Top 10 Terrors of Workers' Compensation (Halloween Edition)

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Employer policies and employment decisions involving workers' compensation can be tricky. We often receive calls to assist employers who are haunted by common misunderstandings. So, as a special Halloween treat this year, we are providing the following reminders to chew on as you navigate employment law compliance in the areas of leave, light duty, and pay related to workers' compensation.

1. **There is no such thing as "workers' compensation leave."**

   Workers' compensation provides *benefits*, not leave. Accordingly, absences by an employee who is injured on the job must be covered by some other form of legally protected or company-provided leave aside from "workers' comp leave."

   Possible choices include federal Family and Medical Leave Act ("FMLA") leave, when applicable, or leave as a reasonable accommodation under the federal Americans with Disabilities Act ("ADA") for an on-the-job injury or illness which rises to the level of a "disability" under that law.

   Employers may of course *create* something called "workers' compensation leave," but this type of leave does not exist in most states as a matter of law.

2. **It is very important if an employee qualifies for FMLA leave to notify them that a company-provided "workers' comp leave" also is going to be designated as "FMLA leave."**

   Otherwise, you could end up having to give the employee twelve (12) additional weeks of job-protected FMLA leave after an extended "workers' comp leave" by virtue of claiming they "did not know" their twelve (12) weeks of job-protected "FMLA leave" was running concurrently with their company-provided "workers' comp leave."
3. **Aside from FMLA leave, you cannot set automatic limits on "workers' comp" or any other type of unpaid leave.**

   For instance, you cannot say, "All company-provided leaves, no matter the reason they are granted, must end after 90 days," or any other specific time limit. It would be deemed a violation of the ADA to terminate employees under such a policy or practice.
4. **Even at the end of an FMLA leave, you still must consider whether additional leave could be provided to an employee as a "reasonable accommodation" under the ADA if their on-the-job illness or injury rises to the level of being a "disability" under that law.**

   This means at the end of an FMLA leave you will need to determine whether you have sufficient information based on the FMLA documentation you have received and your communications with the employee to make an informed decision as to (1) whether their on-the-job illness or injury constitutes a "disability" under the ADA and, if so, (2) whether the amount of additional leave they need beyond the end of their approved FMLA leave can be provided as a "reasonable accommodation" under the ADA.

   Usually, making this second determination will necessitate at least an additional conversation with the employee to learn whether they have a projected return-to-work date before ending their employment due to "not being able to return to work at the end of a medical leave of absence."

   Other return-to-work accommodations also may need to be considered, such as providing temporary essential and/or long-term non-essential function modifications to the employee's job at the end of an approved FMLA leave, before terminating their employment for this reason.

5. **There is no legal requirement to create "light-duty" work for those who are injured on the job.**

   Similar to creating company-provided "workers' comp leave," employers may decide to *create* light-duty types of work for those who are injured on the job. However, if you do this for those injured on the job, you also are going to have to do so for those who have restrictions due to pregnancy and other off-the-job medical situations such as car accidents, cancer, broken legs, etc.

6. **You can give a preference to those injured on the job for your "made-up" light-duty work.**

   However, you cannot reserve all "light-duty" work for those who are injured on the job.
7. **You also can put time limits on "made-up" "light-duty" work that you create.**

   You cannot set time limits on all types of light or modified duty work. For example, if you choose to create office work for injured or ill manufacturing workers, you could choose to specify that this type of light-duty work can only be done for 30 days. Such a time limitation may only apply to created light-duty work, not all light or modified duty work offered.
8. **You also may need to give some thought to how you are paying employees for light-duty work.**

   "Pay drives behavior."

   It should come as no surprise if you are paying employees at or near 100% of their regular pay to work "light duty" that they remain "on light duty" for months at a time. Realistically, who would want to return to "full duty" when they are receiving their full pay for working "light duty?"

9. **The same "pay drives behavior" thought process should be taken into consideration by those employers who are choosing to supplement employees' workers' compensation pay in order to provide them with 100% of their regular pay while they are out on company-provided "workers' comp leave."**

   Again here, who would "try to come back to work" if they are receiving 100% of their pay to sit at home?
10. **You also cannot require a "full duty" release before an employee may return to work.**

    This applies regardless of whether the employee is out on leave due to an on-the-job or an off-the-job injury or illness.

We Can Help

As always, please feel free to contact Stacie Caraway or any member of our Labor & Employment Law Practice Group if you have questions regarding any of the "tricks or treats" described above or need assistance updating your policies or practices in light of them.

Happy Halloween!