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Christian B. Nielsen, (408) 792-5907, CBN@R-WINC.COM

Anne C. Bailey, (408) 792-5919, ACB@R-WINC.COM

“UNFRIENDLY FIRE”

Workers' Compensation Exclusive Remedy Hypotheticals

(1) A Nevada state trooper traces a fugitive to Inyo County, California. The trooper contacts the Inyo County Sheriff's Dept. He deputized so that he can participate in the apprehension of the fugitive. The trooper rides along with an Inyo County Deputy to make the arrest. On the way, they are in a car accident. Is the trooper's lawsuit against Inyo County barred by the workers' comp exclusive remedy rule?

ANSWER: No. A law enforcement officer from an adjoining state who is deputized to investigate a crime in California is not an employee. Labor Code §3352(l). Also, there is no indication that the Nevada state trooper was serving Inyo County or working under the control of the Inyo County deputy.

(2) A police officer's wife volunteers to work at the department's annual charity auction, which raises money for a city-run stay-in-school program. During the event, which is held on the lawn of the police department, she slips and falls. Is her lawsuit against the city barred by the workers' comp exclusive remedy rule?

ANSWER: Depends on the city. Labor Code §3352(I) provides that “any person performing volunteer service for a public agency . . . who receives no remuneration for the services other than meals, transportation, lodging, or reimbursement for incidental expenses” is not an employee. However, a public agency can pass a resolution declaring that volunteers are employees. Labor Code §3365.5.

(3) A police officer is called to a store to arrest a shoplifter. When he arrives, the shoplifter is sitting quietly next to a store security guard. Suddenly, he pulls a knife and flees into the store. The police officer asks the security to guard to assist him and they give chase. Coming around a corner, the police officer accidentally trips the security guard, who strains his back. Is the guard's lawsuit against the city barred by the workers' compensation exclusive remedy rule?

ANSWER: Maybe no, maybe yes. The guard could be considered a volunteer under Labor Code §3352(I). On the other hand, Labor Code §3366 provides that "each person (other than an independent contractor . . .) who is engaged in assisting any peace officer in active law enforcement service at the request of such peace officer is deemed to be an employee of the public entity that he or she is serving or assisting in the enforcement of the law." Labor Code §3366 is a neglected provision that has rarely been cited by the courts.

Note: the "fireman's rule" does not apply to privately-employed security guards. Marquez v. Mainframe (1996) 42 Cal.App.4th 881; see also Neighbarger v. Irwin Industries, Inc. (1994) 8 Cal. 4th 532 [holding that lawsuit by privately-employed firefighters was not barred by "fireman's rule"].

(4) The city of Palm Springs starts a graffiti abatement program in which juvenile offenders spend weekends cleaning graffiti instead of being incarcerated or fined. The program is run through the City of Palm Springs Police Department. One youthful offender claims that he is injured by fumes from the cleaning solvent. Is his lawsuit barred by the workers' compensation exclusive remedy rule?

ANSWER: Yes. Persons who work on public service projects in lieu of criminal penalties are considered employees of the public agency for whom they perform services. Arriaga v. County of Alameda (1995) 9 Cal.4th 1055. The county may also pass a resolution specifically entitling juvenile offenders engaged in rehabilitative work to workers' compensation benefits (and thereby subjecting them to the exclusive remedy rule). Labor Code §§3364.55, 3364.6, 3364.7.

(5) Tree roots are destroying walkways in front of City Hall. The City enters a contract with cement company to repair the sidewalks. The contract requires the cement company to repair the sidewalks within a certain time frame, but the city exercises no control over how this task is accomplished. While on the job, one of the cement company's employees is injured by a falling tree limb. He files a lawsuit claiming that the city parks department was negligent in maintaining the trees. Is his lawsuit barred by

the workers' compensation exclusive remedy rule?

ANSWER: No. The cement company's employees would be considered independent contractors with respect to the City because (1) the City does not control the means by which the task is accomplished; (2) the work performed is relatively skilled; (3) the work is not part of the City's regular business; (4) the time period is relatively short; (4) the workers use tools and equipment provided by the cement company. Labor Code §3353; Kowalski v. Shell Oil Co. (1979) 23 Cal.3d 168, 175.

(6) The flu season hits the police department's clerical employees particularly hard. The department uses Kelly Temporary Services to obtain the needed staff. One of the "temps" trips over a computer network cable and strains her back. Is her lawsuit against the city barred by the workers' compensation exclusive remedy rule?

ANSWER: Yes. Although "temps" are employed by their temporary services agency, they would also be considered "special employees" of the City because while on the job, they are under the City's supervision and control. Santa Cruz Poultry, Inc. v. Superior Court (1987) 194 Cal.App.3d 575.

(7) The Palm Springs Police Department hires a karate master to train officers in hand-to-hand combat. The officers attend classes at the master's studio. The master provides mats and other equipment. The officers are required to purchase karate uniforms for which the department reimburses them. During an exercise, the karate master is injured. He sues the officer responsible as well as the city. Is his lawsuit barred by the workers' compensation exclusive remedy rule?

ANSWER: No. The karate master is an independent contractor. HOWEVER, the doctrine of "assumption of the risk" will probably bar his action. See Knight v. Jewett (1992) 3 Cal.4th 296 [holding that a person injured while engaged in an athletic activity cannot sue a co-participant for an injury caused by a risk inherent in the activity].

(8) Same facts as (7), except that the karate master teaches classes at the police department gym using mats and equipment provided by the department. Is his lawsuit barred by the workers' compensation exclusive remedy rule?

ANSWER: Probably not. Although the karate master does not provide his own equipment, other factors indicate that he is an independent contractor. In particular, he is hired to perform a specific task (teaching karate) in which he has a special skill, and the police department exercises no control over how that task is accomplished.

HOWEVER, assumption of risk would probably still apply.

(9) Sgt. Strong is a police officer employed by the City of Palm Springs Police Department. He is also a nationally-known expert in martial arts, and is frequently asked to teach hand-to-hand combat to police departments around the county. During one training sessions, an officer from the Bakersfield is badly injured. He sues Sgt. Strong and the City of Palm Springs arguing that Sgt. Strong was negligent. Is his lawsuit barred by the workers' compensation exclusive remedy rule?

ANSWER: No. The Bakersfield officer was not providing any service to the City of Palm Springs when he was injured in the training session, and therefore, he cannot be considered an employee of Palm Springs. Sgt. Strong was providing services to the City of Bakersfield, but he appears to have been an independent contractor, and therefore cannot be considered a co-employee of the Bakersfield officer.

The "fireman's rule" (assumption of risk) might bar the lawsuit, if injuries that occur during training are considered part of the inherent risks of police work. This was the holding under similar facts in Pfau v. Kims Hapkido (1999) 74 Cal.App.4th 58. However, the California Supreme Court subsequently "depublished" the decision which indicates it did not agree with that holding.

(10) An applicant for a job as a firefighter is injured during a physical fitness test. He sues the City alleging that the fitness test was negligently run. Is his lawsuit barred by the workers' compensation exclusive remedy rule?

ANSWER: Yes. A job applicant engaged in a physical fitness tryout is an "employee" for purposes of workers' compensation because the employer receives a benefit from the tryout and the applicant subjects himself to the employer's control. Laeng v. Workers' Comp. Appeals Bd. (1972) 6 Cal.3d 771.

(11) Same facts as (10) except that the applicant trips and falls during a job interview at the fire department. Is his lawsuit barred by the workers' compensation exclusive remedy rule?

ANSWER: probably not. Unlike a physical fitness test, a simple job interview does not subject the applicant to the employer's control.

(12) As part of its welfare reform package, Inyo County requires welfare recipients to perform various work around the county. Plaintiff is assigned to work as a school security guard. He is injured on the job and sues the County and the school

district. Is his lawsuit barred by workers' compensation?

ANSWER: Yes. The plaintiff is performing work in return for welfare benefits from the county and, while working as a security guard, is under the control of the school district. Therefore he is an employee of both the County and the school district. County of Los Angeles v. Workers' Comp. Appeals Board (1981) 30 Cal.3d 391; Arriaga v. County of Alameda (1995) 9 Cal.4th 1055.

(13) Pursuant to a mutual aid agreement, the California Department of Forestry (CDF) and the United States Forest Service (USFS) assist each other in fighting wildland fires. The agreement provides that the "protecting agency" is responsible for commanding the fire suppression activities (i.e., if the fire is on federal land, the USFS is in charge). The protecting agency reimburses the other agency for wages, expenses, and workers' compensation costs. While fighting a fire in a state forest, a CDF firefighter is killed. At the time, he is part of a CDF crew working under the direct supervision of a CDF commander. His heirs sue the United States for wrongful death, claiming that USFS failed to warn the CDF crew of an unusually dangerous situation. Is the heirs' lawsuit barred by workers' compensation?

ANSWER: Probably not. Labor Code §3365 provides that each person "other than an independent contractor" who is engaged in fire suppression activities is deemed an employee of the public entity he is serving or assisting. Under these facts, however, there is no evidence that the USFS exercised sufficient control over the CDF firefighter to make him a "special employee" as opposed to an independent contractor. See Enslow v. United States (9th Cir. 1994) 1994 U.S. App. LEXIS 32765 [revising district court opinion to the contrary in Enslow v. United States (C.D.Cal. 1992) 811 F.Supp. 503]. However, assumption of risk (fireman's rule) might apply. Calatayud v. State of California (1998) 18 Cal.4th 1057.

Note: the U.S. government runs its own workers' comp. system under the Federal Employees Compensation Act (FECA), 5 U.S.C. §§8101-8173, and is not subject to California's workers' compensation laws. However, federal law also provides that the United States is liable for its torts as a private person "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). Therefore, in a suit against the United States, California law governs whether a "special employment" relationship exists between an individual and the U.S. government.

(14) Same facts as (13) except that a USFS firefighter sues the state of California for negligence by CDF.

ANSWER: Same workers' compensation and assumption of risk analyses. In addition, state and local public entities are immune from liability for injuries resulting from failure to provide fire protection, the condition of fire equipment and facilities (except as imposed by the Vehicle Code), and failure to provide sufficient fire protection equipment or personnel. Gov. Code §§850, 850.2, 850.4. These immunities apply to conduct of firemen fighting fires (Heimberger v. City of Fairfield (1975) 44 Cal.App.3d 711). Note, there is no comparable immunity for conduct of police. Public entities are immune from liability only for failure to provide any police protection, and for certain specific acts such as allowing a prisoner to escape. Gov. Code §§844-846.

(15) During a massive forest fire in the Sierra foothills, CDF puts out a call for volunteers to assist in fighting the fire. A local man who responds to the call is injured while working in a volunteer unit under the command of CDF personnel. Is his lawsuit against the State barred by the workers' compensation exclusive remedy rule?

ANSWER: Yes. Although he is a volunteer, Labor Code §3365(a) provides that "each person engaged in suppressing a fire pursuant to Section 4153 or 4436 of the Public Resources Code . . . is deemed, except when the entity is the United States or an agency thereof, to be an employee of the public entity that he is serving or assisting." Public Resources Code §4153 and §4436 allow fire departments to summon citizens for assistance in fighting fires. Note that if the volunteer were working under the supervision of the USFS this provision would not apply; however, he might still be a special employee under common law principles. See Enslow v. United States (C.D.Cal. 1992) 811 F.Supp. 503 [rev'd, Enslow v. United States (9th Cir. 1994) 1994 U.S. App. LEXIS 32765].

(16) A CHP officer and a police officer from the City of Pasadena are trying to subdue a suspect when the CHP officer's gun accidentally discharges, injuring the Pasadena officer. Is the Pasadena officer's suit against the State of California barred by the workers' compensation exclusive remedy rule?

ANSWER: No, absent any facts indicating that he was working under the CHP's direction and control. HOWEVER, his lawsuit is barred by the "fireman's rule" because his injury occurred as a result of a risk inherent in the emergency he was hired to confront. Calatayud v. State of California (1998) 18 Cal.4th 1057.

(17) The police departments of Palm Springs, Palm Desert, and Cathedral City form a regional SWAT team called the Desert SWAT Team. The police chiefs sign a mutual aid agreement, and develop an incident manual that creates a unified command system. However, the City Councils never pass a joint powers agreement. During a

training exercise, a SWAT team member from Cathedral City accidentally shoots and kills a reserve police officer from the City of Palm Springs, who had been playing the role of a terrorist. The Cathedral City officer had neglected to unload his gun. The reserve officer's family sues Cathedral City for negligence. Is their action barred by the workers' compensation exclusive remedy rule?

ANSWER: Maybe yes, maybe no. Although the facts indicate that all the officers were working under the direction and control of, and providing services to, the Desert SWAT Team, the Desert SWAT Team cannot be considered an "employer" under the Workers' Compensation Act because it is not a valid joint powers entity. Brassinga v. Mountain View (1998) 66 Cal.App.4th 195. However, the Palm Springs officer might be considered a "special employee" of Cathedral City if it can be shown that he was working under the direction and control of, and providing services to, Cathedral City at the time of his death.

Note: it is doubtful that the "fireman's rule" would apply because the officer probably did not "assume the risk" of being shot with a loaded gun during a training exercise.