



Firing Injured Workers — Recipe for Disaster? California Labor Code Section 132a

No coverage from insurance, so you are paying for it!

Not only can your employees hire attorneys to litigate their claims at the Workers' Compensation Appeals Board (WCAB) for injuries potentially caused from industrial work at your company, they can also bring a petition for discrimination under California Labor Code Section 132a.

Of course, your insurer will pay for your workers' compensation claims, however 132a discrimination claims are not covered by your workers' compensation insurance. That money is coming out of your pocket—typically \$175 per hour or more for your attorney to defend against it, and up to \$10,000 plus lost wages or reinstatement of employment if your injured worker wins.

Injured workers that hire lawyers for their workers' compensation claims are the primary culprits for 132a petitions. Their lawyers attempt to leverage the 132a allegations for bigger settlements. For employees that don't hire lawyers, a 132a petition is an unlikely occurrence.

Discrimination: California Labor Code Section 132a

California Labor Code Section 132a clearly states that it is illegal to fire, threaten to fire, or discriminate in any manner against an employee who has or intends to file a claim for workers' compensation. An adverse action against an employee may include any type of treatment that puts the employee at a disadvantage.

This generally includes wrongful termination or threatening to fire an employee. However, it could also include:

- Reducing the employee's hours
- Reducing the employee's salary or hourly pay
- Change in work duties
- Scheduling the employee at a time that the employer knows the employee cannot work
- Failing to promote the employee
- Reporting the employee for immigration violations
- Constructive discharge
- Denial of benefits
- Encouraging other employees to punish the employee

You do not necessarily have to follow through on the adverse action against the employee. For example, threatening an employee with termination may be considered unlawful discrimination even if you never fire the employee.

To successfully claim discrimination under 132a, an employee must establish the following:

1. Employee filed or made known their intent to file a workers' compensation claim before or at the time of the discrimination, regardless of whether the employee was awarded workers' compensation benefits.
2. Employer fired, threatened to fire, or discriminated against the employee because of the injury or claim.
3. Employer's act singled out the employee as a direct consequence of the work-related injury or claim.

The penalty for 132a discrimination may include any or all of the following:

- 50% increase in compensation to the injured worker, up to \$10,000 cap
- Injured worker's attorney costs, not to exceed \$250
- Reinstatement to prior position, if able to perform
- Reimbursement for lost wages resulting from the discrimination

The injured worker only needs to prove to the WCAB judge that the discrimination taken by you was a consequence of the employee's workplace injury or workers' compensation claim, and that the injured worker was treated poorly or differently than other employees.

If you, as an employer, have a uniformly applied personnel policy, discrimination is more difficult to prove. Example: When you terminate any employee after three days of "no call/no show" in absence of medical documentation, regardless of cause, there is no discrimination.

It is important to note that favorable treatment of an injured worker could also pose issues with non-injured employees. Again, it is best to have written safety and personnel policies in place. Follow your policies and document your interactions with your workers.

Is there a way to avoid 132a petition?

A potential way to avoid this situation is to offer terminated employees a small amount of severance (maybe two weeks or more) in exchange for a general release and waiver of all civil claims, and include 132a claims. Currently, California law seems to be open to the notion that an employee can waive these rights, but an injured worker is never required to waive rights to common workers' compensation benefits.

Please keep in mind, that Employment Practice Liability Insurance (EPLI) is not always your solution to defend against 132a. In general, many EPLI policies will bar claims for workers' compensation matters, and that would include 132a petitions. Another added issue is that EPLI usually has a \$25,000 self-insured retention or deductible, so your money is still at stake for all claims processed under EPLI.

If you receive notice of a 132a petition, immediately notify your broker and insurance carrier. Most likely your workers' compensation insurance policy will not cover this allegation, so you must take action to protect yourself. On a few workers' compensation insurance policies offered in California, 132a petitions may be insured for the defense fees and costs only. But remember, these policies will never indemnify you if your employee prevails on the discrimination brought by your company.

Our best advice: Don't terminate an injured worker on workers' compensation without consulting first with your employment lawyer, so you can determine your risk.

At PentaRisk Insurance Services. LLC, please reach out to Nicole Corey at 408.418.2746, or Greg Roush at 408.418.2736, for more information.

California

PentaRisk Insurance Services
2033 Gateway Pl Ste 150
San Jose CA 95110
p 408.418.2720 · f 408.418.2721
CA License Number 0G47886

Georgia

PentaRisk Associates of Georgia
1870 The Exchange SE #100
Atlanta GA 30339
p 404.809.2530 · f 404.809.2531
GA License Number 186880

Alabama

PentaRisk Associates of Alabama
500 Office Park Dr Ste 420
Birmingham AL 35223
p 205.874.9700 · f 404.809.2531
AL License Number 0415532

Illinois

PentaRisk Associates of Illinois
600 Spring Hill Ring Ste 201
West Dundee IL 60118
p 847.649.5000 · f 847.836.1431
IL License Number 100288418