



# *The* **Carnivale** *of Risk*

## **Remote Work and Workers' Compensation**

**48<sup>TH</sup> CONFERENCE & EXPO**





# The *Carnivale* of Risk



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February 27 – March 2, 2022





# The *Carnivale* of Risk



## Rachel Shaw

Rachel Shaw is the President and Principal Consultant of Shaw HR Consulting, Incorporated. With more than 20 years of executive-level Human Resources experience, Rachel is recognized nationwide as a leader in helping public and private sector employers manage their most challenging disability-related personnel issues. Rachel and her team provide comprehensive solutions to employers on how to successfully manage the interconnected roles of human resources, workers' compensation and disability compliance to successfully reduce litigation, the costs of claims and improve employee-employer relations throughout the process.

Rachel is known nationally as the authority on how to implement and manage the ADA Disability Interactive Process for candidates and employees. Her trainings and seminars are highly anticipated by Human Resource and Risk Management professionals as informative, dynamic and packed with real-life practical solutions. She is author of the industry best-selling and award-winning book, "The Disabled Workforce: What the ADA Never Anticipated."

Rachel served as the Director of Human Resources for the City of Oxnard and prior to that was the Human Resources Director for the Montebello Unified School District. She is a graduate of Brown University and later earned a Master of Business Administration from Colorado State University.

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## COVID19.CA.GOV/STATE-DASHBOARD/

All rules, regulations, and the general state of the law is subject to change at a moment's notice.

This presentation is intended to provide general information and is not advice specific to a particular case.

You should consult an attorney to discuss facts relevant to your particular case.

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## TOPICS FOR TODAY

What are the risks and benefits of having your employees work remotely vs. “in the office”?

### **Applying an AOE/COE analysis to a remote work setting**

- “Personal Comfort” Doctrine
- The “Going-and Coming” Rule
- Special Missions

### **Modified Work**

- Temporary disability indemnity exposure
- Supplemental job displacement voucher



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## LABOR CODE §3600(A)(2)

### The Statute

Liability for... compensation... shall... exist [exclusively] against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death,..."

Any reasonable doubt as to whether any particular activity that the employee is engaged in at the time of his industrial injury was in fact contemplated by his employment is to be resolved in favor of the employee.

[See, e.g., *Tingey v. IAC*, 22 CA2d 636, 8 CCC 174 (1943); *Goodrich v. IAC*, 22 CA2d 604, 8 IAC 177 (1943)]



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## THE HOME AS *THE* JOB SITE

What happens when the home becomes the explicit job site?

### **Cumulative Traumas**

The location of the worksite (home vs. office) would not change the analysis whether there would be injurious exposure created by the work duties.

Question: Do apportionment arguments become more persuasive when there are clear similarities between work activities and non-work activities (e.g. how often does a person sit in their home office chair on the clock vs. off the clock? Should that ratio correlate with apportionment for a neck impairment?).



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## THE HOME AS *THE* JOB SITE

What happens when the home becomes the explicit job site?

### **Out-of-State Injuries**

LC §§3600.5(a) and 5305

An industrial injury that occurs outside of California may still be subject to the jurisdiction of the WCAB. LC §3600.5 provides that the employee or the deceased employee's dependents are entitled to compensation according to law of this state where the employee "has been hired or is regularly working in this state [and] receives personal injury by accident arising out of and in the course of employment outside of this state..."

- - Is there a forum selection clause in the employment contract?
- - Can be very fact specific...



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## THE HOME AS *THE* JOB SITE

What happens when the home becomes the explicit job site?

### **The Personal Comfort Doctrine**

The course of employment requirement does not necessarily mean that to be compensable an injury must occur at the very moment the employee is manipulating the tools of his trade. As a matter of fact, most acts of an employee which occur on the work premises during normal working hours not expressly prohibited by the employer, and which may be reasonably contemplated by the employment relationship are considered to be within the course of employment, so that injuries arising from such acts are compensable.



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## THE HOME AS A JOB SITE

How far does this go at an actual job site?

*Elliott v. IAC*, 7 CCC 303 (1942), where the employee was killed, when feeling poorly at work, he took a drink from a bottle which he thought was wine as a medication for his illness. The bottle in fact contained a lethal poison. COMPENSABLE INJURY.

*Allied Signal Inc. v. WCAB (Briggs)*, 66 CCC 1333 (W/D-2001), where the employee is injured during a restroom break. COMPENSABLE INJURY.

*Reinert v. IAC*, 46 Ca.2d 349 (1956) where caddie, using his perk of employment of playing a free round of golf after his shift, was struck by a golf ball. COMPENSABLE INJURY



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## THE HOME AS A JOB SITE

Based on those cases, what could happen in the following situations where the employee is working remotely (all during what would be regular work hours)?

While coming out of the bathroom, employee injures herself on toy cars left on floor.

Employee injures himself from falling downstairs while taking his coffee mug to his kitchen sink. (How about if the worker is injured while taking his dirty plate he at breakfast on to the sink, something he would never do at the office).

During an unpaid lunch break, the employee hurts himself while doing Pelaton, which is paid for by the company as part as one of its health initiatives.



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## MANY OTHER DOCTRINES COME INTO PLAY...

Once the home is the job site, everything that would occur at the office/regular job site now has to be considered in this unusual venue. Though this works *both* ways.

### **Lunch cases – Off Site Lunch**

*Mission Ins. Co. v. WCAB (Fitzgerald)*, 84 CA3d 50, 43 CCC 889 (1978) - An employee injured in an automobile accident returning from a restaurant a mile and a half from the employment premises during an uncompensated lunch break is not injured in the course of employment.

So the employee who works from home who goes to grab fast food for lunch during an uncompensated lunch break and gets in a car accident is not going to have an industrial injury.



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### **Lunch cases – Inadequate Lunch Facilities**

*Universal City Studios, Inc. v. WCAB (Johnson), 44 CCC 155 (W/D-1979)* - Where adequate lunch facilities on the employment premises are unavailable, or are completely inadequate, extending the premises to at least nearby lunch sites would not seem unreasonable, even where the employee is uncompensated during his lunch hour.

Where the employee works from home (and thus the employer is incapable of providing facilities) does this eliminate the possibility of extending the premises to nearby lunch sites?



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Once the home is *the* job site, everything that would occur at the office/regular job site now has to be considered in this unusual venue. Though this works *both* ways.

### **Permitted Activity – On Duty Recreation**

*LACMTA v. WCAB (Soto), 63 CCC 869 (W/D-1998)* – Injury was industrial when employee briefly leaving the work premises on foot for exercise, fresh air, and a change of scenery.

If a claims examiner, in a fit of frustration after a call from a difficult claimant, steps away from his home desk for a minute to go get his mail from his mailbox in order to “to take a breath” and falls, is that an industrial injury?



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Once the home is *the* job site, everything that would occur at the office/regular job site now has to be considered in this unusual venue. Though this works *both* ways.

### **Prohibited Activity**

*Cobian v. WCAB, 63 CCC 618 (W/D-1998)* – Knee injury occurring on 4<sup>th</sup> of July on work premises was not industrial since he was a) instructed not to come in, and b) directed to go home when he came in anyways.

If the employer specifically directs a worker to not perform overtime work and was even written up once for logging in after hours from home, is there an industrial injury if the employee does so anyways and then suffers a heart attack from work stress?



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## DUAL JOBSITES WITH ONE OF THEM BEING THE HOME

### When is the home a second job site?

Where the employer expressly or impliedly compels the employee to engage in employment activities at home, the employee will be considered to be in the course of his employment while so engaged, and in effect the employee's residence will become a second job site.

*Bramall v. WCAB, 78 CA3d 151, 43 CCC 288 (1978)*

The question to answer will be "is working at the home compelled by the employer in some way or solely for the convenience of the employee."



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## DUAL JOBSITES WITH ONE OF THEM BEING THE HOME

Why is determining whether the home is a “second” work premises important?

### **The Going and Coming Rule**

Generally, an employee who is traveling to or from a single fixed place of employment where he works, without travel pay and without special conditions attached to the trip, will not be considered to be within the course of his employment.



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## DUAL JOBSITES WITH ONE OF THEM BEING THE HOME

Why is determining whether the home is a “second” work premises important?

### **The Going and Coming Rule, Exception for Multiple Job Sites**

Where it is contemplated that the employee be prepared during the course of his work shift to move himself between work locations with his own transportation or arrange with a co-employee for such transportation, the commute to work is subject to the special mission exception.

*Hinojosa v. WCAB, 8 CA3d 150, 37 CCC 734* (fruitpicker injured while going between fields suffered industrial injury).

Normal routine commute vs. Extraordinary situation in which the job is structured, and dependent upon, transportation from one place to another.



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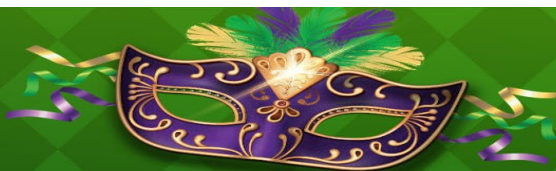
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## DUAL JOBSITES WITH ONE OF THEM BEING THE HOME

Why is determining whether the home is a “second” work premises important?

### **Coming and Going Rule - Special Mission Exception**

The special mission exception requires three factors to be met: (1) the activity is extraordinary in relation to the employee's routine duties; (2) the activity is within the course of the employee's employment; and (3) the activity was undertaken at the expressed or implied request of the employer and for the employer's benefit. *City of Los Angeles v. WCAB (DeLeon)*, 157 CA4th 78 (2007)



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## DUAL JOBSITES WITH ONE OF THEM BEING THE HOME

Why is determining whether the home is a “second” work premises important?

### **Difficult situations arise in this analysis for remote workers...**

Employee works from home on employer-provided laptop. Once every 60-90 days, a problem arises with the laptop making remote work impossible. In these situations, the employee is instructed by the employer to come into the office and use an office workstation. During one of these situations, employee suffers a car accident on the drive to the office. Compensable?

**What facts would alter this analysis and how? If employee was or wasn't off the clock during commute? If employer-provided shuttle was used? If worker stopped at Starbucks on the way in?**



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## DUAL JOBSITES WITH ONE OF THEM BEING THE HOME

Why is determining whether the home is a “second” work premises important?

### **Difficult situations arise in this analysis for remote workers...**

Legal assistant is only working mornings at the office and afternoons at home in an effort to stagger shifts and reduce the amount of employees in the office due employer attempts to reduce exposure COVID. Just after arriving home, she is asked to return to the office for the afternoon subsequent to her lunch break. One the way back, she is in a car accident. Compensable?

*Arboleda v. WCAB*, 253 CA2d 481, 32 CCC 332 (1967), was the need for the second round trip routine or an extraordinary request? What if the worker had already started her afternoon shift (see prior example)?



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## DUAL JOBSITES WITH ONE OF THEM BEING THE HOME

Why is determining whether the home is a “second” work premises important?

### **Difficult situations arise in this analysis for remote workers...**

Animator frequently takes projects home to complete at night to accommodate a clients overseas. On the way home on particular evening where she is intending to complete a project, she is mugged, suffering orthopedic and psych injuries. Compensable?

*New York Marine v. WCAB (Young) (W/D 2017) 82 CCC 1510*, since office and home were both job sites and commute was between job sites, injury is compensable.



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## DUAL JOBSITES WITH ONE OF THEM BEING THE HOME

Why is determining whether the home is a “second” work premises important?

### **Difficult situations arise in this analysis for remote workers...**

Teacher is on the way home with tests that need to be graded that evening along with some art materials for his art course. While taking the stack of papers out of his car, he injures his low back. Compensable?

*Wilson v. WCAB*, 16 CA3d 181, 41 CCC 76 (1976) this is simply an “ordinary” commute and not compensable vs. *Aerospace Corp. v. WCAB (Minich)*, 47 CCC 234 (W/D-1982) engineer injured while carrying computer and paperwork while biking between home and work was compensable because work from home was required to meet deadline.



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## OTHER ISSUES

How does a worker who works from home affect an employer's ability to offer modified work?

Worker who works from home suffers a work injury that includes a work restriction of no going up and down stairs. The worker's home office is upstairs. Is the worker obligated to create a work station downstairs? NO

It is the defendant's burden to establish availability of modified work. *Green Valley Farm Supply, Inc. v. Workers' Comp. Appeals Bd. (Rivera)*, 85 Cal. Comp. Cases 617, 2020 Cal. Wrk. Comp. LEXIS 33 (Cal. App. 6th Dist. April 23, 2020)



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## OTHER ISSUES

How does a worker who works from home affect an employer's ability to offer modified work?

Remote worker suffers wrist injury such that he is temporarily precluded from typing, making regular duties not possible. Employer instead offers job in the office sorting mail and answering phones. Employee refuses. TD owed?

Depends! How far is the office from home? Was there an expectancy that the job was solely remote work? Has the worker, in light of the remote work assignment, moved further from the office making the geographic distance unreasonable? *K-Mart v. WCAB (Cudd)*, 61 CCC 1209 (W/D-1996)



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## REMOTE WORK

- Per policy or CBA
- As a reasonable accommodation for a medical need per the ADA/FEHA



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## REMOTE WORK FOR A NON-MEDICAL REASON

**For completely remote or hybrid assignments work with your attorney to discuss needs related to:**

- What criteria will be applied when selecting which employees can work remote?
- Establish required job duties and expected work product, Prohibited conduct, etc.
- Labor issues including salary/wage and hour issues, timekeeping, etc.
- Logistics including supervision, data security, workspace and work equipment, etc.
- Out of state employees



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## ASSESSING REMOTE WORK FOR A MEDICAL REASON

For employees requesting a work from home accommodations due to a personal medical condition

- Accommodations may have been temporary prior and now need to be assessed for long term reasonableness

**This is the ADA/FEHA disability compliance process**



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# ASSESSING REMOTE WORK FOR A MEDICAL REASON

**COVID-19 Note: Just because you provided work from home in the past, does not mean have to continue to do so**

EEOC provides guidance that work from home accommodation requests should be treated in accordance with ADA law

Ref: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>



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# DISABILITY COMPLIANCE

**For Work From Home Accommodations you follow the ADA/FEHA Mandates:**

1. Employers must engage in a Timely Good Faith Interactive Process when triggered by:
  - Request, perception, or knowledge

AND

2. Employers must provide Reasonable Accommodation for qualified individuals with a disability

**Each is a stand-alone statutory obligation**



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- 1... Medicals / EFPA®
- 2... Explore /  
Research Ideas
- 3... Schedule
- 4... Post Meeting  
Work



**DISABILITY INTERACTIVE  
PROCESS HALLWAY®**



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# DISABILITY COMPLIANCE

## FOYER

How you are triggered to start this process:

- New requests: understand their request
- Continued request to stay at home

Sample 1 – Interactive Process Introduction Letter



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# DISABILITY COMPLIANCE

## Obtain Necessary Documentation/Information

**Medical** report with:

- Serious medical condition impacting work  
- Yes/No answer
- Clear work restrictions & duration
- Leave needs & duration



**Door #1**



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# DISABILITY COMPLIANCE

**Prepare & Send a Questionnaire for Health Care Provider to Complete:**

Sample Questionnaires for Leave and Restrictions:

- Sample 2 – Work from Home (non-COVID reason)
- Sample 3 – COVID-Related Work from Home
- Sample 4 – COVID-Related Psychological Work from Home



**Door #1**



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# DISABILITY COMPLIANCE

**Do you question the legitimacy of the need?**

**Did you not get your questionnaire back?**

Will you utilize the Fitness for Duty process:

- Sample 5 – Notice to Employee of FFD
- Sample 6 – Notice to FFD Provider



**Door #1**



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# DISABILITY COMPLIANCE

## Engage, Interact and Explore Together

Accommodation Exploration:

- Know when concern is
  - “We don’t want you working at home” vs.
  - “You cannot perform the following essential functions at home”
- A work from home accommodation is reasonable if medically needed and the employee can do 100% of their job at home.



**Door #2**



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# DISABILITY COMPLIANCE

## Schedule Accommodations Meeting / Have the Right People Involved in Decisions:

Long-Term decisions:

- Human Resources
- Workers' Compensation / Risk Management
- Employee's Manager / Supervisor
- Employee
- Employee Representative of choice
- Facilitator & Note Taker

Sample 7 - Meeting Invitation



**Door #3**

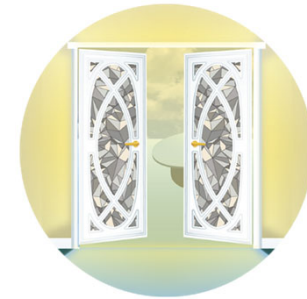


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# DISABILITY COMPLIANCE



## INTERACTIVE PROCESS MEETING (IPM): TAKE NOTES.

### Notes should include:

1. Purpose of meeting / Reason for Meeting
2. Documents relied on (EFPA, Medicals)
3. Summaries of discussions between all parties relating to:
  - Modified work
  - Extended leave of absence
  - Alternate work
4. Summarize outcomes/decisions or next steps
5. Signatures of all attending parties
  - Sample 8 – Short Version
  - Sample 9 – Long Version



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# DISABILITY COMPLIANCE

## Post-Meeting Activities / Close Process Correctly

- Place all documents in the accommodations file
  - Process Letters (Summaries of events, meeting invites)
  - Meeting Notes & Get Signatures
- Complete Post Meeting Agreements
  - Inform others that need to know of a result
  - Complete post meeting forms, letters, etc.
- Identify Next Steps of the Interactive Process
  - Duration if Work from Home is determined reasonable?



**Door #4**



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## FINAL THOUGHTS

It will be important to transition from a more informal process that allowed persons to remain at home during COVID-19 to managing the request like you do with permanent work restrictions



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**THANK YOU!**

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**California Ed Code & the ADA/FEHA Interactive  
Process**

Sep. 21<sup>st</sup> | Half Day

**Leave Management: Battling Excessive Use and  
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