




---

---

---

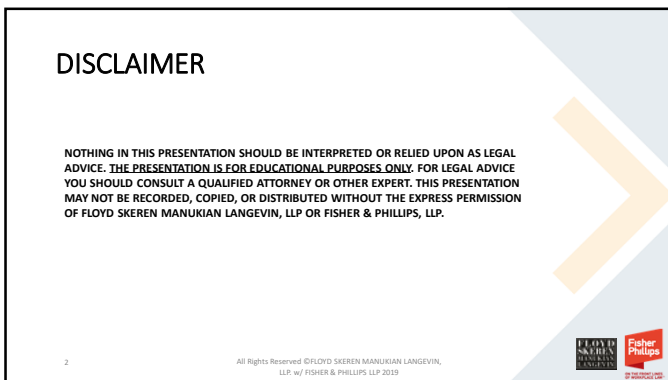
---

---

---

---

---




---

---

---

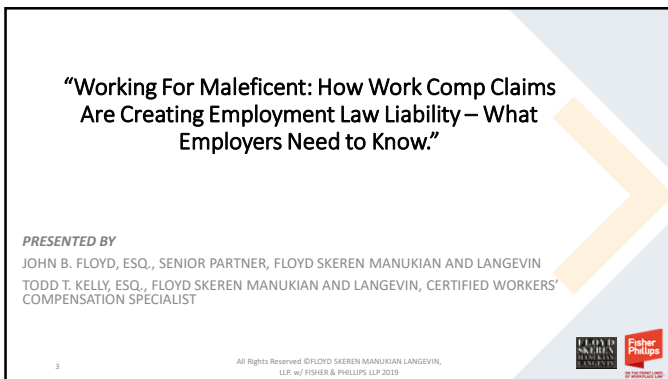
---

---

---

---

---




---

---

---

---

---

---


---

---

# OVERVIEW

4

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019



---

---

---

---

---

---

---


---

# OVERVIEW OF TOPICS

- What is the problem?
- What types of workers' compensation claims can directly lead to an employment law claim?
- What additional types of employment law claims are being filed?
- What can an employer do to help reduce the risk and cost of employment law claims?
- Questions

5

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019



---

---

---

---

---

---


---

---

# WHAT IS THE PROBLEM?

6

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019



---

---

---

---

---

---

---

---

### PROBLEM: WC APPLICANTS ARE ALSO FILING EMPLOYMENT RELATED CLAIMS

- Applicant's attorneys understand the value of employment law cases, and that the attorney's fees are **substantially** higher.
- Applicant's attorneys also recognize that often there is some type of employment law issue with an employee who has filed a workers' compensation claim, which may have significant value.
- Consequently, applicant's attorneys are either filing employment law related claims at the same time as the workers' compensation claim, or are partnering with an employment law attorney who files the claim/s, and then agrees to provide a referral fee to the workers' compensation attorney.

7

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019




---

---

---

---

---

---

---

---

### EMPLOYMENT LAW CASES ARE COSTLY TO DEFEND AND RESOLVE

- Employment law cases cost thousands to defend, on average between \$450.00 an hour to \$1000.00 an hour for an experienced employment law attorney.
- Plaintiff attorneys usually take these cases on a contingency basis, so the employee/plaintiff is not incurring attorneys fees, unless there is a recovery for damages.
- Employment law cases can result in a settlement that is in the millions of dollars, especially if a class action and/or PAGA claim is filed. This is due in part because the plaintiff is entitled to a recovery of their attorneys' fees, which can be substantial.
- Depending on the particular facts of the case, the general consensus is that employment law cases involving FEHA harassment claims with any merit typically require around \$500,000.00 to settle; disability discrimination claims often require around \$100,000.00 to settle; and wage and hour claims often involve multi-million dollar claims especially for larger employers.

8

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019




---

---

---

---

---

---

---

---

### WHAT TYPES OF WORKERS' COMPENSATION CLAIMS CAN DIRECTLY LEAD TO AN EMPLOYMENT LAW CLAIM?



9

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019




---

---

---

---

---

---

---

---

### PSYCHIATRIC CLAIMS

- Work Comp psychiatric claims often involve claims of "harassment" by a manager or supervisor.
- Employers should carefully scrutinize all psychiatric claims to determine the underlying allegations for the claim, and prepare accordingly. Employment law counsel should be consulted, and any necessary investigation into the allegations must be done by the employer in a timely, objective, thorough and fair manner, and remedial measures implemented if appropriate.



10

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019




---

---

---

---

---

---

---

---

---

---

### 132a CLAIMS

- What is a 132 a claim?
- What damages are recoverable in a 132a claim?
- Who pays for the defense of a 132a claim?

**Remember:** 132a claims involve some form of alleged discrimination that may trigger a more costly employment law claim. Due to this, it is important for the employer to consult with employment law counsel as soon as the employer receives notice of the 132a claim for advice and defense.



11

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019




---

---

---

---

---

---

---

---

---

---

### EXAMPLES OF ADDITIONAL TYPES OF EMPLOYMENT RELATED CLAIMS THAT MAY BE FILED ALONG WITH THE WC CLAIM



12

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019




---

---

---

---

---

---

---

---

---

---

# FEHA/ADA DISABILITY DISCRIMINATION CLAIMS

• This is one of the most common types of employment law claims filed along with a workers' compensation claim. The allegations typically include that the employer:

- 1. Failed to engage in the interactive process and failed to offer an accommodation;
- 2. Advised that it could not accommodate work restrictions;
- 3. Failed to return the employee back to work (often there are conflicting medical reports and the employer decides to rely on the one that says the employee cannot perform the essential functions of the job, even though the employee disagrees with this medical opinion);
- 4. Terminated the employee while the employee was on leave for a work related injury, without considering extended leave as an accommodation.

**Remember:** There are many points in a work comp case in which the employer must conduct the interactive process to consider whether a reasonable accommodation can be offered, including in the form of extended leave, or the ability to work from home.

13

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019



---

---

---

---

---

---

---

---

---

---

# INTERFERENCE WITH FAMILY AND MEDICAL LEAVE RIGHTS

• Employees who are injured on the job may be eligible for family and medical leave pursuant to the Family and Medical Leave Act/California Family Rights Act (FMLA/CFRA). In general, these statutes provide job protected, unpaid leave, of up to 12 weeks for the employee's serious health condition. The employer must have 50 or more employees and the employee must have worked for the employer for 12 months, 1,250 hours during the last year, and work at a location with 50 or more employees within a 75 mile radius.

**Remember:** In California, the question of whether an employer can require designation of FMLA/CFRA leave during a work injury related leave is unsettled in California, and thus employment law counsel should be consulted to determine if it is appropriate to require use of available FMLA/CFRA leave during a work injury related leave. However, at a minimum, it is recommended that employers advise eligible employees of their right to take FMLA/CFRA leave.

14

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019



---

---

---

---

---

---

---

---

---

---

# WAGE AND HOUR CLAIMS

• Increasingly, wage and hour claims are being filed with workers' compensation claims. Such claims can include:

- 1. Meal and rest period violations
- 2. Paystub violations
- 3. Misclassification of workers as independent contractors
- 4. Failure to pay minimum wage/overtime

**Remember:** Employers, HR administrators and payroll departments must understand and comply with the myriad of wage and hour laws. It is not sufficient to rely on third party administrators. Wage and hour claims are prolific in California, and extremely costly.

15

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019



---

---

---

---

---

---

---

---

---

---

### AGE DISCRIMINATION

- Increasingly, age discrimination claims are being filed with workers' compensation claims alleging, for example, that the employer terminated the employee due to disability and age.
- It is anticipated that more age discrimination claims will be filed against employers due to an aging workforce, and these will be costly. One of the most recent age discrimination cases resulted in a \$15.5 million dollar verdict against the Los Angeles Times.

**Remember:** Successor planning does not mean "out with the old in with the new". Make sure your hiring practices reflect diversity, including on the basis of age.

16

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019




---

---

---

---

---

---

---

---

### PREGNANCY DISCRIMINATION

- If the injured worker is also pregnant, the employment law claim could involve alleged pregnancy discrimination, based on disability or some other protected basis.

**Remember:** Pregnant employees have substantial rights in the workplace, including: (1) up to 4 months of protected leave for disability, and additional time off if needed under FEHA for disability, and the employer can provide the leave without undue hardship; (2) workplace accommodations; (3) up to 3 months of baby bonding time, if eligible; and, (4) lactation accommodation.

17

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019




---

---

---

---

---

---

---

---

### DISCRIMINATION BASED ON CANCELLATION OF HEALTH INSURANCE

- If an employer cancels an employee's group health insurance while they are on leave due to a work related injury, the employee may claim discrimination.

**Remember:** Employers are only required to keep group health insurance in place if mandated by statute, such as the Family and Medical Leave Act/California Family Rights Act, or Pregnancy Disability Leave law. However, employers must consult with employment law counsel over the appropriate policies to have in place regarding cancellation of group health insurance as there are significant risks if the appropriate policies are not in place and uniformly enforced.

18

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019




---

---

---

---

---

---

---

---

## PRIVACY/HIPAA VIOLATIONS

- Employers must exercise care not to disclose private and confidential information related to the employee's medical condition, or this could result in a claim for violation of privacy and/or HIPAA violation.

**Remember:** Employee's medical records, including interactive process records, must be kept in a separate, secure location. Be sure to have adequate security measures in place for medical records contained in your electronic database. Be sure your medical providers are not asking for information that is protected by law, such as genetic information--review the intake form they are using--does it have the required GINA warning? Also, make sure your front line managers and supervisors are not asking for a medical diagnosis, especially when an employee calls in sick or is on extended medical leave, as this is not permitted in California.

19

All Rights Reserved ©FLOYD SKEREN MANUJIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019




---

---

---

---

---

---

---

---

---

---

## WHAT CAN AN EMPLOYER DO TO REDUCE THE RISK AND COST OF THESE CLAIMS?



20

All Rights Reserved ©FLOYD SKEREN MANUJIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019




---

---

---

---

---

---

---

---

---

---

## BE PREPARED

- Carefully monitor your workers' compensation claims for indications of an employment related claim;
- In particular, review and monitor all 132a claims, and advise your employment law counsel as soon as possible upon notice of such a claim;
- Ensure that your workers' compensation defense counsel is prepared for all issues when taking applicant's deposition, including those related to an employment law claim.

21

All Rights Reserved ©FLOYD SKEREN MANUJIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019




---

---

---

---

---

---

---

---

---

---

### BE PREPARED *continued...*

- Train your HR team, risk managers, front line managers and supervisors, and any other personnel involved with these issues on the employer's obligations related to workplace laws, and on the employer's required policies and procedures for ensuring compliance, particularly in regards to wage and hour compliance.
- Update your employee handbook and workplace policies every year.
- Implement current and accurate job descriptions that are signed by employees.
- Consult with your employment law counsel as to whether you should have an arbitration agreement in place, which is signed by all employees.

22

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019




---

---

---

---

---

---

---

---

### OBTAIN EMPLOYER'S PRACTICES LIABILITY INSURANCE

- All employers should have "Employer's Practices Liability Insurance" (EPLI) which covers many types of employment related claims including claims for discrimination, harassment or retaliation.
- However, most EPLI policies will not cover wage and hour matters.

23

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019




---

---

---

---

---

---

---

---

### INTERACTIVE PROCESS AND REASONABLE ACCOMMODATION

- Employers should engage in the interactive process when required (e.g. request to return to work, receipt of work restrictions, request for extension of leave, applicant has reached MMI). If the employee-applicant is represented, employers should obtain consent from applicant's counsel to conduct the interactive process. Employers must also document all interactive process consultations using an interactive process form.
- Employers should thoroughly review possible accommodations that would enable the employee to perform the essential functions of the job and return to work, if a return to work is requested. If appropriate, a reasonable accommodation should be offered provided it does not impose an undue hardship. If a reasonable accommodation is not available, alternative vacant positions should be considered.

**Remember:** Undue hardship can be difficult to establish.

24

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019




---

---

---

---

---

---

---

---



### TIMELY DOCUMENT AND CORRECT PERFORMANCE PROBLEMS

- It is essential that managers and supervisors document performance problems in a timely and accurate manner because if there is a claim of discrimination, harassment or retaliation, this helps the employer establish a good faith personnel decision in defense of the claim.
- Employers must be timely, fair, and consistent in implementing disciplinary measures.
- Employers must document all performance problems and disciplinary measures.

25

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019




---

---

---

---

---

---

---

---

### EXERCISE CAUTION WITH TERMINATIONS PARTICULARLY WITH INJURED/DISABLED WORKERS

- Termination should never come as a surprise.
- Be sure that performance problems leading to termination are properly documented and reviewed with the employee.
- Do not terminate employees who have been granted medical leave for a work related injury or disability without consulting counsel.
- Remember an interactive process **is required** whenever an employee is requesting an extension of WC medical leave because the employee needs more time for recovery.

26

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019




---

---

---

---

---

---

---

---

### CONSIDER A GLOBAL SETTLEMENT WITH THE WC RESOLUTION

- If there are allegations of an employment law violation, and the workers' compensation case is settling via a Compromise & Release, the employer may want to consider a separate global settlement of all claims.
- How is the global settlement typically handled in the workers' compensation case?
- What are the considerations with resignations and a "Compromise & Release"?

**Remember:** The global settlement will require separate consideration and should be drafted by employment law counsel working with the workers' compensation defense attorney.

27

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019




---

---

---

---

---


---

---

---

**QUESTIONS**

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019




---

---

---

---

---

---

---

---

**SPEAKER BIOS**

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019




---

---

---

---

---

---

---

---


**JOHN B. FLOYD, ESQ.**

The Law Offices of Floyd Skeren Manukian Langevin, LLP was established in 1987 by John B. Floyd. Since then, the firm has experienced significant and steady growth. Today, the Law Offices of Floyd Skeren Manukian Langevin has 10 offices throughout California. Mr. Floyd is a Certified Specialist and has devoted many years in the workers' compensation field representing insurance companies, self-insureds, municipalities and employers in §132a claims and serious and willful actions. He has served as an Arbitrator, Mediator, and Judge Pro Tem, as well as being an expert witness in bad faith claims and is a Certified Administrator for Self-Insurers.

Mr. Floyd has been involved in numerous committees, including California Chamber of Commerce Amicus Committee and the Employers' Fraud Task Force. Additionally, Mr. Floyd is nationally recognized and AV Rated by Martindale-Hubbell. He is also a member of the California Association of Joint Powers Authorities (CAJPA).

Mr. Floyd helped publish Retired Judge David W. O'Brien's treatises on *California Workers' Compensation Claims and Benefits* and *California Unemployment and Disability Compensation Programs*.

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019




---

---

---

---

---

---

---

---

### TODD T. KELLY, ESQ.

Mr. Kelly is of counsel with the Law Offices of Floyd Skeren Manukian Langevin, LLP and brings with him not only over a quarter-century of litigating workers' compensation claims, but also the business acumen and skills associated with effective account management and client success. He is a State Bar Certified Specialist in Workers' Compensation who has authored articles and spoken on behalf of Lorman Education Services, the Council on Education in Management, and the Employer's Advisory Council.

Mr. Kelly has acted as a Judge Pro Tem with the Workers' Compensation Appeals Board and serves as a guest speaker for various entities and organizations. He is licensed to practice before all State and Federal Courts in California and is a member of all applicable Bar Associations. Mr. Kelly is a lifetime member of the Cambridge Who's Who and is the recipient of the Award of Excellence from the American Biographical Institute. Similarly, he is a Gold Congressional Awardee, is a Paul Harris Fellow with Rotary International, and sits on the Board of Directors for Ventura County Council, Scouts BSA.

31

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019



---

---

---

---

---

---

---

---

---

---



32

All Rights Reserved ©FLOYD SKEREN MANUKIAN LANGEVIN, LLP w/ FISHER & PHILLIPS LLP 2019

---

---

---

---

---

---

---

---

---

---