

DEPARTMENT OF INSURANCE

EXECUTIVE OFFICE, LEGAL DIVISION

45 FREMONT STREET, 23RD FLOOR
SAN FRANCISCO, CA 94105Kenneth B. Schnoll
General Counsel & Deputy Commissioner
TEL: 415-538-4379
FAX: 415-904-5889
E-Mail: Kenneth.Schnoll@insurance.ca.gov
www.insurance.ca.gov

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[Name and Address Redacted]

SUBJECT: Senate Bill 189
Change to Definition of "Employee"
under California Labor Code §3352(a)(19)

The California Department of Insurance received a request for a legal opinion regarding the issue presented below. The following legal opinion is issued pursuant to California Insurance Code section 12921.9.

I. Issue Presented

What coverages must be included in a disability policy for such policy to be comparable in scope and coverage to a California workers' compensation policy and sufficient to permit officers and directors of cooperative corporations to waive workers' compensation coverage pursuant to California Labor Code section 3352(a)(19)?

II. Summary Conclusion

Effective July 1, 2018, a disability policy must include those coverages set forth in Section V below for the disability policy to be comparable in scope and coverage to a California workers' compensation policy.

III. Background

Effective as of July 1, 2018, SB 189 authorizes officers and members of boards of directors of a cooperative corporation organized pursuant to the California Cooperative Corporation Law (Cal. Corp. Code §12200 et seq.) who execute a document in writing and under penalty of perjury to waive their rights under the laws governing California workers' compensation by stating that they are covered by both a health care service plan or health insurance policy and a disability insurance policy that is "comparable in scope and coverage to a workers' compensation insurance policy," as determined by the Insurance Commissioner. The waiver filed by an officer

or board member of a cooperative corporation is effective upon the date it is received and accepted by the cooperative's insurance carrier. The insurance carrier, with the consent of the individual executing the waiver, may, however, elect to backdate the acceptance of the waiver up to 15 days prior to the date of receipt and acceptance of the waiver.

The officer or member of the board of directors seeking a waiver of their rights to California workers' compensation benefits is required to provide a copy of the waiver to all other officers and members of the board of directors of the cooperative corporation, and the cooperative corporation is required to keep a copy of the waiver on file. The insurance carrier, insurance agent, or insurance broker is not required to investigate, verify, or confirm the accuracy of the facts contained in the waiver. Instead, there is a conclusive presumption that a person who executes such a waiver is not covered by California workers' compensation benefits. Cal. Labor Code §3352(a)(19).

An officer or director of a private cooperative corporation who is the sole shareholder of a private cooperative corporation is excluded from the definition of "employee" of the cooperative unless the officer, director, or private cooperative has elected to be subject to liability for workers' compensation pursuant to Labor Code section 4151(a). Cal. Labor Code § 3352(a)(19)(B).

IV. Analysis

Individuals who otherwise qualify for a waiver of workers' compensation coverage pursuant to California Labor Code section 3352(a)(19) must be covered by a disability policy that is comparable in scope and coverage to a California workers' compensation policy. There is no legislative history or other guidance with respect to what is required for a disability policy to be comparable in scope and coverage to a California workers' compensation policy. The health care expenses of individuals who waive their rights to workers' compensation benefits pursuant to California Labor Code section 3352(a)(19) must be covered by a health care service plan or health insurance policy and a disability policy that is comparable in scope and coverage to a workers' compensation policy. Accordingly, to avoid requiring redundant coverage of health care expenses in both the required health care service plan or health insurance policy and the required disability policy, the Legislature presumably intended that the required disability policy include only those workers' compensation indemnity benefits not covered by a typical health care service plan or health insurance policy.

The following chart provides an overview of the principal differences between the scope and coverage of California workers' compensation indemnity benefits and the typical scope and coverage of the indemnity benefits available under a disability policy:

	WC Temporary Disability	WC Permanent Disability	Disability Policy
Benefit Amount	Amount of benefit is 2/3 of average weekly earnings subject to a statutory minimum and maximum, that is paid periodically while the injured worker recovers from his or her work injury.	Amount of benefit is based on a measurement of permanent physical impairment as set forth in AMA Guides, consideration of diminished future earning capacity, and an adjustment for occupation and age. This benefit takes the form of a one-time “award” to compensate the injured worker for his or her impairment.	Amount of benefit is based upon a percentage of earnings, usually up to 60%. The benefit amount can be a percentage of lost income (usually 40-60%) or a set monthly amount for a term of years.
Benefit Duration	Benefits are subject to the applicable cap, or limitation on the duration of benefits, unless an exception applies.	Permanent and total disability (100%) results in temporary disability payments for life. Certain injuries are presumed to result in permanent and total disability (e.g. loss of sight in both eyes).	Benefits are generally payable until the beneficiary reaches 65 years of age or Social Security retirement age.
Lifetime Payments	N/A	Injured workers are entitled to a life pension if permanent disability is 70% or more. Injured workers are entitled to a benefit equal to temporary disability for life if they are permanently and totally (100%) disabled.	Severity of injury does not affect benefit amount or duration; no lifetime payments are available.

As set forth in the chart, the covered benefits under a typical disability policy are not generally comparable in scope and coverage to the indemnity benefits under a California workers’ compensation policy. Unlike most disability policies, California workers’ compensation insurance provides liberal benefits and reimbursement for certain expenses that arise in connection with a claim, including indemnity payments, lifetime medical benefits, mileage, penalties for late payments, job displacement benefits for injured workers who cannot return to work, death benefits, and other ancillary benefits.

As a result, unless the officers and members of the board of directors of California cooperative corporations are able to obtain a disability policy that is comparable in scope and coverage to a California workers' compensation policy, such officers and members of the board of directors of cooperative corporations will be precluded from waiving their rights to California workers' compensation benefits pursuant to SB 189.

V. Workers' Compensation Indemnity Benefits to be Provided for a Disability Policy to be Comparable in Scope and Coverage to a Workers' Compensation Policy

Based on the foregoing, for a disability policy to be comparable in scope and coverage to a workers' compensation policy for purposes of SB 189, the following workers' compensation indemnity benefits must be provided by the disability policy:

1. Benefits are payable if the individual's injury, illness or condition arises out of employment or occurs in the course of employment in accordance with the California Labor Code section 3600 et seq.
2. Benefits are payable in accordance with the California Labor Code section 4451 et seq. (permanent total disability and permanent partial disability benefits), California Labor Code section 4650 et seq. (commencement and manner of payment), California Labor Code section 4700 et seq. (death benefits), and California Labor Code section 4751 et seq. (benefits for subsequent compensable injuries), and include the following provisions:
 - a. Benefits are payable no later than 14 days after knowledge of the injury and disability and every two weeks thereafter in accordance with Labor Code section 4650, subject to the maximum period for the payment of temporary disability payments.
 - b. Benefits for temporary total disability and temporary partial disability are payable in accordance with Labor Code section 4650 et seq., and are subject to the minimum amounts payable pursuant to California Labor Code sections 4451 through 4459.
 - c. Benefits for permanent disability are payable in accordance with Labor Code sections 4658, 4659, 4660, 4660.1, 4661, 4661.5, and 4662.
 - d. Benefits for life pensions and total permanent disability are payable in accordance with Labor Code section 4659.
 - e. Supplemental job displacement benefits are payable in accordance with Labor Code sections 4658.5 through 4658.7.

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- f. Benefits for the death of the injured worker are payable in accordance with Labor Code section 4700 et seq.
- g. Benefits for subsequent compensable injuries are payable in accordance with Labor Code section 4751 et seq.

VI. Filing Disability Policy Forms

If an insurer intends to file a disability policy for approval pursuant to Labor Code section 3352(a)(19) (effective July 1, 2018), the policy forms should be filed in the System for Electronic Rates and Forms Filings (SERFF), in the California LAH (life and health) instance, noting the following in the General Information section:

Disability Policy pursuant to SB 189, that made changes to Labor Code section 3352(a)(19) pertaining to workers' compensation insurance for officers or members of the board of directors of a cooperative corporations.

Very truly yours,



Kenneth B. Schnoll
General Counsel & Deputy Commissioner