

Workers' comp, then a RIF?

What *not* to overlook

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The past year has seen the biggest economic fallout in the history of the United States, leading to mass layoffs and job losses in all industries. While it is theorized that 2009 will bring about the end of this recession, many companies' restructuring efforts may result in additional layoffs or reductions in force which, while fiscally necessary, pose a substantial risk of additional litigation for employers, not the least of which might be discrimination-based claims including, but not limited to, age, race and disability, and other statutory claims.

One issue that employers conducting RIFs tend to overlook, however, is the potential impact of workers' compensation claims filed by employees either prior to involuntary termination or shortly thereafter.

While many, if not most, workers' compensation claims are genuine, there is a persisting concern that a significant portion of these claims are the result of fraudulent claims filed by employees. Genuine as well as fraudulent claims impact employers and employees alike with the rising costs of insurance premiums and the potential loss of benefits to eligible employees. The onus rests on the company's counsel to advise the client of the best way to minimize the risk of litigation following a RIF,

including the risk of litigation relating to work-related injuries.

The law

Workers' compensation is a "no fault" insurance program that provides medical treatment, wage replacement and permanent disability compensation to employees who suffer work-related injuries, illnesses or occupational diseases, and death benefits to dependents of workers who have died as a result of such work-related injuries, illnesses or occupational diseases. An injury, illness or occupational disease is considered "work-related" if, but for the person's employment and performance of work-related duties, the injury, illness or occupational disease would not have occurred.

Except in cases where the employer has actual knowledge of an injury, the employee is required to notify the employer of the injury within 14 days of the date of the accident. There are exceptions to this notice requirement that permit an employee to wait as long as 90 days to give the employer notice. Under these exceptions, the employee must demonstrate that the failure to notify the employer was due to either mistake, inadvertence, ignorance of fact or law, or any other reasonable excuse for the delay.

An injured employee will be eligible to receive benefits unless he or she was willfully negligent in causing the injury; however, the employee



is precluded from instituting a civil action against the employer for the actual injury, lost wages occasioned by the injury, and pain and suffering, except where the employer's acts were intentional.

Workers' compensation fraud occurs when someone knowingly makes a false representation of material fact to obtain or deny workers' compensation benefits. While workers' compensation fraud can be caused by either an employer or an employee, the most common form of employee fraud is "claimant fraud." Claimant fraud occurs where an employee: (a) claims an injury is work-related when it is not; (b) exaggerates a true injury incurred while at work; or (c) secretly continues working for another employer while collecting workers' compensation benefits. While there are no concrete numbers, the National Insurance Crime Bureau estimates that claimant fraud contributes significantly to the billions of dollars lost in insurance fraud each year in the United States.

To combat the rising costs from workers' compensation fraud, some jurisdictions have enacted laws with substantial penalties for filing a fraudulent claim. Under New Jersey law, it is a fourth degree crime if an employee makes a misrepresentation for the purpose of unlawfully obtaining workers' compensation benefits. In addition, the Division of Workers' Compensation may order that the employee's benefits be

terminated and the employee repay any amounts wrongfully obtained. Finally, the Division may order that the employee forfeit future benefits that might otherwise be properly received in connection with the particularly injury subject to the claim.

Costs, risks of workplace injury

There are no firm statistics of fraudulent workers' compensation claims: While

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some assert that 25 percent of all workers' compensation claims involve some form of fraud, others estimate that fraud arises in less than two percent of all claims. Regardless of the number, it is clear that when fraud does occur, it can cause a definitive wrinkle in a fledging company's plans to recover from the current

recession inasmuch as the workers' compensation premium is directly linked to the employer's claim experience.

Attorneys who counsel employers during these tough economic times must consider the impact of work-related injuries while planning a RIF. The New Jersey Workers' Compensation Law makes it impermissible for an employer to terminate an employee in retaliation for filing a workers' compensation claim, or for testifying at a workers' compensation hearing. Thus, there is an increased risk of litigation where an employee who recently filed a workers' compensation claim is slated for termination as part of a RIF. A cautious employer will think twice about whether that employee should be selected for termination.

However, such caution may also give the dishonest employee a distinct advantage if the employee suspects he or she may be on the chopping block. The anti-retaliatory provisions of the workers' compensation laws may prove to be excellent job protection during a RIF, with the dishonest employee gambling that the employer feels it safer to avoid the costly litigation that may result from terminating the employee on workers' compensation leave.

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and Medical Leave Act or the Americans with Disabilities Act.

Indeed, under FMLA, certain eligible employees, including some employees who sustain work-related injuries, are entitled to up to 12 weeks of unpaid, job-protected leave per year. Although the U.S. Department of Labor regulations provide that an employee may be terminated while on FMLA-protected leave if he or she otherwise would have been terminated as part of a RIF, it is the employer's burden to prove the FMLA leave had no bearing on its termination decision.

Similarly, the ADA makes it unlawful for an employer to discriminate against an employee on the basis of his or her disability or perceived disability. If the employee with a feigned injury is terminated, he or she could argue the termination was because of the disabling condition. In either case, the employer must consider the potential risks of terminating an employee who sustained a work-related injury. **Reduced salaries, benefits?**

Another important reason for employers to monitor work-related injuries is cost: Workers' compensation claims cost both the employer's insurance company as well as the employer itself. The more benefits an employer's insurance company is required to pay, the higher the premiums for coverage. As a result of increased workers' compensation experiences and

premiums, an employer may be forced to reduce salaries and employee benefits. There are numerous anecdotal narratives of small companies forced out of business from the rising costs associated with excessive workers' compensation claims. And, far more scenarios exist where the fear of false workers' compensation claims has caused employers to cut other benefits in the hopes that decreased benefits would make filing a fraudulent claim less "appealing."

There are a number of strategies to employ to reduce the risks of litigation and workers' compensation claims during layoffs. Attorneys should advise clients to have appropriate safety precautions and measures in place to prevent workplace injuries from the start. Some employers in certain industries may be required to comply with federal and state safety laws. Strictly adhering to, and faithfully following, such safety rules and regulations will be extremely effective in preventing injury or avoiding a work environment which an employee can later point to as having caused an injury, whether real or fictitious. Even if an employer is not required to follow legal safety requirements, simply keeping the workplace clean and free of debris or hidden dangers can prevent many injuries from occurring.

Moreover, attorneys should work with employers to develop and implement procedures for workers to report work-related injuries immediately. The employer should properly investigate and document any injury taking place on the worksite, no matter how slight. An employee is far more likely to file a false workers' compensation claim if the employer's investigatory and reporting procedures are poorly established, documented and/or implemented.

Conversely, if an employer has clear and established procedures for reporting and investigating workplace injuries that it follows faithfully, a dishonest employee will have an uphill battle in trying to assert a workers' compensation claim for an undocumented and unsubstantiated injury.

Finally, many fraudulent claims can be prevented by merely treating departing employees "right" — that is, fairly and honestly. An employer who gives employees advance notice of mass layoffs (whether or not required under federal and state WARN laws) and provides out-placement counseling is more likely to have employees leave on good terms. In other words, an employee who feels the former employer has "done him wrong" is more likely to file a fraudulent claim than



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the employee who feels he or she has been treated fairly. An attorney should consider advising her clients to deal with employees directly in these difficult economic times.

The big picture

A recent survey of fraud examiners by the Association of Certified Fraud Examiners indicates that the current financial crisis has increased the incidence of fraud worldwide. Indeed, scaling

back a workforce is more likely to leave gaping holes in a company's organizational structure that would ordinarily rummage out such fraud. More than ever, employers must be advised to follow internal procedures to avoid workers' compensation fraud — in a world where budgets are leaner than ever, rising premiums and litigation expenses are certainly avoidable and unnecessary costs.