

IT TAKES A JEDI

BALANCING ADA/FEHA AND INDUSTRIAL CLAIMS



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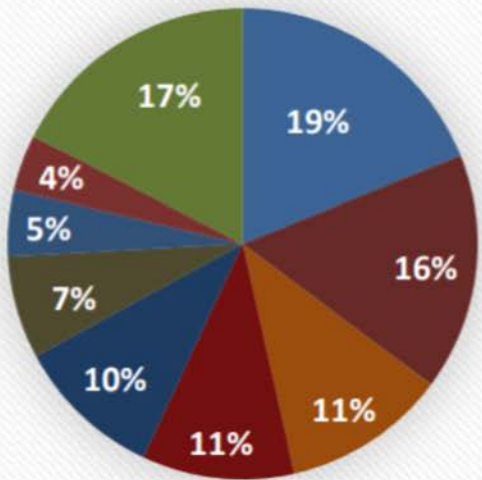


UPDATING YOUR WORLD

- Real Life Changes Since We Last Spoke on These Issues
 - Differences in Emphasis by Claimant's Counsel
 - New Strategies for Prosecution/Handling of Claims
 - Increases in Exposures – Defense and Indemnity
- Laws Have Changed
 - Major New Laws/Emphasis on Privacy
 - Internal “Realities” in Information Handling
- And, W/C and Civil Coverage Providers Are Far More Divergent in Views, Scope and Approach to handling “cross-over” claims

WHEN THEY CHANGE CATEGORIES ... THE NUMBERS INITIALLY LOOK A LITTLE DIFFERENT

Bases of Employment Complaints



- 19% Age - 1,836
- 16% Disability - 1,579
- 11% Engagement in Protected Activity - 1,094
- 11% Sex - Gender - 1,018
- 10% Race - 984
- 7% Sexual Harassment - 683
- 5% Family Care - 441
- 4% National Origin - 374
- 17% All Other - 1,696

TABLE 8: RIGHT-TO-SUE LETTERS BY BASIS⁵

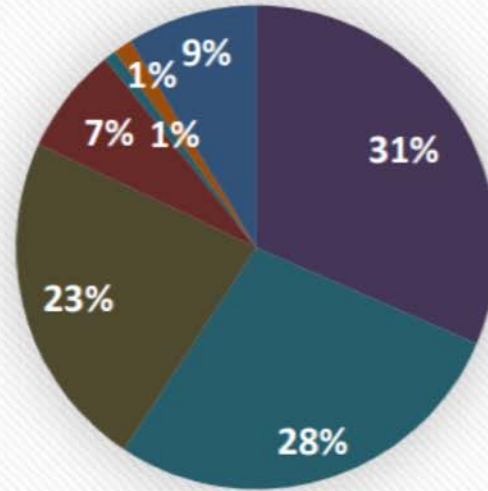
Age	8,331
Ancestry	1,129
Association with a member of a protected class	1,880
Color	1,675
Disability	6,662
Engagement in Protected Activity	8,468
Family Care	3,653
Genetic Information	268
Marital Status	472
Medical Condition	3,645
Military or Veteran Status	144
National Origin	1,693
Race	3,010
Religion	591
Sex - Gender	4,792
Sexual Harassment ⁶	3,698
Sex - Gender Identity	460
Sex - Pregnancy	1,002
Sexual Orientation	698
Other	1,582
Total	53,853

DFEH EMPLOYMENT COMPLAINANTS' COUNTY OF RESIDENCE

County	Right-to-Sue	Investigated	Totals
Los Angeles	4,255	1,459	5,714
Orange	1,220	385	1,605
San Diego	744	388	1,132
San Bernardino	544	218	762
Riverside	479	194	673
Alameda	473	356	829
Sacramento	438	472	910
San Francisco	410	250	660
Santa Clara	373	250	623

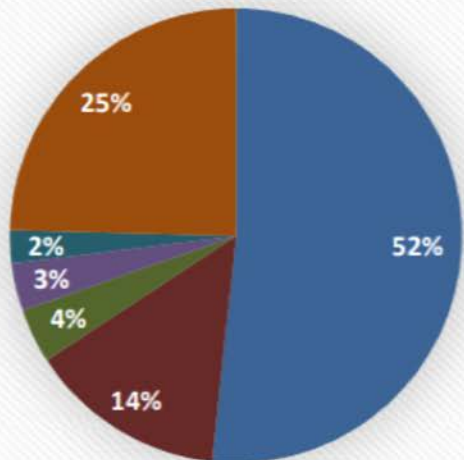
MORE CATEGORIES...

Number of Complainants by Race



- 31% White - 2,868
- 28% Hispanic or Latino - 2,526
- 23% Black or African American - 2,067
- 7% Asian - 654
- 1% Native Hawaiian or Other Pacific Islander - 74
- 1% American Indian or Alaska Native - 114
- 9% All Other - 797

Number of Complaints by National Origin



- 52% American [U.S.] - 3,473
- 14% Mexican - 946
- 4% Other Hispanic/Latino - 262
- 3% English - 227
- 2% Filipino - 158
- 25% All Other - 1,652

LATEST DIR REPORT INFORMATION

- Key Drivers

- Rates Stabilized Due to Increased Wages and Increased Number of Employees
- SB 863 Drivers Continue to be Effective

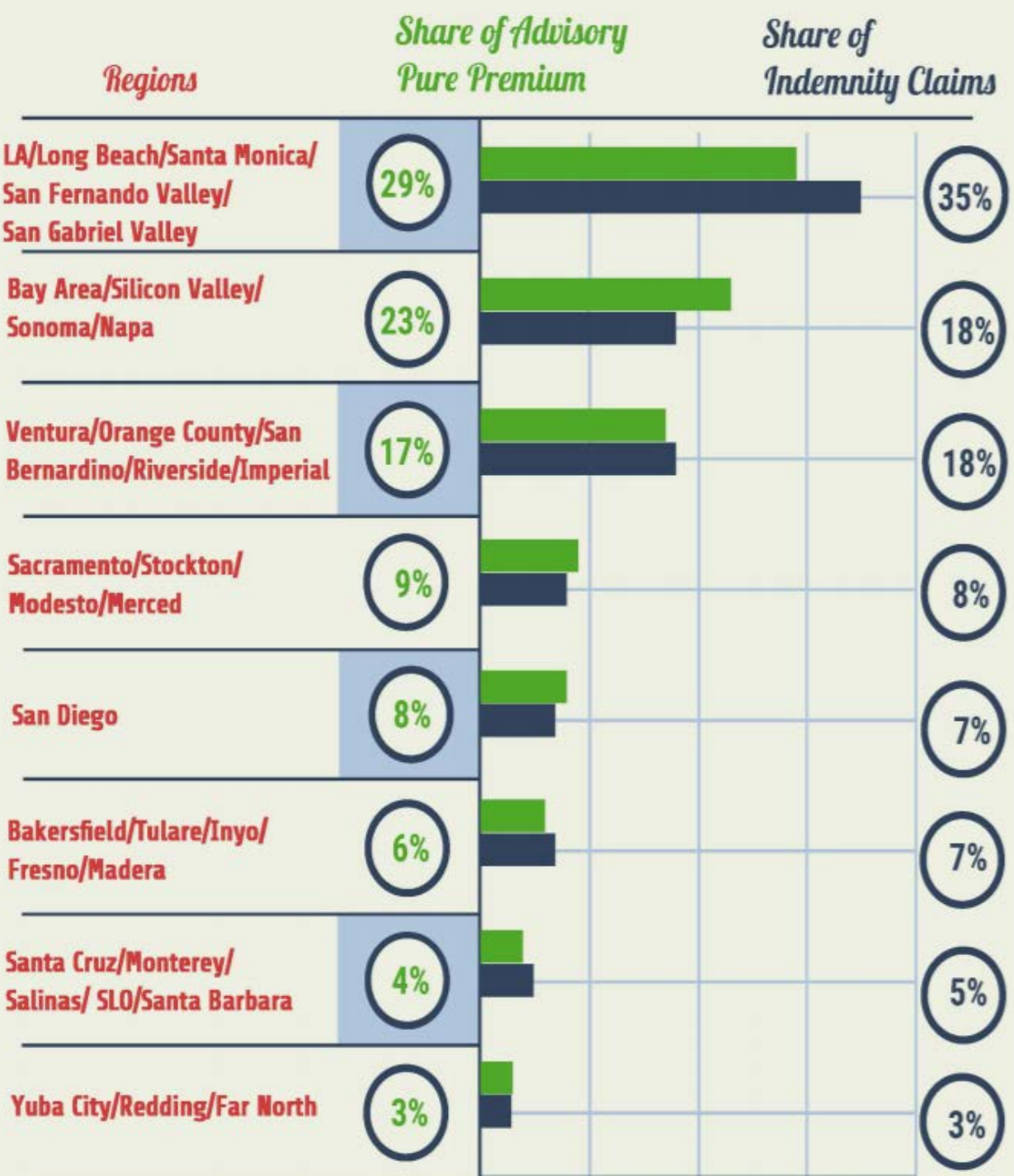
- Recognizing Also

- We have a high frequency of permanent disability claims
- We have high medical costs per claim
- A more prolonged pattern of medical treatments (Chart 30)
- Much higher than average costs of handling claims and delivering benefits



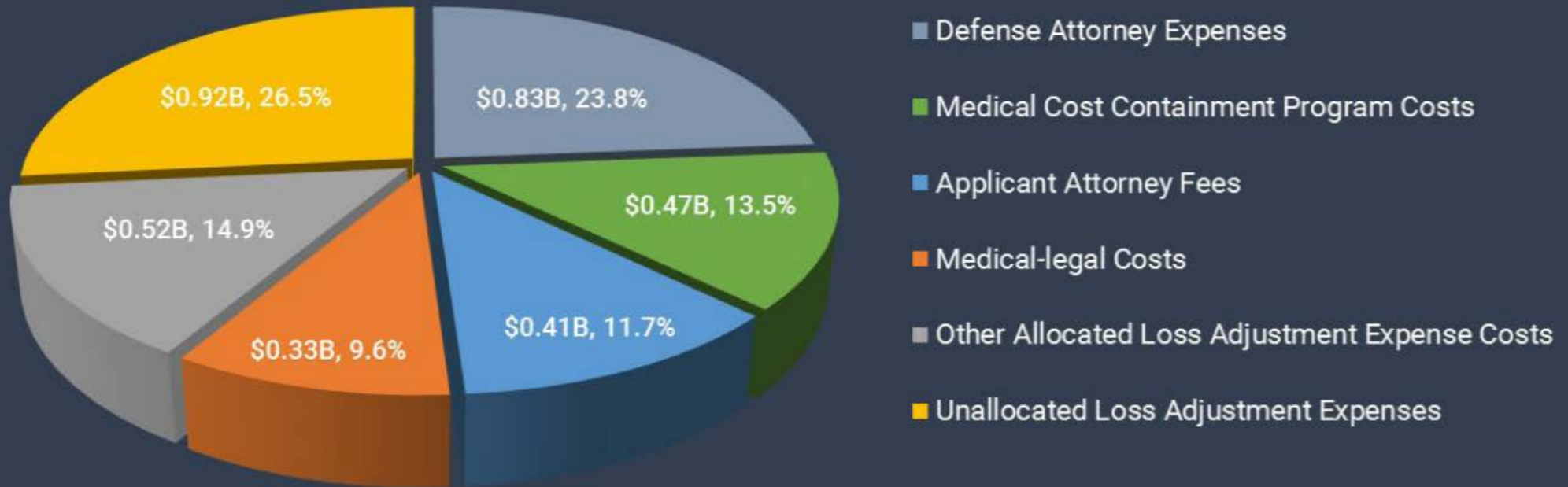


WHERE THE MONEY GETS SPENT BY SECTOR



WHERE MONEY GETS SPENT BY LOCATION

THE NON-CLAIM PAYMENT COSTS



2016 (\$3.5B)

AND NOW ... PRIVACY

HUMAN RESOURCES

- Sr. Management
- Benefits
- Sometimes W/C
- LOA

RISK MANAGEMENT **

- Risk Manager
- Benefits
- Sometimes W/C
- OSHA/Accident Reporting

THIRD PARTY ADMINISTRATORS (TPA)

- Claims Management

COUNSEL

- In a Legal Role
- Full Cross-Over

The “Money People” - CBOs and/or JPAs

SEPARATE FILES – SEPARATE PURPOSES

General Personnel File

- HR & Supervisors
- Contains General Work/Performance Documents

Benefits/Authorization to Work

- HR & Benefits Staff
- Contains all information regarding Workers' Compensation Claim

Workers' Compensation

- Internal WC "Managers"
- Contains all information regarding Workers' Compensation Claim

Disability/Accommodation

- **Separate File for Each Distinct Request**
- Assigned RTQ/Disability Accom Only/ Not Generally Available to all HR
- Contains accommodation requests, medical information, and notes/communications regarding interactive process, as well as written documentation of accommodations

Leave of Absence

- **Arguably Separate File for Each Situation**
- HR Only
- Contains leave requests, documents supporting leave, and required written responses to requests

“Claims Files” –
External to TPAs/JPs/Insurers
Sometimes “Internal”

Confidential Medical Information Act ("CMIA") - Civil Code Section 56.20

- Each employer who receives medical information shall establish appropriate procedures to ensure the confidentiality and protection from unauthorized use and disclosure of that information.
- No employer shall use, disclose, or knowingly permit its **employees or agents** to **use or disclose** medical information which the employer possesses pertaining to its employees without the patient having first signed an authorization under Section 56.11 ..., except ...
 - Information relevant to a lawsuit, arbitration, grievance, or claim, to which the **employer and employee are parties** and in which the patient has placed in issue his or her medical history, mental or physical condition, or treatment
 - The administration of employee benefit plans, short-term and long-term disability income, workers' compensation, and eligibility for paid and unpaid leave from work for medical reasons."

SO, THE RULES

- Private or Confidential Information can only be obtained and used for the purpose for which it was intended.

No “Bait and Switch” – Now, or in the Future

- Private or Confidential Information contained in one file cannot be used for a purpose unrelated to the purpose of the file – And the File Can Only be Viewed by a Person Expressly Authorized to Access the File

No “File Surfing” for Information; and Certainly not by “Unauthorized” Personnel

THE EASY BUTTON RULE

**IF YOU ARE ORDINARILY “ENTITLED” TO SEE A PARTICULAR FILE, OR
REVIEW SPECIFIC INFORMATION IN MEETING YOUR SPECIFIC JOB
FUNCTIONS**

**YOU ARE PROBABLY ENTITLED TO SEE/USE THE
INFORMATION IN A FILE**

But (there’s always a “but”)



SO ... MAKE THIS “REAL” FOR ME

An Attorney, a Benefits/Risk Manager, and a Risk Pool Claims Manager go to a Mediation

- Employee files a claim for alleged disability discrimination, and her attorney agrees to an early mediation
- The “disability” arises from an industrial accident that is slowly resolving itself; many fellow employees believe the injury was faked
- In getting ready for the Mediation, the attorney interviews various witnesses and learns that Benefits/Risk Manager has been **sharing information**, including information unrelated to the injury and/or return to work situation they are handling
- During the mediation, the “Defense Team” learns from claimant’s counsel that the Employee also just came back from **Mexico**

BUT I WANT TO KNOW ... IT MAY BE IMPORTANT

- Employee asserts a workers' compensation claim for an injured back, managed internally by Risk Management
- Human Relations is managing the return to work/interactive process
 - Employee has only requested accommodation/identified the back injury
 - Human Relations (properly) is also approving Intermittent LOA through FMLA/CFRA
- In managing the W/C claim, TPA learns of prior back injury and knee injury claim
- Human Relations learns during the interactive process of a newly diagnosed diabetic condition that may impact the ability to return to work or perform the same job functions.

LABOR CODE 132A – WHAT?

- Injured Employee's intermittent/modified duty failed for 18 months.
- Employee is finally cleared to return to work by W/C physician, but tells a supervisor on Friday she still does not believe she can safely return to work and will tell this to HR Manager on Monday when scheduled to return to work
- On Monday, employee comes in and says she cannot return to work – and says she plans to get a “second opinion.” HR Manager says that all accommodations have failed, and after 18 months, they can no longer continue without a permanent employee.
- HR Manager hands employee separation paperwork. Employee is “stunned” that the paperwork was already prepared; HR Manager states that based on what employee told Supervisor on Friday, she was “just prepared.”

WHEN NON-DISABLED EMPLOYEES CREATE YOUR RISKS

- Employee on Return to Work is given extra breaks, a change in hours, and reduced work duties as part of initial “interactive process.”
- Supervisor is complaining (to management and to fellow employees) that she can’t get all work done due to the “preferential” work assignments; the supervisor has also been concerned that management does not believe she is meeting her job expectations.
- Fellow employee actually tells employee that “he’s tired of favoritism,” and accuses employee of being a “faker” and “lazy.” The fellow employee then begins to use racial and sexual orientation epithets.
- Employee complains about this “hostile work environment” to Human Resources.

RETURN TO WORK – HECK NO!

- Employee is on a legitimate workers' compensation leave; prior to the industrial accident, however, the employee was marginal (at best). There are multiple written warnings, but no decision was made to terminate.
- Physician note states "off-work two weeks; return to work half-time for two weeks; should be full duty after month."
- Small Department is "stressed" by absence, and the employees are divided by "racial" issues. Before the leave, Employee had complained about the situation, and claimed it was impacting her ability to work.
- A fellow employee (from the other racial group) then finds a series of "errors" in the Employee's work that materially impacts prior reports that had gone to management, and which now have to be modified and updated. No one wants Employee back!

COMPETING MEDICAL OPINIONS AND INTERNAL FACTIONS

- Bus driver is cleared for return to work six months after back injury by W/C physician, although there remains a question as to potential future back surgery.
- Personal physician issues medical opinion with additional limitations, raising concern she has not fully studied/appreciated Job Description and duties, and her comments seem “slanted” in favor of employee.
- Risk Manager tells HR Manager to “take him back” to get him off W/C benefits; HR Manager and Risk Manager do not get along. Risk Manager is seen as overly harsh; HR Manager is seen as a “push over.”
- Employee shows up for work, where HR Manager and Supervisor are presented with a new note from personal physician with additional limitations, calling into question whether Employee can “safely” do her job.

TOO MANY CHEFS IN THE KITCHEN

- A campus security employee has suffered from declining work performance and attendance. He is notified by HR that they will be pursuing progressive discipline.
- The Employee then claims a soft tissue injury that was not witnessed; it was not reported timely to the Risk Management Department. The claim is delayed in resolution, and additional information is received as “sub-rosa” surveillance begins.
- The surveillance uncovers potentially fraudulent activity, with the District Attorney contacting the District to gather information so criminal charges can be pursued.
- The Employee files DFEH and EEOC claims for discrimination including religious, disability and racial harassment and/or discrimination

SO, YOUR TURN



“WAIVER” – WHAT’S A WAIVER

- You Can Share Information Between Departments, TPAs, and Doctors, if you get an Email or Handwritten Note from the Employee “authorizing” the sharing of Information:

- **Yes**

Yes, but you shouldn't

- **No**

I have no idea

NEVER ENOUGH INFORMATION

I don't "like" the medical evaluation with work restrictions, so I'm going to call the Doctor and given her information she probably does not have and see if I can get the restrictions lift.

- **Yes**

Yes, but you shouldn't

- **No**

I have no idea

I'M AFRAID ... FOR THEM, OF COURSE

I see medical restrictions that say the Employee can come back to work, but I just don't think the Employee can safely do them, so I want to tell HR/RM to put them back out on leave because I think we're going to get a new/more significant W/C claim.

- Yes

Yes, but you shouldn't

- No

I have no idea

WELL, THEY TOLD ME FAIR GAME NOW

I know (based on what I heard today, which I will never, ever forget because it was so great) that I am only supposed to ask about issues during an “interactive meeting” about the disability for which the Employee is seeking accommodation, but they gave me medical information from their personal physician about conditions and limitations that show that their W/C claim is fraudulent, so I’m going to share it with everyone.

- **Yes**

Yes, but you shouldn't

- **No**

I have no idea



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**CHULA VISTA ELEMENTARY
 SCHOOL DISTRICT**

Each Child is an Individual of Great Worth



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