

## **MEMORANDUM OF LAW**

**DATE:** October 31, 2001  
**TO:** Ed Oliva, Director, Risk Management  
**FROM:** Deborah A. Hollingsworth, Deputy City Attorney  
**SUBJECT:** Workers' Compensation Disability Benefits Offsets

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### **INTRODUCTION**

Deloitte and Touche, in providing management consulting services for the Workers' Compensation Division of the City of San Diego, recommended that workers' compensation payments be reduced by amounts received by the applicant/employee from other income sources such as unemployment insurance, social security disability income, and other income. In its recommendation, the firm cited California Labor Code sections 4653, 4654 and 4657.

### **QUESTION PRESENTED**

What sources of an employee's income, if any, may be used to offset workers' compensation disability benefits paid by the City of San Diego to a City employee?

### **SHORT ANSWER**

The City may offset, against State of California Workers' Compensation disability benefits paid by the City to a City employee: (1) monies received by the employee as part of a third party settlement for the work injury, (2) monies paid by the City to the employee as part of a settlement or verdict under the Federal Harbor and Navigation Act, and (3) self-employment or dual employment earnings. The City has no right to a credit or offset for benefits paid by the Social Security Administration Office or California State Unemployment Office to a City employee for a work injury.

### **ANALYSIS**

#### Permitted Offsets

There are only three types of permitted offsets of an employer's payment of workers' compensation benefits against an employee's income. First, pursuant to California Labor Code

sections 3852 and 3861, an employer is entitled to seek a credit with the Workers' Compensation Appeals Board for an employee's net recovery in a third party lawsuit related to the work injury. A petition for credit must be approved by the court. However, the Workers' Compensation Appeals Board may reduce the amount of the credit if it finds the employer was negligent and a contributing cause of the work injury. *Associated Construction and Engineering Co. v. Workers' Comp. Appeals Bd.*, 22 Cal. 3d 829, 842; 43 Cal. Comp. Cases 1333 (1978).

Second, if an employee files a concurrent federal civil lawsuit against his employer, pursuant to the Longshore and Harbor Workers' Compensation Act, the employer is entitled to deduct, dollar for dollar, any benefits paid in the State of California Workers' Compensation case for the same injury, against any award or settlement in the federal civil lawsuit pursuant to 33 U.S.C. section 903, subsection (b) and 933, subsection (g)(2). *Sea-Land Service, Inc. v. Workers' Comp. Appeals Bd.*, 14 Cal. 4th 76, 91-92; 61 Cal. Comp. Cases 1360 (1996); *Employment Development Department v. Workers' Comp. Appeals Bd.*, 64 Cal. Comp. Cases 239-241 (1999).

Third, an employer is entitled to an offset of its payment of temporary disability payments for: (1) any monies received by the applicant from another employer during the period he was temporarily disabled, and (2) any monies received from self-employment earnings less the cost of goods and other expenses reasonably related to the production of the self-employment income. *Hupp v. Workers' Comp. Appeals Bd.*, 39 Cal. App. 4th 84, 87-89; 60 Cal. Comp. Cases 928 (1995).

Deloitte and Touche refers to three California Labor Code sections to support the City's potential recovery of offsets against workers' compensation benefits paid by the City. These sections are: Labor Code sections 4653, 4654 and 4657. None of these sections allow the City an offset against any payment of Workers' Compensation benefits made to a City employee.

California Labor Code section 3752 makes it abundantly clear that the City is not entitled to any offset against its payment of benefits unless the Labor Code specifically prescribes it:

Liability for compensation shall not be reduced or affected by any insurance, contribution or other benefit whatsoever due to or received by the person entitled to such compensation, except as otherwise provided by this division.

Upon reviewing the pertinent statutes regarding offsets in the Labor Code, it is clear there are no statutory provisions that allow an employer to take an offset of the employee's receipt of unemployment benefits, unemployment disability benefits or federal social security benefit payments against any workers' compensation benefits the employee receives from the City.

#### Unemployment Compensation Benefits

California Labor Code section 4653, cited by Deloitte and Touche, states what the basic formula is for computing temporary total disability compensation, and California Labor Code

section 4657 sets forth the method for computing temporary partial disability payments. Neither section discusses offsets or collateral benefits. Thus, neither of these sections can be used as authority to take an offset against any collateral benefits received by an employee.

California Labor Code section 4654, cited by Deloitte and Touche, provides that:

If the injury causes temporary partial disability, the disability payment is two-thirds of the weekly loss in wages during the period of such disability. However, such disability payments shall be reduced by the sum of unemployment compensation benefits and extended duration benefits received by the employee during the period of temporary partial disability.

This section means that the temporary partial disability payment shall be reduced by any unemployment benefits payments received by the employee for unemployment compensation benefits. However, it is not the City that receives the offset. An employer is not entitled to a credit for unemployment compensation benefits paid to an injured employee. Only the Department of Human Resources Development is entitled to claim a lien against any award of workers' compensation benefits paid by the employer to the employee for the same days of disability for which unemployment compensation benefits were paid. *El Cortez Hotel v. Workers' Comp. Appeals Bd.*, 39 Cal. Comp. Cases 159, 161 (1974); Cal. Code Regs. tit. 8 § 10772; Cal. Lab. Code §§ 3865, 4903(g).

The only liens that may be asserted against a workers' compensation award are set forth in California Labor Code sections 4903 and 4903.1. These provisions are narrowly construed. *Williams v. Workers' Comp. Appeals Bd.*, 17 Cal. App. 4th 582, 589; 58 Cal. Comp. Cases 534 (1993).

California Labor Code section 4903, subsection (g) provides for a lien solely against temporary disability benefits paid in a workers' compensation case, for the amount of unemployment compensation benefits and extended duration benefits paid for the same days for

which an award of temporary disability indemnity payments is made by the Workers' Compensation Appeals Board.

#### Unemployment Compensation Disability Benefits

State unemployment compensation disability benefits are distinguished from unemployment compensation benefits. State unemployment compensation disability benefits are only paid if the employee is disabled. Regular unemployment benefits are only paid if the employee is able to work.

California Labor Code section 4903, subsection (f) provides for a lien against workers'

compensation temporary disability benefits for the amount of unemployment compensation disability benefits, commonly called state disability indemnity (SDI) paid by the Employment Development Department (EDD) while there is uncertainty as to whether workers' compensation or unemployment compensation disability benefits are payable to an injured employee. For injuries after January 1, 1994, a state disability lien may also be asserted against permanent disability compensation payable to an employee. Cal. Lab. Code §§ 3865, 4904(f). However, nothing in this code section allows the kind of offset Deloitte and Touche recommends. Only the State of California can file these liens. Thus, the City cannot offset unemployment compensation disability benefits.

#### Federal Social Security Benefits

42 U.S.C. § 424(a) authorizes the federal government's Social Security Administration to decrease the amount an employee is entitled to receive when the combined amounts of social security and state workers' compensation benefits exceed 80 percent of the employee's average current earnings. This reduction will not be effective if the state workers' compensation law or plan provides for a reduction of compensation benefits by reason of the receipt of any disability social security benefits pursuant to 42 U.S.C. § 424(a)(2).

In California, the state's workers' compensation laws do not provide for the reduction of compensation benefits by the employee's receipt of any federal social security disability benefits although other states have adopted such laws.

California Labor Code section 4909 states in pertinent part:

Any payment, allowance, or benefit received by the injured employee during the period of his incapacity . . . which was to not then due and payable or when there is any dispute or question concerning the right to compensation shall not in the absence of any agreement, be an admission of liability for compensation on the part of the employer, but any such payment, allowance or benefit may be taken into account by the appeals board in fixing the amount of the compensation to be paid.

However, Labor Code section 4909 does not authorize a credit against workers' compensation for federal social security disability benefits received by an employee. *Marriott Corp. v. Workers' Comp. Appeals Bd.*, 60 Cal. Comp. Cases 234, 235 (1995). Labor Code section 4909 only applies to advance payments made by the employer, not to payments made by the Social Security Office. *Id.*

The City has no right to take a credit or offset against federal social security benefits paid to an employee for a work injury. Only the Social Security Administration has a right to offset its payment of social security benefits to a City employee if the employee receives a workers' compensation settlement. *Hatch v. Heckler*, 626 F. Supp. 1367, 1371-72 (N.D. Cal. 1986). In *Hatch*, the court noted, "[t]he intent of Congress was to prevent collection of duplicate benefits. Thus, if the workers' compensation award, or settlement, represents benefits on account of the worker's disability, the federal disability payments will be reduced pro tanto." *Id.*

**CONCLUSION**

The City's right to take an offset against an employee's receipt of collateral benefits from a work injury is statutorily limited by California Labor Code section 3752. Upon reviewing the pertinent sections of the California Labor Code that refer to collateral benefits, there are no Labor Code provisions which allow the City the right to take an offset for an employee's receipt of unemployment compensation benefits, unemployment compensation disability benefits, or federal social security disability benefits against any workers' compensation benefits paid by the employer.

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By

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