

OCTOBER 2009 CASE DEVELOPMENTS
IN CALIFORNIA HEALTH LAW

By Suzanne K. Nusbaum of Impartia

INSURANCE COVERAGE:
LONGSHORE AND HARBOR WORKER'S ACT

[Pedroza v. Benefits Review Board](http://www.ca9.uscourts.gov/datastore/opinions/2009/10/01/05-75449.pdf), No. 05-75449, 2009 U.S. App. LEXIS 21533, (9th Cir., October 1, 2009), available at <http://www.ca9.uscourts.gov/datastore/opinions/2009/10/01/05-75449.pdf>.

Psychological injuries arising from legitimate personnel actions are not compensable under the Longshore Act.

The Longshore Act provides that compensation shall be payable for disability of an employee, but only if the disability results from an injury. 33 U.S.C. § 903(a). In order to fall within the act, the injury must be work-related. *See* 33 U.S.C. § 902(2). A psychological impairment, which is work related, is presumed to be compensable. 33 U.S.C. § 920(a). To receive the benefit of this §920(a) presumption, the claimant must prove not only that he has a psychological impairment, but that an accident occurred, or working conditions existed, which could have caused the impairment.

Here the worker was demoted for poor performance after being reprimanded for causing an accident. His ensuing depression was caused by his employer's disciplinary action and remands. The Court held that psychological injury resulting from a legitimate personnel action is not the type of injury that was intended to be compensable under the Longshore Act, and sustained the denial of benefits.

INSURANCE COVERAGE:
WORKERS' COMPENSATION

[Esquivel v. Workers' Compensation Appeals Board](http://www.courtinfo.ca.gov/opinions/documents/D054197.PDF), 178 Cal. App. 4th 330 (4th App. Distr., 2009), available at <http://www.courtinfo.ca.gov/opinions/documents/D054197.PDF>.

Injuries received en route to medical treatments are not always compensable. There is a reasonable geographic limitation on an employer's risk of incurring liability under the Workers' Compensation Act for new injuries sustained en route to medical treatment for an industrial injury. Here the Court denied compensation for injuries received in a car accident 130 miles from the employee's residence, where her medical care providers were located within 8 miles of her home. The accident occurred while traveling from her mother's house, which she had visited for reasons unrelated to her employment.

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INSURANCE COVERAGE: **SURVIVING CORPORATION OF A MERGER**

Catholic Healthcare West v. California Ins. Guarantee Assn., 178 Cal. App. 4th 15 (Fifth App. Dist., 2009), available at <http://www.courtinfo.ca.gov/opinions/documents/F055842.PDF>.

The California Insurance Guarantee Association was required to pay to the survivor of corporate restructuring, benefits that would have been paid by an insolvent workers' compensation carrier to the hospital entity that had disappeared in the merger.

Insurance Code §1063.1(c)(9)(B) excludes from coverage any claim by any person other than the original claimant under the insurance policy in his or her own name. Nevertheless, these claims were covered even though the corporation had changed its name to a name not listed in the insurance policy, and even though the corporation listed in the policy had ceased to exist.

Pursuant to Corporations Code § 6020 (a), Catholic Healthcare West succeeded to all the rights of the original insured employer and was subject to all of the employer's debts and liabilities, including its responsibility for the workers' compensation benefits owed to its injured employees. Therefore, Catholic Healthcare West held all of original insured's rights under the policy that CISG guaranteed.

The statutory phrase "original claimant under the insurance policy in his or her own name" included the affiliate corporation into which the employer corporation was merged because the merger was an internal restructuring of a family of corporations, and did not expand or otherwise change the ownership or control of the operations, and because the surviving corporation continued the employer corporation's corporate activities as well as its hospital operations.

The court applied an "economic reality" test and concluded that Catholic Healthcare West was a continuation of the named insured. It found that the ultimate ownership of both the corporate activities and actual operations had not been changed by the mergers. The corporate restructuring conducted within the Catholic Healthcare West family of corporations had not resulted in a previously independent economic actor obtaining an ownership interest in the overall enterprise or in the operations of the facility where the worker had been injured.

LABOR & EMPLOYMENT: EMPLOYMENT CONTRACT **NONCOMPETE AND NONSOLICITATION CLAUSES**

Dowell v. Biosense Webster, Inc., Nos. B201439, B203501, 2009 Cal. App. LEXIS 1860 (Cal. Ct. App., Second District, Div. Two, October 20, 2009), available at <http://www.courtinfo.ca.gov/opinions/documents/B201439.PDF>.

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The Court affirmed summary judgment declaring that noncompete and nonsolicitation agreements were void under Bus. & Prof. Code § 16600 and constituted unfair competition under Bus. & Prof. Code § 17200.

Bus. & Prof. Code § 16600 provides, with some exceptions not applicable here, that “every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.” This section expresses California’s strong public policy of protecting the right of its citizens to pursue any lawful employment and enterprise of their choice, and evinces a policy in favor of open competition and employee mobility. Violations of § 16600 are defined by § 17200 as unfair competition.

The broadly worded noncompete clause prevented the employees, for a period of 18 months after termination of employment, from rendering services, directly or indirectly, to any competitor in which the services they may provide could enhance the use or marketability of a conflicting product by application of confidential information to which the employees had access during employment. Similarly, the broadly worded nonsolicitation clause prevented the employees for a period of 18 months postemployment from soliciting any business from, selling to, or rendering any service directly or indirectly to any of the accounts, customers or clients with whom they had contact during their last 12 months of employment. The court concluded that these provisions restrained the employees from practicing their chosen professions, and so were void under § 16600.

LABOR & EMPLOYMENT: FAIR LABOR STANDARDS ACT (FLSA)

[Parth v. Pomona Valley Hospital](http://www.ca9.uscourts.gov/datastore/opinions/2009/10/21/08-55022.pdf), 584 F.3d 794 (9th Cir. 2009), available at <http://www.ca9.uscourts.gov/datastore/opinions/2009/10/21/08-55022.pdf>

Employees can be paid different rates for different shifts. Such wage differential does not violate the FLSA.

Here, the hospital changed its shift schedule at the request of its nurses to create an optional 12 hour shift. It created a reduced pay rate for the 12 hour shift to keep the change revenue-neutral. Nurses working a 12 hour shift received a lower base hourly rate than those working an 8 hour shift.

The Court found that a “weighted average” of calculating “regular pay” method is permissible. The “weighted average” method adds all of the wages payable for the hours worked at the applicable shift rates and divides by the total number of hours worked.

The Court concluded that an employer subject to the Fair Labor Standards Act (FLSA) may alter a “regular rate” of pay in order to provide employees with a schedule they desire. A hospital can respond to its employees' requests for an alternative work schedule

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by adopting the sought-after 12 hour schedule and paying the employees the same wages they had received under the less-desirable 8 hour schedule. The hospital's actions were perfectly reasonable, were requested by the nurses (who work the schedules), and were the result of a bargained-for exchange between the hospital administration and the union.

PAYMENT AND REIMBURSEMENT:
CONTRACT ACTION AGAINST COURT APPOINTED RECEIVER

Medical Development International v. California Department of Corrections and Rehabilitation, No. 08-15759, 2009 U.S. App. LEXIS 23890 (9th Cir. 2009), available at <http://www.ca9.uscourts.gov/datastore/opinions/2009/10/30/08-15759.pdf>.

The receiver appointed by the US District Court in the Northern District to take control of the delivery of medical services to California state prisoners instructed the Department of Corrections and Rehabilitation (CDCR) to stop payments on Medical Development International (MDI) invoices because a question had been raised about the legality of MDI's operations without a California medical license. MDI was instructed to continue to provide services in two pilot programs while the question was being resolved. Despite efforts by MDI to show that its services were lawful, the Receiver then ended the relationship, and expelled MDI from the two institutions where it had been working. MDI then sued the receiver and CDRC in the California Superior Court in Sacramento County. The receiver removed the action to US District Court in the Eastern District and claimed absolute judicial immunity.

28 USC § 1442(a) authorizes the removal of a civil action against a receiver acting in his official capacity or under color of office. Here the receiver was acting as the chief executive officer of the medical division, which contracted with and managed those responsible for providing medical care to prisoners. In this situation, the plaintiff did not need to obtain permission from the appointing court to sue the receiver in another venue. Venue was proper in the Eastern District.

MDI sued the receiver in his official capacity. Actions against the receiver are in law actions against the receivership. Thus payment could only be made from the funds of CDRC as controlled by the receiver. Judicial immunity does not extend to the receiver's refusal to pay for services that MDI performed under a contract with CDRC. The receiver is not immune from suit challenging his actions in operating CDRC as a going enterprise.

TAXATION:
MENTAL HEALTH SERVICES ACT

Jensen v. Franchise Tax Bd., 178 Cal. App. 4th 426 (2nd App. Dist., Div. 2, 2009), available at <http://www.courtinfo.ca.gov/opinions/documents/B211815.PDF>

The court upheld the constitutionality of the Mental Health Services Act, which had been adopted by California voters through the initiative measure, Proposition 63. The

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proposition expanded funding of mental health services for Californians by imposing an additional tax of 1% on annual income in excess of \$1 million.

An income tax may be rationally based on a taxpayer's income level and ability to pay, and there is no need to show that a particular taxpayer personally benefits from a tax assessed for the public good. Taxpayers earning more than \$ 1 million annually do not comprise a "suspect class" requiring a strict scrutiny constitutional analysis.

Like any state law, a tax must be rationally related to achievement of a legitimate state purpose. The party challenging the constitutionality of a state law must negative every conceivable basis which might support it.

A tax is a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. The most fundamental principle of government is that it exists primarily to provide for the common good. There is no need for a link between the taxpayer and the services being funded. Thus taxpayers cannot resist payment of a tax because it is not expended for purposes that benefit them.

The Legislature does not have the exclusive power to raise taxes. The people also have that power, which they can exercise through a statutory initiative.

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