When a Workers' Comp Case Turns Into a Minefield of Litigation

Lauri A. Kavulich, The Legal Intelligencer, Labor & Employment Special Section
November 2016

The intersection between workers' compensation law and "traditional" employment statutes presents a new minefield for employers and attorneys to navigate. In recent years, as the number of workers' compensation cases in Pennsylvania and beyond has trended downward, the number of employment lawsuits arising out of workers' compensation claims has increased. Most frequently, plaintiffs' attorneys have parlayed workers' compensation claims into alleged violations of the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (as amended)(ADAAA).

There are several reasons for this shift. Initially, the value of workers' compensation claims has decreased because of recent changes in how the courts interpret the Workers' Compensation Act. Additionally, the number of workers' compensation petitions filed with the Bureau of Workers Compensation Office of Adjudication has significantly decreased, from a high of 67,429 in 1994 and 1995, to 43,723 for the most recent fiscal year. Due to these factors, and the stiff competition in the workers' compensation arena, plaintiffs' attorneys have become more sophisticated in employment laws and are scrutinizing the employers' actions during the pendency of the claim.

Traditionally, under *Shirk v. Shirey Lumber*, 716 A.2d 1231 (Pa. 1998), state courts recognize wrongful discharge and retaliation cases arising out of an employee's "protected activity" of filing a worker's compensation claim. While *Shirk* still is frequently cited by plaintiffs' attorneys, there has been a shift toward asserting retaliation and discrimination claims under additional statutes, such as the FMLA and the ADAAA.

However, many employers are unaware of the procedural requirements for these statutes, which poses a significant risk for protracted litigation. The unfamiliarity with these requirements becomes quite problematic when workers' compensation cases are handled by an outside claims handler, who may or may not coordinate the handling of the claim with the employer. Further, the task of administering workers' compensation within a company may sit in various locations, such as the finance department, safety department, risk management, legal department or human resources. Because of this lack of integration, an employer may focus on an employee's claim as a "workers' compensation case" and ignore the potential implications on the employment side, resulting in violations of the FMLA or ADAAA. For example, a claims adjuster may control the employee's return to work or job offer without recognizing the implications of the FMLA or ADAAA. Often, actions of an employer that are permitted under workers' compensation law are not permitted under the FMLA and ADAAA. The good news is that employers can protect themselves from liability by using some relatively simple strategies.

There are several claims that plaintiffs' attorneys commonly allege in the context of workers' compensation leave. First, plaintiffs' attorneys often assert that their clients were not notified of their FMLA rights. The FMLA requires that employers provide employees with certain notices about their potential FMLA rights. I often hear from defendant-employers that "the employee didn't ask for FMLA, so we didn't send anything out." As a best practice, in every instance where an employee has a lost time claim, the employer should send out a notice of FMLA rights, followed by an eligibility notice, even if the injured worker may not qualify for FMLA leave. Forms from the Department of Labor can be found at https://www. doLgov/whd/fmla/forms.htm.

Second, plaintiffs' attorneys often raise retaliation claims under the FMLA, alleging that the employer failed to return the injured plaintiff, who was out on both workers' compensation and FMLA leave, to his or her prior position. The FMLA provides that eligible employees receive up to 12 weeks of unpaid, job-protected leave within a 12-month period. To avoid an FMLA retaliation claim, employers must preserve the employee's position, and also must maintain the employee's health care benefits during the FMLA leave period.

In the workers' compensation world, employers commonly issue job offer letters to employees who are ready to return to work, which are based on an IME doctor's opinion of what tasks the employee can physically perform. Frequently, employees challenge these letters because they disagree with the IME doctor's conclusions. While the refusal to return to work might be a basis for a suspension of workers' compensation benefits, refusal to return to work is not automatically a basis for termination of employment. If an employee refuses to return to work, and FMLA leave has not been exhausted, that employee's job must be protected for 12 weeks.

To make things more complicated, plaintiffs' attorneys also use the ADAAA as a basis for discrimination and retaliation claims when an injured employee is terminated after FMLA leave expires. For example, oftentimes an employee runs out of FMLA leave and is terminated under the employer's attendance policy. However, once FMLA leave is exhausted, it is not an automatic green light for termination because it is significantly likely that the ADAAA also may be implicated.

The ADAAA requires employers to make reasonable accommodations for employees with disabilities. One form of reasonable accommodation may be an extension of an employee's FMLA leave. Therefore, if an employee asks for additional leave beyond that which the FMLA requires, the employer must engage in an "interactive process" to determine whether additional leave would enable the individual to perform the essential job functions "within a reasonable amount of time." While indefinite leave is not a reasonable accommodation under ADAAA, there is no hard and fast rule as to what constitutes a "reasonable amount of time."

The best way for employers to protect themselves from these claims is to closely monitor an employee's FMLA leave. This task can be particularly challenging because FMLA leave may be taken in increments (often as small as one hour), referred to as intermittent leave. Crucially, if an employee who is out on workers' compensation and FMLA leave asks for additional leave beyond that which is required under the FMLA, an employer must have a conversation with the employee to determine whether additional leave is a reasonable accommodation under the ADAAA. In such a scenario, it is appropriate for the employer to request medical documentation of the employee's restrictions and ask the employee to estimate the amount of additional leave required.

In the situation where an employee is given a job offer letter and refuses to return to work in the position offered, the employer should still engage in an interactive process with the employee. Again, this may include asking for medical documentation, as well as requesting that the employee identify accommodations that would allow them to perform the essential functions of their pre-injury position.

Fortunately for employers, the ADAAA's interactive process is a two-way street. Therefore, if the employee refuses to cooperate or does not engage in the interactive process, at that point, the employer can consider termination. An employer does not have to keep the position open indefinitely while the employee is out on workers' compensation because, as previously noted, indefinite leave is not a "reasonable accommodation" under the ADAAA.

Finally, employers and lawyers should be cognizant of issues that may arise in connection with unemployment claims. I have seen claimants' lawyers use both unemployment and workers' compensation hearings to gather information, evidence and witness testimony, which they in turn use to build their FMLA and/or ADAAA case (before the actual complaint is filed). This is particularly concerning in the context of unemployment hearings, because often the employer is unrepresented and does not recognize that a potential claim is on the horizon, yet presents testimony under oath. If the employer is fully focused on the unemployment case and not on the risk of a potential lawsuit, a plaintiff's attorney can put together a case on the record under oath before the defense attorney even enters the picture. Within the workers' compensation arena, lawyers defending employers in litigated cases are usually sophisticated enough to spot issues that may arise. It is prior to litigation that employer missteps usually occur.

In conclusion, there must be more communication and coordination among departments within employers and with the insurance companies when dealing with injured workers. Due to the nature of workers' compensation insurance, employment practices and workers' compensation are separate policies and are contained in silos. Therefore, employers have to make a concerted effort to make sure all aspects of employment laws are being considered, and not walk into this minefield without adequate protection.

Lauri A. Kavulich is a member in Clark Hill's labor and employment practice group where she serves as both a litigator and consultant to clients of the firm in the areas of labor and employment law, Section 1983 civil rights litigation, and workers' compensation. She handles employment practice litigation in state and federal administrative proceedings and courts for governmental entities and large and small employers. She can be reached at lkavulich@clarkhill.com or 215.640.8527.