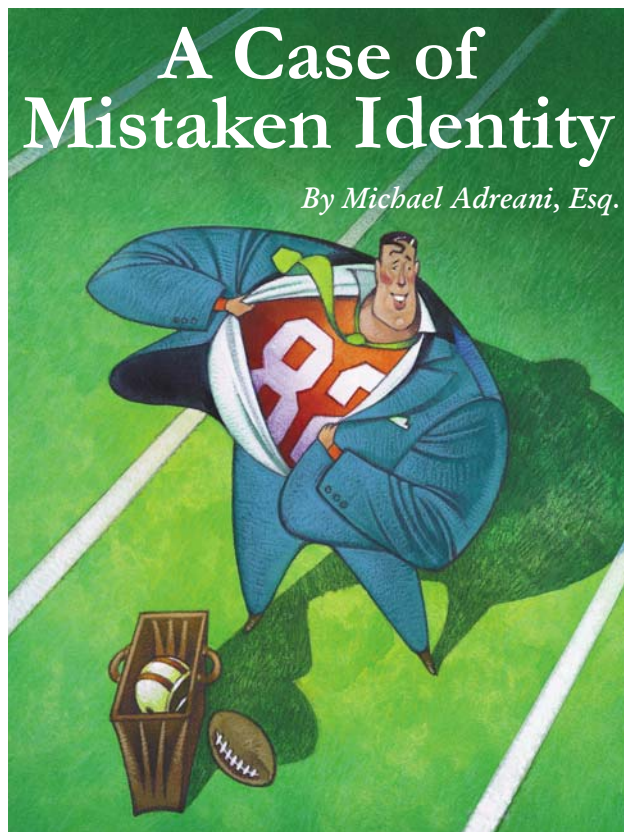
Several examples of how RPN works in conjunction with workers' compensation insurance are present in this edition of *Frontline*. Aldon Bolanos writes about how employers can avoid discrimination claims against their workers' compensation and Craig Pynes writes about arbitration agreements and workers' compensation policies. The remaining articles in this edition focus on litigation and cost containment issues that affect every employer, not just those with workers' compensation issues.

I encourage our *Frontline* readers to review this publication and our web site

(www.rpnlaw.com) with an eye towards their global needs as employers. Have a great summer! ■

A Case of Mistaken Identity

By Michael Adreani, Esq.





Carefully Consider Your Policy Agreement Before Entering Into It

Case In Point: The Impact of Arbitration Provisions

by Craig Pynes, Esq.

Most businesses choose their workers' compensation insurer (and other carrier lines) primarily on the cost of the policy being offered. This decision is generally made solely on the overall policy premium and, in many instances, the amount of the per claim deductible the business will have to pay out of pocket (which is chosen largely because it reduces the overall premium).

Unfortunately, most businesses do not focus on the many other costs passed on to them by insurers hidden in the prolix of largely undefined or under defined policy terms. Some of these costs include "allocated loss adjustment expense" addressed in a separate article in this newsletter and provisions requiring dispute resolution by arbitration instead of trial among others. These hidden costs can have a substantial impact on a business' bottom line profits. While a difference in premiums may amount to a few thousand dollars, the difference in costs generate by such hidden provisions may result in hundreds of thousands of dollars in unanticipated costs.

One provision appearing more often, hidden at the end of many policies, requires policyholders to submit any disputes they have with the insurance company to arbitration. Policyholders often are not aware of such provisions, because they do not receive their policy until many months after their policy's inception and do not even recognize the provision as it is hidden at the back of their policies. Such provisions are often further hidden under labels such as "Addendum" or "Dispute Resolution."

If a dispute arises with your carrier, an arbitration provision may substantially impact your ability to obtain complete relief against your carrier. While choosing to arbitrate a case rather than proceeding to trial may save money in the short term, it can have critical consequences for your case unrelated to its merits.

For instance, many arbitration provisions contain related "choice of law," "venue," and "limitation of remedy" provisions. The former may require that arbitration proceed under the laws of the state of New York. While this may seem innocuous, New York's laws provide very little protections to policyholders against their carrier's bad faith mishandling of claims. A "venue" provision may actually require the arbitration to take place out of state, usually where the carrier maintains its headquarters. "Limitation of remedy" provisions limit policyholders' ability to recover damages.

Many arbitration provisions require that the arbitra-

tors selected be employed by the insurance industry, often for at least ten years. This provides a huge advantage to carriers before your case is even filed. Insurance industry executives are often hardened to even the most egregious insurer conduct. Thus, even if your case involves outrageous insurer misconduct, they will

largely turn a deaf ear to your company's plight. If they are sympathetic, the insurer's limitation of remedy provision has stacked the deck ensuring that your recovery will be severely limited.

If your case is subject to contractual arbitration, you must take all steps to ensure you have completely neutral arbitrators. Impartiality is a greater consideration for arbitrators than for judges because arbitrators are not required to strictly follow the law. Accordingly, it is important to obtain complete disclosure of your arbitrator's potential conflicts before your case proceeds to the hearing.

As is evident in many instances, contractual arbitration in the insurance context is not preferable to a trial by jury. At the outset of the relationship, determine if such a provision exists, and if so, is it tethered to choice of law, venue, and limitation of remedy provisions? If so, raise the red flag. ■

"If your case is subject to contractual arbitration, you must take all steps to ensure that you have completely neutral arbitrators."

Insurance Broker Negligence:

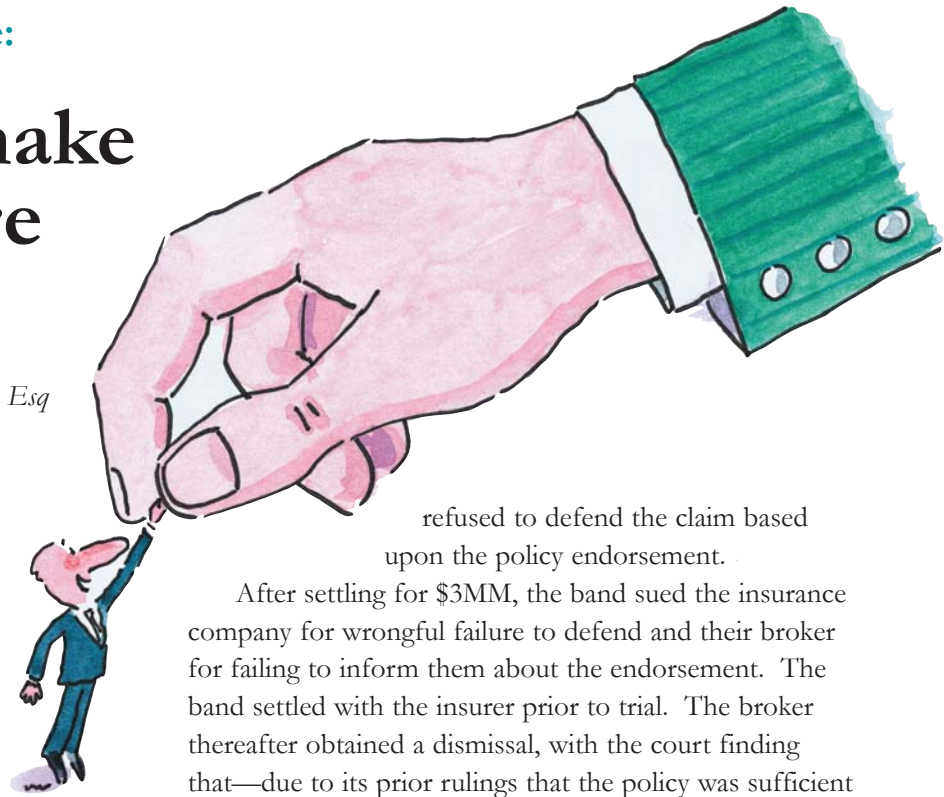
Why a Handshake and a Smile Are Not Enough

By Michael Kline, Esq

In the sophisticated world of insurance brokers and clients, litigation abounds, particularly in the area of broker negligence. Typical problems include employers claiming their brokers did not obtain the insurance they requested, brokers claiming they followed their clients' instructions to the letter, and insurance companies seeking to place liability for inadequate coverage anywhere but at their doorstep. Our experience in this area has led us to the inescapable conclusion that a vast majority of these lawsuits could be avoided by the simple act of documenting an insured's coverage assumptions and/or demands prior to inception of the relevant policy.

All too often, both brokers and their clients rely on the proverbial handshake and a smile when placing coverage with insurers. When representing clients, a broker takes on the duty to (1) discharge with loyalty and good faith the trust imposed in him; (2) obey the instructions give to him by insured; and (3) exercise reasonable skill, care, and diligence in effecting the insurance. When an issue arises regarding exactly what instructions were given to the broker to procure an insurance policy, and when that issue encompasses oral communications between a broker and his client, a coverage dispute can quickly devolve into a "he said/she said" battle, and an expensive and time-consuming one at that.

The recent decision of *Third Eye Blind v. Near North Entertainment* only reinforces the need for brokers and their clients to document clients' insurance expectations as early as possible. In *Third Eye Blind*, a popular rock band directed its broker to obtain a general liability insurance policy. Unbeknownst to the band, the policy contained an endorsement that potentially excluded coverage for claims that were ultimately brought by a fired band member. The claim was tendered to the insurance company. However, the insurance company



refused to defend the claim based upon the policy endorsement.

After settling for \$3MM, the band sued the insurance company for wrongful failure to defend and their broker for failing to inform them about the endorsement. The band settled with the insurer prior to trial. The broker thereafter obtained a dismissal, with the court finding that—due to its prior rulings that the policy was sufficient to provide coverage—the contention that the broker was negligent in obtaining inadequate coverage had no merit.

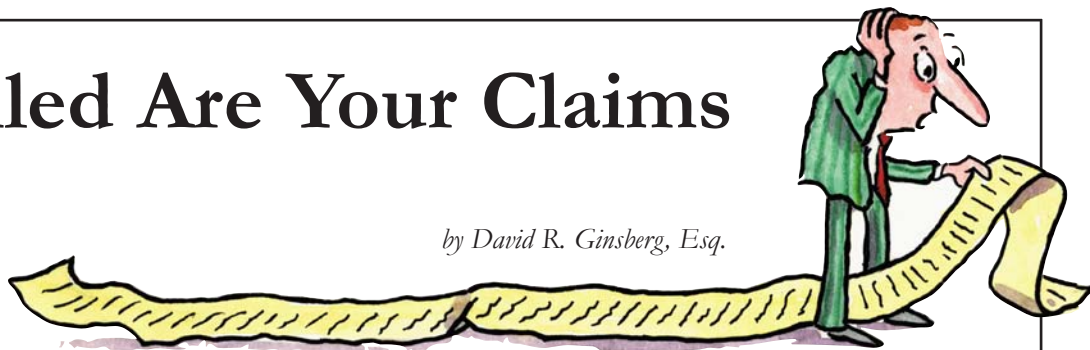
The Court of Appeals disagreed. It ruled that the broker's liability was not dependent on an assumption that coverage was deficient, but rather upon the broker's failure to tell the band that the endorsement would give the insurer a reasonable basis upon which to deny coverage, and that they should obtain an additional policy to ensure complete coverage. Simply stated, the Court held (for the first time in California) that a broker could be liable for negligence if a policy was not exactly what the client expected and/or requested—even if the policy ultimately provided coverage sought by the client.

In business, as in life, acting informally advances the development of interpersonal relationships (and future business) far more than the mandatory documentation of demands and expectations. Yet, as anyone previously involved in litigation will admit, a paper trail tells a far more compelling story than an individual recitation of communications a jury may or may not believe actually took place.

Ordinary broker/insurer/insured transactions involve formal documentation such as letters of authorization, deal memos etc. But it shouldn't stop there. Insured coverage demands should be documented from the beginning of any broker-insured relationship and again at each period of renewal. Doing so will insulate both broker and clients from expensive future conflicts founded in theories of insurance broker negligence. ■

How Detailed Are Your Claims Bills?

by David R. Ginsberg, Esq.



Does your company have a large deductible or retrospectively rated workers' compensation policy? If the answer is yes, then you likely receive a lump-sum invoice on a regular basis. Do the invoices tell you how much your insurer charged for medical bill review expenses? Or the amount of benefits paid for a particular claimant? If your invoice lacks any sort of detail, you are not alone.

Most insurers fail to provide a breakdown of various charges in their invoices. Nor do they show you the amount charged per claimant. Instead, insurers demand a lump sum payment without any explanation of the how they came up with the invoice amount. It seems impossible that an insurer's invoices would lack the transparency expected in this post-Enron world. But that is precisely how employers are invoiced today. Imagine a grocery receipt without a list of the food purchased, a telephone bill without a list of the calls made, or a legal bill without a description of the work done, and you get some idea of how an insurer invoices your business.

Many of these unaccounted for and mysterious charges are included as allocated loss adjustment expenses (ALAE). A large deductible or retrospectively rated policy contains an endorsement which allows for these charges. ALAE includes a variety of categories, such as arbitration and court costs, legal fees, expert fees, copy costs, deposition costs, medical examination costs to determine liability, and "all other compensation, fees, costs and expenses chargeable to the investigation or defense of a claim."

This last catch-all category allows for various charges not normally expected by an employer. For example, your company may have been charged for the use of a nurse case manager. A nurse case manager reviews the file and

interacts with medical providers in an effort to contain costs and provide medical management. However, the nurse case manager may be doing the work of the adjuster. You are not billed for the adjuster's work, but you are billed for the use of a nurse case manager. Your invoice probably fails to list nurse case manager fees.

When was the last time your invoice listed medical bill review charges? A medical bill review company may be able to reduce some of the claimants' medical bills, but the reviewer may also be simply reducing medical bills to amounts allowed by statute. In other words, the medical bill review company is doing what the adjuster

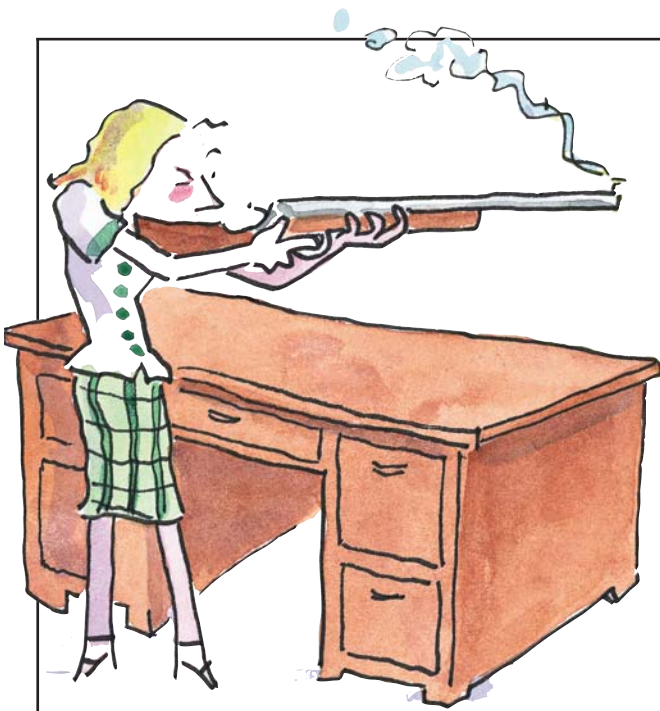
should have done—reduce medical bills to the amounts mandated by workers' compensation fee schedules. Instead, the medical bill review company (who may even be owned by the insurer) is charging your company extra fees to reduce bills. Your invoice is not likely to tell you anything about

In today's age, a business needs detailed bills to gauge its future expenses, and to monitor the quality of the coverage the insurer is providing.

these bill review charges.

Unlike the rest of the business world, workers' compensation insurers seem to be stuck in an earlier age where detailed billing may have been less important. In today's age, a business needs detailed bills to gauge its future expenses, and to monitor the quality of the coverage the insurer is providing. Unfortunately, there has been no movement by insurers to provide easy-to-understand invoices to employers.

At Roxborough, Pomerance & Nye, we are committed to determining whether or not your business has been paying too much to its workers' compensation carrier. We will make transparent what is oftentimes a confusing and shrouded billing process. After all, you should know about the costs and fees your insurer is charging your business. Your insurer does. ■



Corporate Officer Liability Under Fire

By Marina N. Vitek, Esq.

Recently the California Labor Commissioner, through the Division of Labor Standards Enforcement (DLSE), attempted to impose individual liability upon corporate officers for delinquencies in payment of wages of the corporation. The DLSE attempted to impose this liability not because the officer was “doing business as” or through a “veil-piercing” process but simply because the officer “had operational control” of the corporation’s enterprise.

Fortunately, it was decided in a recent decision from the California Court of Appeal that the Labor Code does not provide a claim against a corporate agent for unpaid employee wages and expenses. Such claims remain subject to established theories such as a claim that the corporation was simply the alter ego of the individual officer(s).

In *Jones v. Gregory*, the Court did not uphold the DLSE’s attempt to utilize the broad definition of “employer” provided in the Fair Labor Standards Act (FLSA) when interpreting the Labor Code statutes. Under the FLSA definition of “employer,” an individual corporate officer or owner may be deemed an employer under the FLSA—and therefore responsible for the corporation’s FLSA obligations—in situations where the individual (1) has overall operational control of the corporation, (2) possesses an ownership interest in it, (3) controls significant functions of the business or (4) determines the employees’ salaries and makes hiring decisions.

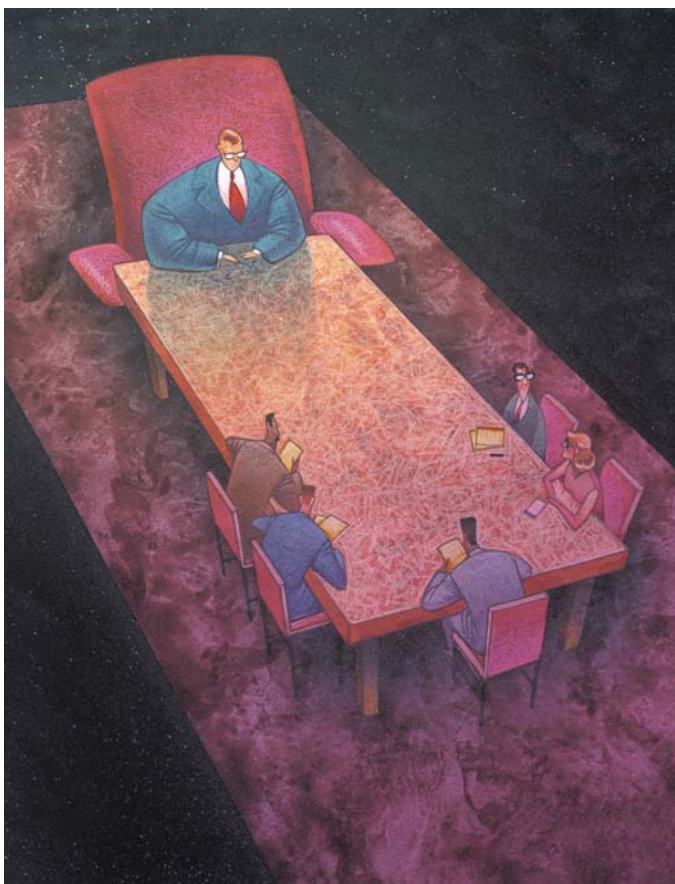
Likewise, the Court did not support the DLSE’s attempt to utilize the definition of “employer” promulgated by the Industrial Welfare Commission (IWC) which includes an individual who “exercises control over the wages, hours, or working condi-

tions of any person.” However, unlike the FLSA and IWC wage orders, none of the Labor Code sections relied upon by the DLSE in its claims against the corporate officer supplied a definition, broad or narrow, for “employer.”

In conclusion, the *Jones* Court held that the Labor Code affords no redress against individual corporate officers for the wage obligations of the corporation based only upon the officer’s significant ownership and operational control of the corporation’s day to day functions. Without a specific definition in the Labor Code which includes the corporate officers or owners, enforcement against those individuals remain subject to established rules. The Court noted, however, that the claims at issue in *Jones* arose before enactment of the Labor Code Private Attorneys General Act of 2004 (Labor Code § 2698, et seq.). The Private Attorneys’ General Act is yet untested and may ultimately be found to permit a direct action by the employees against corporate officers for unpaid wages.

At issue is whether the absence of a definition of “employer” within the Labor Code, which would either include or exclude corporate officers and owners with significant control, constitutes a considered policy decision by the Legislature or a Labor Code gap. The inconsistent rulings surrounding this issue and need for California Supreme Court review is also highlighted by the recent jury verdict in a class action lawsuit against Wal-Mart, alleging Wal-Mart violated California Labor Code 512. Approximately \$172 million in general and punitive damages was awarded to 115,000 individuals who worked for Wal-Mart in California between 2001 and 2005. Since the award appears to include damages for a period that exceeds the one-year statute of limitation and in essence, results in a “double penalty,” it appears likely that an appeal will be filed.

Regardless of how this story unfolds, it is important to be prepared. Prudent employers should conduct thorough reviews of their employment law compliance practices, paying close attention to proper employee classifications as exempt or nonexempt from overtime claims have up to a four year statute of limitations. Meanwhile, stay tuned for new developments in the courts ... there is more to come. ■



Is This Conversation Privileged?

By Erin LaBrache, Esq.

We have all heard that communications between clients and their attorneys are privileged. But what about when the communication is made before the attorney is retained, or with in house counsel? Are the communications between non-legal employees ever privileged?

Let's first explore why courts recognize attorney-client privilege. The courts have recognized the importance in protecting certain communications from disclosure to the other side. The attorney-client is one such communication. The purpose of the privilege is to encourage clients to be forthcoming with their attorneys so that the attorney is sufficiently well-informed to provide sound legal

advice. The privilege attaches only where extending its protection would foster more forthright and complete communication between the attorney and client about the client's legal dilemma.

The attorney-client privilege encompasses not only qualifying communications from the client to the attorney, but also communications from the attorney to the client in providing legal advice. However, all communications between an attorney and client does not necessarily mean that they are privileged. The attorney-client privilege only protects communications between the attorney and her client made in confidence for purposes of securing legal advice. Thus, communications that pertain to business rather than legal matters may not be privileged.

This arises often in the corporate setting where in-house counsel may be involved intimately in the corporation's day-to-day business activities and may serve as integral players in business decisions or activities. In such an example, the privilege does not protect the attorney's business advice. Corporations may not conduct their business affairs in private simply by staffing a transaction with attorneys. On the other hand, communications between corporate personnel and in-house counsel made for the purpose of securing legal advice are protected by the privilege.

Another area of confusion is how to determine when a communication between non-legal employees is privileged. When non-legal employees discuss or transmit legal advice given by counsel, such communications reveal privileged communications and are deemed privileged. Also, materials transmitted between non-lawyers that reflect matters about which the client intends to seek legal advice are comparable to notes a client would make to prepare for a meeting with his or her lawyer...notes that could serve as an agenda or set of reminders about things to ask or tell counsel. It would undermine the purpose of the attorney-client privilege not to extend protection to such notes. Therefore, internal communications that reflect matters about which the client intends to seek legal advice are protected.

If you intend a particular conversation to be confidential, be mindful that the communication should be for purposes of securing or seeking legal advice. Remember that just because a lawyer may participate in your "business" decisions, those conversations may not be protected or deemed "privileged." ■

Avoiding Workplace Discrimination Claims *(cont. from front page)*

light duty, precluding him from meetings and insinuating that he faked his injury.

The distinction between discrimination and sound business judgment is blurred when employees return to work with physician-imposed restrictions on the types of tasks they can safely perform. Often, this puts employers in the unenviable position of assigning personnel to tasks they cannot physically perform. For example, a cargo loader with a restriction requiring that he lift objects weighing no more than 15 pounds at a time is of little value to a company in the business of distributing furniture much heavier than 15 pounds. In this case, if the employee is demoted and takes a pay cut, the employer may have exposed itself to a discrimination claim.

The key for California employers to avoiding liability under this statute is to document efforts to treat injured workers returning to the workplace as any other employee would be treated. This can mean setting forth workplace standards of performance for certain positions, and evaluating employees periodically to ensure that the standards are being met. It is equally important to document shortcomings in job performance by employees returning to work after a workplace injury. If an employer can demonstrate to a fact-finder that it discharged or demoted an employee based solely on job performance criteria applicable to all employees, the employer will have taken an important step toward insulating itself from a discrimination claim.

California's employer community should strive to reintegrate loyal and diligent workers back into the workforce after they have suffered a workplace injury. A reasonable effort must be made to accommodate temporary work restrictions while the employee heals from his or her injury. However, a company does not need to act to its detriment to accommodate employees.

Like any protected class of individuals, injured workers are entitled to be treated in a manner similar to their non-protected peers.

Should a discrimination claim arise, don't drop the ball. It is imperative to immediately seek legal representation to ensure a strong defense. Insurers do not provide coverage for discrimination claims. As a result, employers are forced to stand alone in their own defense.

Roxborough, Pomerance & Nye has a long and successful history of providing quality legal representation to California's employer community. The firm possesses an excellent record of obtaining favorable results whether by outright dismissal, prevailing on the merits, or settlement at a fraction of the potential liability. Employers interested in either taking preventative measures to insulate itself from liability or obtaining quality legal representation when a claim has been made should contact the firm to set up a meeting with one of the principals. ■

