



Pre-judgment writ of attachment against uninsured employers

Labor Code section 3602 shatters the exclusive remedy defense, opening up civil remedies when employers neglect to carry workers' compensation insurance

BY ADAM J. SAVIN

Picture this: Your client sustains an injury on the job, confidently asserting that it happened within the course and scope of their employment. But here's the twist: You uncover that the employer neglected to secure workers' compensation insurance, a clear violation of California Labor Code sections 3700-3702. With this failure, the once ironclad exclusive remedy defense crumbles, leaving the path open for civil remedies. In these not-so-uncommon yet intricate scenarios, we'll explore strategies for navigating this legal terrain. To kick things off, let's talk fundamentals and explore the available remedies and the steps toward gaining the ultimate leverage: obtaining a pre-judgment writ of attachment.

The civil remedies

When an employer is found to be illegally uninsured for workers' compensation at the time of an employee's injury, the shield of exclusive remedy, as outlined in Labor Code section 3602, shatters. In these cases, the affected employee has the right to pursue a civil lawsuit against the illegally uninsured employer under Labor Code section 3706.

California law supplies plaintiffs with potent presumptions, benefits, and leverage in cases involving illegally uninsured employers. Let's delve into these provisions:

A. Under Labor Code section 3708, plaintiffs enjoy a *rebuttable* presumption that the on-the-job injury resulted directly from the employer's negligence. Notably,

defenses such as contributory negligence or assumption of the risk hold no weight. Effectively, this provision strips defendant employers of any arguments that could place the blame on plaintiff for their on-the-job injuries.

It is critical to note that employers have non-delegable duties under the Labor Code concerning workplace safety. (Lab. Code, §§ 6400-6403.) These include responsibilities like conducting workplace inspections, rectifying hazardous conditions, and providing adequate training and warnings, as established in *Bonner v. Workers' Comp. Appeals Bd.* (1990) 225 Cal.App.3d 1023.

B. In cases involving serious injuries, CAL/OSHA often conducts onsite investigations. If violations are discovered, plaintiffs are entitled to a presumption of negligence per se under Labor Code section 6304.5.

C. Plaintiffs in these cases are entitled to reasonable attorney's fees, typically in addition to any verdict or judgment in their favor.

D. Finally, pursuant to Labor Code section 3707, plaintiffs can seek to attach an employer's real property to secure payment of any judgment obtained in a civil action against an illegally uninsured employer. This provision presents a significant opportunity and leverage.

Labor Code § 3707 - We've heard about it, but how does it work?

In scenarios involving an illegally uninsured employer who possesses real property, Labor Code section 3707

presents a powerful leverage tool. Typically, pre-judgment writs of attachment are limited to unsecured commercial obligations in excess of \$500 for which an attachment is authorized. (Code Civ. Proc., § 483.010.) However, pursuant to Labor Code section 3707, in an action against an uninsured employer, the injured employee or their dependents may attach the property of the employer, in an amount fixed by the court, at any time on or after institution of the action. (65 Cal. Jur. 3d Work Injury Compensation § 91.)

Now, let's dive into the general steps required to secure an illegally uninsured employer's real property. Please note, however, that it is essential to verify your own local rules and any new updates to applicable forms and new procedural requirements; this article offers only foundational guidance and to generally steer you in the right direction.

Procedure to the pre-judgment writ of attachment

(1) Application

To succeed in securing an illegally uninsured employer's real property, you will first need to obtain a Right to Attach Order and an Order for Issuance of Writ of Attachment. Both can be applied for using a single form, Judicial Council Form AT-105. (Code Civ. Proc., § 484.010.) On this form, it is crucial to present specific facts demonstrating that a plaintiff is entitled to a judgment on the claim, with specific reference and quotation of Labor Code section 3707 as a basis for authority.



As you navigate through this application process, thorough review of sections 484.010-484.110 of the Code of Civil Procedure is imperative. These code sections outline the numerous statutory requirements that must be meticulously addressed to ensure the success of your application.

(2) Employee declaration in support

Next, Code of Civil Procedure section 484.030 sets forth the statutory requirement of an affidavit demonstrating that, based on the presented facts, a plaintiff would be entitled to a judgment on the claim upon which the attachment is based. To fulfill this requirement, your client can provide a declaration in support of the Request for Right to Attach Order and Order for Issuance of Writ of Attachment for Employer's Property.

The declaration should include – but is not limited to – the following key elements: (1) specific facts establishing the employment history, relationship, and the illegally uninsured status of the employer; (2) a detailed narrative of the incident resulting in the injury, providing a clear context; (3) a concise overview of the injury sustained and the subsequent treatment received, supplemented by relevant attachments such as medical records and photographs; (4) a summary of medical expenses and loss of earnings supported by attachments such as wage statements and medical bills/liens; (5) an explanation of any benefits (or lack thereof) provided by the employer up to the present; (6) a statement affirming that the attachment is sought solely to secure recovery on the claim, without any alternative purpose; (7) specification of the amount to be secured by the attachment; and (8) an affirmation that the employee possesses no information or belief indicating that any defendant(s) have initiated bankruptcy proceedings under Title 11 (Bankruptcy) of the United States Code or has made a general assignment for the benefit of creditors.

By ensuring that all key elements are thoroughly addressed in the declaration, you strengthen your meritorious

grounds for obtaining the Right to Attach Order and the Order for Issuance of Writ of Attachment for Employer's Property.

(3) Memorandum of points and authorities

To effectively support your application, the Memorandum of Points and Authorities should be carefully crafted. Begin with a concise introduction, setting the stage for the arguments to follow. Summarize the main purpose of the memorandum and highlight the key legal principles at issue.

Provide a thorough overview of the pertinent facts and circumstances surrounding the case. Detail the employment relationship between the plaintiff and the illegally uninsured employer, as well as the facts and circumstances leading up to the injury sustained by the plaintiff.

Next, articulate why the plaintiff is entitled to a Writ of Attachment, focusing specifically on Labor Code section 3707 which provides: "The injured employee or his dependents may in such action attach the property of the employer, at any time upon or after the institution of such action, in an amount fixed by the court, to secure the payment of any judgment which is ultimately obtained."

Additionally, briefly discuss Labor Code section 3700.5 by underscoring the criminal nature of failing to provide workers' compensation benefits. This further strengthens a plaintiff's argument for entitlement to remedies.

You should also expound on Labor Code sections 3706, 3708, and 3709 to provide the court with a comprehensive understanding of the range of remedies available to the plaintiff due to the illegal nature of the employer's failure to provide workers' compensation insurance coverage.

Underscore the overarching public policy imperative for safeguarding employees when their employers fail to provide workers' compensation coverage. Emphasize the fundamental principle that every worker deserves adequate protection, safeguards, and recourse in the event of a workplace injury.

Highlight the inevitability of the plaintiff prevailing in his or her personal injury suit against the illegally uninsured employer. By demonstrating the employer's statutory negligence and per se violation of applicable labor laws – coupled with the legal remedies available under related California statutes – the plaintiff's success is virtually assured.

Finally, emphasize the anticipated recovery of damages for the plaintiff, including but not limited to compensation for medical expenses, loss of earnings, pain and suffering, and any other applicable damages. Paint a compelling and comprehensive picture of justice being served and the plaintiff receiving the restitution they rightfully deserve.

(4) Attorney declaration

In addition to the employee and any witness declarations you deem necessary, you should provide a separate attorney's declaration in support of the application, adhering to the requirements outlined in Code of Civil Procedure sections 484.020-484.040. This declaration should affirm the attorney's personal knowledge of the facts presented in the application, as well as the legal basis for seeking the Right to Attach Order and the Order for Issuance of Writ of Attachment for Employer's Property. It should also attest to the accuracy and completeness of the information provided in the application and provide the foundation for evidence of the uninsured nature of the employer.

(5) Noticed hearing

To obtain a Right to Attach Order, the "noticed hearing" method is the recommended approach. This entails serving the Application for a Writ of Attachment on the illegally uninsured employer at least 16 days (plus two court days for service by electronic mail) before the scheduled hearing date. Unless your client faces significant or irreparable harm from a delay in obtaining the writ of attachment, it is advisable to avoid pursuing an ex parte application.

Once you secure a hearing date, you must serve the following documents on the defendant: (a) Summons and



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Complaint; (b) Notice of Application and Hearing (Judicial Council Form AT-115); and (c) the Application (Judicial Council Form AT-105) along with any supporting affidavit(s), Memorandum of Points and Authorities, and all declarations and attachments. Additionally, make sure you prepare your Right to Attach Order and Order for Issuance of Writ of Attachment After Hearing using Judicial Council Form AT-120, and ensure proper service accordingly. Furthermore, you may simultaneously apply for a temporary protective order (Judicial Council Form AT-140), which places an immediate lien on the identified real property for 40 days, after which it expires or merges into the subsequent attachment order. (Code Civ. Proc., §§ 486.050-486.100.)

(6) A bond or undertaking

Before a plaintiff is granted a Right to Attach Order, it is *imperative* to file an undertaking, or bond, in an amount sufficient to protect the debtor defendant in the event of damages resulting from a wrongful attachment. (Code Civ. Proc., § 489.210.) The bond must be filed when the Writ of Attachment is granted, or else the Writ is deemed invalid. (*Vershbow v. Reiner*, 231 Cal.App.3d 879.) The minimum amount for the undertaking is \$10,000. However, the Court has discretion to increase this amount if the debtor defendant can demonstrate that damages for a wrongful attachment would exceed this sum. (Code Civ. Proc., § 489.220.) In other words, the Court is

essentially making a risk analysis determination.

Plaintiffs seeking a writ of attachment must grasp their responsibilities concerning bond posting and court compliance. Obtain a bond from a licensed surety company in California, maintaining it throughout the attachment process and lawsuit duration. Upon lawsuit resolution or satisfaction of judgment, or if deemed unnecessary by the court, the bond will be released.

After filing an undertaking or bond of at least \$10,000 and obtaining the Right to Attach Order and Order for Issuance of Writ of Attachment, the next step is to prepare the Writ of Attachment (Judicial Council Form AT-135). Ensure the exact identification of the real property parcel per the assessor's legal description and public records. When serving the Notice of Attachment on the debtor defendant, you must also disclose the debtor defendant's right to object to the undertaking/bond. (Code Civ. Proc., § 489.230.)

Conclusion

In conclusion, navigating the legal complexities of cases involving illegally uninsured employers and employees injured at the workplace requires a thorough understanding of California labor laws and its procedural requirements. By leveraging the provisions outlined in the Labor Code, plaintiffs can pursue unique civil remedies to obtain the justice and compensation they rightfully

deserve. From securing a Right to Attach Order, to preparing the Writ of Attachment, each step in the process plays a crucial role in ensuring a successful outcome for the injured employee. The pre-judgment Writ of Attachment is a powerful tool that should be utilized more frequently by employee plaintiffs who encounter illegally uninsured employers.

Finally, it is important to note that the information provided here serves as a foundational guide and should not be solely relied upon as the definitive step-by-step instructional guide for obtaining a Writ of Attachment. Each case may present unique circumstances, challenges, and legal nuances that require careful consideration and tailored strategies. While this general guide aims to offer a starting point and general overview, achieving success in securing a Writ of Attachment demands comprehensive, case-by-case legal analysis, strategic planning, and adherence to established legal procedures.

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