



## Workers' Compensation Retaliation

### Who, What, Why . . .

*Who does it apply to:* All employers, whether subscribers to workers' compensation insurance, or not.

*What is the issue:* Employees of businesses that make workers' compensation claims sometimes engender the aggravation of their employer. Employers think the employee is faking injury, milking the claim, or simply preventing the employer from getting work done while the employee is out. This aggravation can sometimes turn into retaliation by the employer which is prohibited under the law.

*What is the law:* Employers are prohibited from discriminating (or retaliating) against an employee who has:

- made a claim for worker compensation in good faith;
- hired a lawyer to represent the employee in a claim;
- instituted or caused to be instituted an administrative proceeding regarding a workers' compensation claim; and
- testified or is about to testify in an administrative proceeding regarding a claim for workers' compensation.

*Is termination retaliation:* If you have not yet experienced a workers' compensation claim, you don't realize that this is THE question when it comes to workers' compensation retaliation. Virtually all of the disputes regarding retaliation revolve around termination that occurs while the employee is out with the injury or when the employee returns.

As noted above, the law prohibits retaliation against an employee who has made a claim. So, employers cannot terminate the employee for making the claim. But, maybe they can terminate the employee because they have to refill the position.

When an employee goes out with a workers' compensation claim, the employer is left with an open position that it requires an employee to fill. The injured employee may be out a few days or a year. If it is a few days or weeks, most employers will simply make do. If it is a few months, the employer probably will

need a replacement – at least temporarily – until the employee returns. If it is a few years, the employer will most likely want to bring in a permanent replacement. In either of the latter cases, the employer will need to know if it has to hold the position open or can fill it permanently with a replacement.

The need to fill a position can serve as a legitimate non-discriminatory reason to let an employee go. That said, employers need to be careful they can justify that decision. A court will likely agree that employers should make due for a few days or weeks, hire a temp if it is a few months, and possibly need a permanent replacement if it is a year or more. Stepping outside these confines may be seen as some evidence the employer is trying to get rid of the employee because of the claim.

*What other considerations are there:* Because it is often difficult to determine an employer's motivation in terminating an employee out on workers' compensation leave, the courts have developed a non-exclusive list of factors that lean toward discriminatory or retaliatory intent:

- knowledge of the compensation claim by those making the decision on termination;
- expression of a negative attitude towards the employee's injured condition;
- failure to adhere to established company policies;
- discriminatory treatment in comparison to similarly situated employees; and
- evidence that the stated reason for the discharge was false.

*Are there other laws to consider before terminating:* If you are subject to the Family Medical Leave Act (50 employees, and other requirements), or the Americans with Disabilities Act (15 employees), you must follow the limitations those laws impose on your ability to terminate. For example, the time the employee is out for workers' compensation should be designated as FMLA leave so the time out runs concurrently. Then, if subject to the ADA, you must consider whether the injury counts as a temporary disability requiring reasonable accommodation.

*What can happen if retaliation occurs:* Employers who are found to have retaliated against an employee are liable for reasonable damages incurred by the employee, punitive damages, and the employee may be reinstated to his or her former position.

### **Common Situations:**

*Missed the deadline:* Sally is injured when a pile of boxes fall over on her in a hallway at Boxes-R-U's. She files a workers' compensation claim and takes leave to recover. Boxes holds her position open and counts her time out toward her FMLA leave. Prior to her scheduled return date Boxes sends Sally a letter requesting a release from her doctor. Boxes doesn't hear from Sally until 5 days after her scheduled return date. She offers no excuse. At this point Boxes has terminated Sally under its "3-day rule" which states that employees absent for 3 days or more without excuse will be considered to have abandoned their position or quit. Is Boxes in the right? As long as Boxes is uniformly enforcing an existing written policy and Sally has no justification, she is out of a job and a claim for retaliation.

*But you only said termination:* Kimmy injured her back while carrying a heavy box of tongue depressors at Health Hut. Kimmy makes a workers' compensation claim which is accepted and goes out on leave for 3 months. Upon her return, Kimmy's supervisor makes derogatory comments about how Kimmy cost the company money in an effort to warn other employees against making claims. Cal witnesses the comment and supports Kimmy to make a claim against Health Hut for retaliation for making a workers' compensation claim. Health Hut cannot believe that Cal would back Kimmy in a claim and fires him. Is Health Hut in hot water? Yes. While most of the retaliation claims occur over termination, employers still can be liable for treating Kimmy badly and firing Cal for supporting her.

*Horseplay hurts:* Jenn, an employee at Stretch String, Inc., is injured one afternoon while double dutch jump roping with some co-workers using stretchy string as rope. Jenn makes a worker compensation claim, but before it can be approved or disproved, Stretch String fires her for violating company safety policies. Is Stretch in trouble? Likely not. Just because an employee is injured and makes a claim does not insulate them from company policies. Jenn was goofing off and Stretch does not have to stand for it.

### **What should I do:**

*Good:* Keep your head if an employee makes a claim. Do not bad mouth them. If they are going to be out a short while or a period protected by law, be careful to follow the rules. If the employee will be out a long time, consult with your lawyer about possibly administratively terminating the employee.

*Better:* Follow the above advice and also establish a 3-day rule to terminate employees absent for 3 or more days without an excuse and follow it so you may use it with a workers compensation employee if they do not come back on time. Hire temps to replace employees out for months or more. If you cannot get a temp, document it and consult your lawyer about letting the employee go.

*Best:* Keep on the straight and narrow with the advice above and train all supervisors and employees not to negatively treat employees who make a claim.



Michael Kelsheimer is a Shareholder in the employment law section at Looper Reed & McGraw where he is joined by a number of employment law attorneys with experience in all areas of employment and labor law. Michael recognizes that the cost and expense of litigation makes resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his prior experience as a briefing attorney for the United States District Court and his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients.

This guide is one in a series. For more information, or to receive the entire collection contact Michael Kelsheimer by email at [mkelsheimer@lrmlaw.com](mailto:mkelsheimer@lrmlaw.com) or by phone at 214.237.6346