RESOLUTION 06-01-2023

DIGEST
Resolution of Litigation: Mandatory Discussion of Settlement
Amends Labor Code section 4050 and adds Labor Code section 4617 to create a statewide network of medical care providers for treating persons with work-related illnesses or injuries.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Labor Code section 4050 and adds Labor Code section 4617 to create a statewide network of medical care providers for treating persons with work-related illnesses or injuries. This resolution should be disapproved because creating and maintaining a network of qualified medical care providers would add an administrative burden to the Workers' Compensation system without providing a substantial benefit to the employees.

Under current law, employees have multiple opportunities to select their own medical care provider. Any employee can designate their regular personal physician, or medical group, as the medical care provider for any work-related illness or injury. If this designation is made before the injury, and the employee has health care insurance at the time of injury, the employee can go to their regular care provider, so long as the care provider agrees to provide treatment. (Lab. Code § 4600). If the employer or its insurer has contracted with a health care organization (HCO) to provide managed care for work-related injuries and illnesses, the employer must provide each employee with the predesignation form, DWC Form 9783, at the time of hire and annually thereafter. (Lab. Code § 4600.3). Under current law, the employee may also submit a one-time request for a change of physician at any time. If the request is made within 30 days of the injury, the claims administrator is required to assign a new medical care provider within 5 days. (8 Code Reg. § 9781, subdivs. (a) and (b)). In addition, after 30 days from the date the injury is reported, the employee has the right to be treated by a physician or at a facility of the employee's own choosing. (Lab. Code § 4600; 8 Code Reg. § 9781, subdiv. (c)). Thus, employees who suffer serious injuries or illnesses requiring longer-term care can select their own medical care providers.

This resolution has no restrictions on the employee's ability to change medical care providers, which could disrupt the continuity of medical care. Serial changes could delay resolution of claims and result in additional costs to the insurance carriers, as any new provider would have to either perform a new intake or review additional records. In addition, the employee could change providers whenever the provider was not willing to follow the employee's preferred course of treatment or run tests that the employee desired, but which the provider had determined were not medically appropriate. In addition, this resolution would require creation of another administrative group within the Division of Workers' Compensation to review qualifications of

physicians, assure that the physicians were willing to accept the fee structure and restrictions of the Workers' Compensation system, and maintain the list in the future.

There are no anticipated unintended consequences of the resolution.

This resolution is similar to Assembly Bill No. 1465 (2020-2021 Reg. Sess.), as originally drafted. That bill was opposed by the California Coalition on Workers' Compensation, in partnership with American Property Casualty Insurance Association, the California Chamber of Commerce, the California Association of Joint Power Authorities, and Public Risk Innovation, Solutions, and Management.

Therefore, this resolution should be Disapproved.

RESOLUTION 06-01-2023

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Labor Code section 4050 and add Labor Code section 4617, to read as follows:

§ 4050

Whenever the right to compensation under this division exists in favor of an employee, ~~he~~ the employee shall, upon the written request of his employer, submit at reasonable intervals to examination by a practicing physician, from an approved worker's compensation provider list or approved provider network ~~provided~~ and paid for by the employer, and shall likewise submit to examination at reasonable intervals by any physician selected by the administrative director or appeals board or referee thereof.

§ 4617

(a) The administrative director shall establish a statewide medical provider network to be called the California Medical Provider Network (CAMPN). The CAMPN shall consist of physicians, as described in Section 3209.3, throughout the state who are willing and able to provide medical treatment to injured employees.

(b) Notwithstanding any other provision of law, if the employer or insurer has established a medical provider network (MPN) pursuant to Section 4616, or a health care organization (HCO) pursuant to Section 4600.3, the injured employee may choose to treat with a physician in that MPN or HCO, or may choose to transfer treatment to a physician in the CAMPN. If the employer or insurer has not established an MPN, the employee may choose to treat with a physician of the employee's choice, as provided in subdivision (c) of Section 4600, or to treat with a physician in the CAMPN. An employee who is treating with a physician in the CAMPN may, at any time, change to a different treating physician within the CAMPN. Nothing in this section shall be construed to limit the right of an employee to treat with their personal physician as described in subdivision (d) of Section 4600.

(c) The number of physicians in the CAMPN shall be sufficient to enable treatment for injuries or conditions to be provided in a timely manner and shall, to the extent feasible, include within the CAMPN physicians in all medical specialties. The CAMPN shall include an adequate number and type of physicians, as described in Section 3209.3, to treat common injuries experienced by injured employees based on the type of occupation or industry in which the employee is engaged, and the geographic area where the employees are employed. With respect to availability and accessibility of treatment, the administrative director shall consider the needs of rural areas, specifically those in which health facilities are located at least 30 miles apart and areas in which there is a health care shortage.

(d) A physician who possesses the requisite license for practice of their medical specialty is eligible for inclusion in the CAMPN, if all of the following apply:

(1) The physician is in good standing with the Medical Board of California.

(2) The physician has not been suspended pursuant to Section 139.21.

(3) The physician does not meet any of the criteria specified in paragraph (1) of subdivision (a) of Section 139.21.

(4) The physician agrees to treat injured workers within the scope of their medical practice.

(5) The physician agrees to bill in accord with the official medical fee schedule established pursuant to Section 5307.1.

(6) The physician agrees to practice in accord with rules and regulations applicable to the workers' compensation system, including preparation of required reports.

(e) A physician who meets the criteria in subdivision (d) shall be included in the CAMPN. In no event shall economic profiling, as defined in subdivision (c) of Section 4616.1, be a factor to be considered for inclusion in or expulsion from the CAMPN.

(f) All treatment within the CAMPN shall be provided in accordance with the medical treatment utilization schedule established pursuant to Section 5307.27, which remains presumptively correct.

(g) Treatment within the CAMPN shall be subject to utilization review, as described in Section 4610, and independent medical review, as described in Section 4610.5.

(h) Nothing contained herein shall be construed to limit or eliminate utilization review as described in Section 4610, independent medical review as described in Section 4610.5 or 4610.6, or the antifraud provisions contained in Sections 139.21 and 4906 of this code, and Section 14123 of the Welfare and Institutions Code.

(i) The initial list of CAMPN physicians shall be created by including any physician who meets the criteria in subdivision (d) and was listed as of January 1, 2024, on any MPN created pursuant to Section 4616. Within 60 days of the effective date of this section, each employer, insurer, or private entity, that has established an MPN pursuant to Section 4616, shall file with the administrative director a list of those physicians in the MPN as of January 1, 2024.

(j) The administrative director shall, on or before April 30, 2025, and after public hearings, establish rules and procedures governing the CAMPN. The administrative director shall include a continuity of care policy meeting the requirements of Section 4616.2. The CAMPN shall be implemented no later than June 30, 2025.

(k) A physician in the CAMPN may, at any time, leave the CAMPN pursuant to the rules and procedures created by the administrative director.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Under current law, worker's compensation treatment is performed by physicians paid for by the worker's compensation insurance carriers who routinely strike those physicians who may be perceived as too worker oriented in relation to treatment and treatment recommendations. This leads to a culture of worker's compensation physicians who are incentivized to only provide the minimal, lowest cost, treatment for injured workers, and not necessarily treatment that is best for the long-term health and recovery of injured workers. This problem is compounded by the fact that it is the worker's compensation insurance carriers who choose which physicians will provide assessment and treatment of an injured worker.

The Solution: This resolution amends Labor Code sections 4050 and adds Labor Code section 4717 to provide injured workers with the ability to choose an evaluating and treating physician from a list of approved workers compensation physicians or a physician from an approved provider network, and for the state to create the California Medical Providers Network (CAMPN) of approved worker's compensation physicians. By having the state create the CAMPN, and allowing injured workers the option of choosing from the CAMPN or the employer or insurer provided medical provider network or health care organization, it provides injured workers the ability to choose their own treating physician from networks of approved physicians. In addition, this change would eliminate current incentives on the part of employers and their insurers to eliminate otherwise qualified physicians from their provider networks because those physicians may be perceived as to favorable to injured workers in the care they provide.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
Similar to Assembly Bill 1465, as originally introduced. No known prior similar CCBA resolutions.

AUTHOR AND/OR PERMANENT CONTACT:
Daniel Mazzella, Esq., 1901 First Avenue, Ste. 1079, San Diego, CA 92101, (619) 295-1244; dmazzatlaw@aol.com.

RESPONSIBLE FLOOR DELEGATE: Daniel Mazzella

RESOLUTION 06-02-2023

DIGEST
Labor Code: Additional Requirement of Notice Under California WARN Act
Amends Labor Code section 1400.5 to require employers to provide advance notice of any layoff or reduction of hours of 50 percent or more that lasts 6 months or longer.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Labor Code section 1400.5 to require employers to provide advance notice of any layoff or reduction of hours of 50 percent or more that lasts 6 months or longer. This resolution should be approved in principle because it would align the California Worker Adjustment and Retraining Notification (WARN) Act, California Labor Code section 1400, *et. seq.*, more closely with the federal WARN Act, 29 U.S.C Section 2101, *et. seq.*.

Under current law, both the state and federal WARN Acts require employers to provide 60 days advance notice of employment loss as the result of plant closures and mass layoffs. (Lab. Code, § 1401, subsec. (a) and 29 U.S.C § 2102, subsec. (a)). The California WARN Act defines "layoff" as a separation from a position for lack of funds or lack of work" and "mass layoff" as "a layoff during any 30-day period of 50 or more employees at a covered establishment." (Lab. Code, § 1400.5, subsecs. (c) and (d).) Under the federal WARN Act, a "mass layoff" is a "a reduction in force which (A) is not the result of a plant closing; and (B)results in an employment loss at the single site of employment during any 30-day period for (i)(I) at least 33 percent of the employees (excluding any part-time employees); and (II) at least 50 employees (excluding any part-time employees); or (ii) at least 500 employees (excluding any part-time employees)." (29 U.S.C § 2101, subsec. (a)(3).) The federal regulations explain that "employment loss" means "(i) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (ii) a layoff exceeding 6 months, or (iii) a reduction in hours of work of individual employees of more than 50% during each month of any 6-month period." California's law does not have a comparable definition.

The Fourth District Court of Appeal held that the phrase "separation from a position" in Labor Code Section 1400.5 "encompasses a temporary job loss, even if some form of the employment relationship continues and the employees are given a return date." (*Intern'l Brotherhood of Boilermakers v. NASSCO Holdings, Inc.* (2017) 17 Cal.App.5th 1105, 1118). The court found that the employer was required to give notice under the California WARN Act for a layoff lasting 4 to 5 weeks.

Adding a minimum length of time for a layoff or reduction in hours will provide clarity to the statute, eliminate the need for providing notice when the time off is shorter than the required notice period, and avoid having different obligations under the state and federal laws.

The California WARN Act will continue to differ from the federal WARN Act in other regards, including California's decision to require smaller employers to give WARN Act notices.

There are no anticipated unintended consequences of the resolution.

There are no similar pending bills, nor any in the last three years.

Therefore, this resolution should be Approved in Principle.

RESOLUTION 06-02-2023

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Labor Code section 1400.5, to read as follows:

§ 1400.5

The definitions set forth in this section shall govern the construction and meaning of the terms used in this chapter:

(a) "Covered establishment" means any industrial or commercial facility or part thereof that employs, or has employed within the preceding 12 months, 75 or more persons.

(b) "Employer" means any person, as defined by Section 18, who directly or indirectly owns and operates a covered establishment. A parent corporation is an employer as to any covered establishment directly owned and operated by its corporate subsidiary.

(c) "Layoff" means a separation from a position <u>for more than six consecutive months, or a reduction in hours of work of more than 50 percent during each month of any 6-month period,</u> for lack of funds or lack of work.

(d) "Mass layoff" means a layoff during any 30-day period of 50 or more employees at a covered establishment.

(e) "Relocation" means the removal of all or substantially all of the industrial or commercial operations in a covered establishment to a different location 100 miles or more away.

(f) "Termination" means the cessation or substantial cessation of industrial or commercial operations in a covered establishment.

(g) (1) This chapter does not apply where the closing or layoff is the result of the completion of a particular project or undertaking of an employer subject to Wage Order 11, regulating the Broadcasting Industry, Wage Order 12, regulating the Motion Picture Industry, or Wage Order 16, regulating Certain On-Site Occupations in the Construction, Drilling, Logging and Mining Industries, of the Industrial Welfare Commission, and the employees were hired with the understanding that their employment was limited to the duration of that project or undertaking.

(2) This chapter does not apply to employees who are employed in seasonal employment where the employees were hired with the understanding that their employment was seasonal and temporary.

(h) "Employee" means a person employed by an employer for at least 6 months of the 12 months preceding the date on which notice is required.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Under current state and federal law, generally known as the Worker Adjustment and Training Notification or WARN Acts, employers are required to provide 60-calendar-days notification to employees in advance of plant closings and mass layoffs. If the required notice is not provided, or not properly provided, an employer can be liable for up to 60 days of pay and benefits, plus civil penalties and attorneys' fees.

Under the federal WARN Act, an "employment loss" that triggers a WARN Act notice includes (1) a layoff exceeding 6 months; or (2) a reduction in hours of work of more than 50% of each month during any 6-month period. (29 U.S.C. § 2101(a)(6); 20 C.F.R. § 639.3(f)(1).) Unlike federal law, Cal/WARN does not explain whether a layoff occurs for California employees who are placed on a temporary furlough (days, weeks or months with no work) or for whom work hours are reduced on a temporary basis due to business needs. The term "layoff" under Cal-WARN is simply defined as a "separation from a position for lack of funds or lack of work." (Labor Code §1400(c), (d).) This has led to confusion and employers generally following federal WARN Act notice requirements, hoping that in doing so they are not inadvertently violating the Cal/WARN Act. Other employers neglect to provide any advance notice when employees' workdays or work hours are temporarily eliminated, causing financial hardship to workers who are caught off guard.

For example, in the case The International Brotherhood of Boilermakers, et al. v. NASSCO Holdings, Inc. (2017) 17 Cal.App.5th 1105, the company placed workers on unpaid furlough for three (3) to five (5) weeks without the 60-day notice required under the state law. Workers were told of their immediate layoffs on the same day they showed up at the shipyard for their regular shifts. The workers found themselves suddenly without wages and unable to earn vacation or pension benefits. The appellate court agreed that NASSCO had violated Cal-WARN because "separation from a position" includes a "temporary job loss." The court did not explain what duration of a temporary job loss activates WARN.

The Solution: By adding the exact words of the federal WARN Act to the Cal/WARN definition of "layoff," this resolution would provide in essence that, in event of a temporary furlough or temporary reduction in employees' work hours, a WARN Act notice issued in compliance with the federal WARN Act satisfies the requirements of the Cal/WARN Act. This gives employers certainty as to when to issue WARN Act notices under federal and California law. All other Cal/WARN requirements, including the definition of covered employers, remain unchanged.

IMPACT STATEMENT

This resolution may require additional statutory or regulatory changes.

CURRENT OR PRIOR RELATED LEGISLATION

No known prior or pending similar legislation.

AUTHOR AND/OR PERMANENT CONTACT:
Lisa Hird Chung, Esq., Schor Vogelzang & Chung, LLP, 2170 Fourth Ave., San Diego, CA 92101, (619) 354-6519, lisa@svclegal.com

RESPONSIBLE FLOOR DELEGATE: Lisa Hird Chung

RESOLUTION 06-03-2023

DIGEST
Medical Licensing: Appeal of Trial Court Decision Affecting Physician's License
Amends Business and Professions Code section 2337 to permit standard appellate review of a superior court review of an administrative decision affecting a physician's license to practice medicine.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Business and Professions Code section 2337 to permit standard appellate review of a superior court review of an administrative decision affecting a physician's license to practice medicine. This resolution should be approved in principle because it would give physicians the right to full appellate review of licensing decisions, which is similar to the review process available to other licensed professionals in California.

Under current law, a disciplinary action against a physician is initiated by an accusation from the California Attorney General's Office. The physician may dispute the accusations through a trial at the Office of Administrative Hearings. Review from an Office of Administrative Hearings decision is via a petition for writ of mandate to the superior court. The physician's only means of challenging the superior court's decision is through an extraordinary writ. Other professions have access to full appellate review to challenge the superior court's decision. (*See*, *e.g.*, Bus. & Prof Code, § 5571 (architects)).

This resolution would allow physicians to challenge a superior court decision through a standard appeal. "*A writ is different from an appeal:* An *appeal* is a petition to a higher court by a party who seeks to overturn a lower court's ruling. A *writ* is a directive from a higher court that orders a lower court to take action in accordance with the law." (Moore*, Seeking Extraordinary Relief by Filing a Writ Petition,* (June 2022) Advocate (https://www.advocatemagazine.com/article/2022-june/seeking-extraordinary-relief-by-filing-a-writ-petition [as of July 20, 2023]). "Courts of Appeal are obligated to provide a reasoned opinion deciding appeals. Whether to issue writ relief is almost wholly discretionary. A Court of Appeal may, and usually does, dispose of a writ petition by way of a one-sentence order." (*Ibid*). A physician, who has spent more years learning her profession, should have the benefit of a full and thoughtful review of any decision to deny or limit the right to practice that profession. There are no anticipated unintended consequences of the resolution.

There are no similar pending bills, nor any in the last three years.

Therefore, this resolution should be Approved in Principle.

RESOLUTION 06-03-2023

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend section 2337 of the Business and Professions Code, to read as follows:

§ 2337

Notwithstanding any other provision of law, superior court review of a decision revoking, suspending, or restricting a license shall take preference over all other civil actions in the matter of setting the case for hearing or trial. The hearing or trial shall be set no later than 180 days from the filing of the action. Further continuance shall be granted only on a showing of good cause.

~~Notwithstanding any other provision of law, review of the superior court's decision shall be pursuant to a petition for an extraordinary writ.~~

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Once a professional acquires a license to practice his or her profession, the licensing board may not revoke, suspend or restrict it in the absence of good cause shown through clear and convincing evidence. Should a regulatory agency impose discipline, the licensee may seek judicial review by petitioning the superior court for administrative mandamus (Civ. Proc. Code, § 1094.5). The judge has the authority to issue writ relief should it appear trial was unfair, a prejudicial abuse of discretion, or an unjustified outcome. If the court denies writ relief, the licensee may appeal that judgment to the court of appeal. That right of appeal applied to every licensee—until 1996. The Medical Board's claim that a physician's right to direct appeal interferes with the need for expedited discipline for public safety, resulted in the enactment of Business and Professions Code § 2337, declaring a physician has no right to appeal from where a superior court judge refuses to overturn the Board's decision. Section 2337 only authorizes a physician appellate review through discretionary writ—which the appeals court may choose to either entertain or summarily deny, without full briefing or argument. This limitation applies to no other licensee—only physicians. Despite obvious due process and equal protection concerns, the court in *Landau v. Superior Court* (1998) 81 Cal.App.4th 191, upheld the constitutionality of the statute based on the Medical Board's dubious expediency rationale. That makes no sense. If the physician is truly a danger, the Board can obtain an interim suspension order immediately suspending the doctor from practicing pending full hearing and decision. Otherwise, administrative hearings occur within six months of the accusation. If discipline is imposed, it goes right into effect—even if the physician petitions the superior court. Only if the court finds the doctor does not pose a threat to public safety and is likely to prevail, will the Board's decision imposing discipline be stayed. Otherwise, and usually, discipline remains in effect until the court can rule on the merits of the petition. If it ultimately denies the petition, and the doctor appeals, the challenged discipline remains in effect during the pendency of the appeal.

Public protection is thus assured during the appeals process. Current law effectively denies a physician appellate review where the superior court judge refuses to intervene. Denied the right of direct appeal, the likelihood the appellate court will grant a petition for discretionary writ is a long shot, yet costly quixotic pursuit. In truth, this has nothing to do with expediency or public safety. Its real aim is to effectively eliminate a second and more thoughtful tier of judicial scrutiny concerning the propriety of the Medical Board's action, and a needed check on bureaucratic hubris, whim and sometimes tyrannical abuse directed at a physician's ability to practice and earn a livelihood.

The Solution: This resolution will restore the physician's right of direct appeal from a superior court judge's decision to the court of appeal—a right, if not need, that is enjoyed by every other licensee in California.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
No known prior similar legislation or CCBA resolutions.

AUTHOR AND/OR PERMANENT CONTACT:
Joel Bruce Douglas, Bonne, Bridges, Mueller, O'Keefe & Nichols, Professional Corporation, 355 S. Grand Avenue, Suite 1750, Los Angeles 90071. Telephone: (213/607-5834).; email: jdouglas@bonnebridges.com

RESPONSIBLE FLOOR DELEGATE: Joel Douglas