

Limiting Workers' Compensation Retaliation Risk

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There are many times when a company executive or a human resources manager wants to terminate a particular underperforming employee, or would at least like to have the option of termination, but the employee is out on workers' compensation leave. The executive's antennas immediately should go up, however, as a savvy employer in this employer-beware-litigious-society understands that the employee may be protected by workers' compensation retaliation laws. The executive keenly spotted the issue, as almost all states have some type of retaliation law to protect those filing workers' compensation claims. But the existence of those laws may not be the end of the story, and just because an employee has filed a workers' compensation claim does not mean that such an employee is immune from any employment action.

Recently, the Eastern District of Tennessee dismissed an employee's lawsuit that claimed retaliation for the filing of her workers' compensation claim because she was reassigned to kitchen duty, but was not terminated. In *Smith v. Rivermont Care & Rehabilitation Center*, 2010 WL 376612 (E.D. Tenn. Jan. 25, 2010), the court held that Tennessee's law against retaliation only prohibits termination.

Retaliation laws, found in either statutes or court cases, vary from state to state, so it is important that companies have a firm grasp on the specific statutes in each state where they are located, as well as the fact that a termination may still be viable for alternative reasons.

LANGUAGE IS KEY

Some state statutes have narrow language that only prohibits discharge of the employee as a result of the filing of a workers' compensation claim. Such statutes would read that "no employer shall discharge an employee for the filing of a claim." In those jurisdictions, the only conduct that will come under scrutiny would be an actual termination.

In other states, though, the language is broader, prohibiting something like "any employer who discharges, threatens to discharge, or in any manner discriminates against an employee" who has filed a claim. Notably,

California and Texas have this type of broad coverage. In those states, employment actions such as demotion, altering schedules, or reducing benefits could potentially violate the statute.

In still other states, the prohibition of workers' compensation retaliation is not found in a statute, but rather has been created in the courts as a public policy exception to the standard employment at will status for employees. Courts, however, are reluctant to expand their rulings beyond the direct retaliation context of termination, and, thus, the application of those case standards will be construed narrowly, as shown by the *Smith* case mentioned earlier. And, then, there are a few states that do not have prohibitions against terminating an employee for the filing of a workers' compensation claim, either via statute or a court case.

BURDEN OF PROOF

Additionally, in almost every jurisdiction, the burden of proof for such a retaliation claim rests squarely on the employee. He or she has to show that the termination was a direct result of the claim being filed. Thus, there may be a factual dispute on the actual reason for the termination—i.e., the filing of the claim *or* poor performance, poor attendance, reduction in force, etc. Under normal circumstances where the employment at will concept applies, an employee can be terminated for a good reason, a bad reason, or no reason at all. The filing of that workers' compensation claim, however, may give an employee added protection—employers need to be cognizant of that fact when making decisions.

ON LEAVE

Finally, employers may say, "Well, we're not firing him because he filed a claim, we're firing him because he has not been at work for six months and our policy says if you are gone for six months you will be terminated." In most states, an employer might have legitimate grounds to discharge based on a neutral absence-control policy. There are some states, however, that have statutes that prohibit a termination if the employee has been out on workers' compensation leave. Another similar

principle is terminating someone who went out on workers' comp and the injury the employee sustained prevents the employee from doing his or her job; here, the employee is not being terminated because the employee filed a claim, but is being terminated because the employee cannot perform his or her job. Although a termination in these situations due to leave exhaustion or for injury may be permissible as far as workers' compensation is concerned, it may be prohibited under the federal Americans with Disabilities Act. Under the ADA,

options for a reasonable accommodation, such as extending the leave, or, in the case of a permanently restricted employee, looking for an open alternative job, will have to be evaluated before termination.

CONCLUSION

Claims of workers' compensation retaliation will invoke nuances with each state's laws. If an employer has a prospective termination that involves an individual with a recently-filed workers' compensation claim, it should take time to consider

how that termination will stand up when scrutinized. By the same token, it should not immediately wave the white flag, as there may be viable options to support the termination. ☪

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