Return to work concerns with injured workers

By Alan G. Brackett, Esq., and Ava Wolf, Esq., Mouledoux, Bland, Legrand & Brackett

DECEMBER 21, 2022

The objective of every workers' compensation law is to provide an injured worker with wage replacement and medical care so that hopefully, following the necessary course of treatment, they can return to their job of injury. But what happens when an employer no longer wants the employee on its payroll? Or what happens when the employee will never be able to return to work to their position with employer because of work restrictions or a permanent disability? Can the employer terminate the employee or request a voluntary resignation?

Employers must be very cautious in how they treat an injured worker who in most states, has significant protections against injury related employment action.

There are many reasons why an employer may not want to continue the employment relationship with an injured worker. Workers' compensation schemes are by their nature "non-fault," meaning the cause of injury is immaterial to the entitlement to benefits. A worker injured by their own negligence is still entitled to statutory benefits, and a negligent employer is protected from a damages suit, regardless of its actions causing the injury (unless there is an intentional act or gross negligence, but that's a topic for another article).

An employer may not want to return a worker to its payroll if the employee's negligence was egregious and makes that person a risk to themselves or others in the workforce. An employer may suspect but is unable to prove substance use at work that caused the accident, or horseplay, or any other inappropriate behavior. The employer may simply not want an injured employee who poses an increased risk of a future injury to return to its payroll. Whatever the reason, employers must be very cautious in how they treat an injured worker who in most states, has significant protections against injury related employment action.

Retaliatory termination

In 37 states, it is statutorily prohibited for an employer to discriminate against or discharge an employee because they filed a workers' compensation claim. Adverse employment action against an injured worker constitutes retaliatory termination and can lead to very expensive consequences.

For example, in Louisiana, it is improper to discharge an employee from employment because the employee has asserted a claim for benefits under the Workers' Compensation statute or under the law of any state of the United States. La. Rev. Stat. § 23:1361(B). Florida, New Mexico, and North Dakota take it a step farther, making it illegal for an employer to so much as *threaten* an employee with termination if they file a workers' compensation claim. Fla. Stat. § 440.205; N.M. Stat. § 52-1-28.2(A); N.D. Cent. Code § 65-05-37.

The penalties for retaliation can be significant. For example, in Louisiana an employer can be responsible to pay the worker a year's wages for the position denied to the injured worker, along with attorney fees and costs.

Of the 13 states that don't have statutes protecting an employee from adverse employment action for filing a workers' compensation claim, 10 states recognize the common-law claim of wrongful or retaliatory termination. To prevail in a common-law workers' compensation retaliation claim in Colorado, the employee bears the burden of proving: (1) the employee was employed by the employer; (2) the employer discharged the employee; and (3) the employee was discharged for exercising a job-related right or privilege to which they were entitled. *Herrera v. San Luis Central Railroad Co.*(Colo. Ct. of App. 1999)

Georgia, Mississippi, and Rhode Island, however, provide neither statutory nor common law protection from retaliatory termination. In 1993, in *Pacheco v. Raytheon Corp.*, the Rhode Island Supreme Court stated, "we now unequivocally state that in Rhode Island, there is no cause of action for wrongful discharge."

Is the employer-employee relationship non-ending?

An employer may not want to continue employing an injured worker because of the increased liability of the employee potentially sustaining a second injury. Are employers "stuck" with the injured employee? Not necessarily. New Hampshire, a state that recognizes a common-law claim of wrongful or retaliatory termination, has a statute regarding the reinstatement of an injured employee. Under RSA 281-A:25-a:

An employer shall not be obligated to provide the former position to:

- An injured employee of a construction contractor if the project is completed, unless another project is ongoing.
- A temporary employee, except that a temporary employee shall not include an employee of a temporary agency;
- An employee who has been given permanent restrictions by his or her treating physician and who is not released to return to work at his or her former position; or
- An employee unable to return to work within 18 months from the date of injury.

RSA 281-A:25-a. In New York, employers are not required to hold a job for an injured employee if (1) the injured employee is unable to work and (2) the employer needs to fill the position for business reasons. However, not all states have these provisions, and it can become a slippery slope when an employer wants to sever ties with an injured employee.

Many states have attempted to incentivize the re-hiring of injured workers by establishing "second injury funds." These funds are typically designed so that when a worker has a pre-existing permanent partial disability and subsequently sustains a more disabling second injury, the statutory fund will assume some portion of the liability for both wage and medical benefits.

In addition, employers have the right to negotiate resignation as a part of a workers' compensation settlement. However, as with laws regarding retaliatory termination, the laws regarding employment release or resignation agreements vary from state to state. Some states require specific language in these releases in order for them to be enforceable.

In Pennsylvania, courts have allowed employment release clauses to be included in workers' compensation settlement agreements as long as they are non-coercive. In Massachusetts, employment release agreements are allowed; however, in a lump-sum settlement agreement, the parties cannot agree to bar the employee from ever working again or bar the employee from bringing a claim against their employer for wrongful discharge. M.G.L. c. 152 § 48(3).

Additional concerns can arise in union workplaces. If the worker is subject to a collective bargaining agreement, the agreement for an employee to not seek future work may not be enforceable, because the collective bargaining agreement can take precedence over the settlement between the injured worker and the employer.

In 37 states, it is statutorily prohibited for an employer to discriminate against or discharge an employee because they filed a workers' compensation claim.

So, while employment release agreements are generally allowed, the laws of a specific state or the contract governing the employment should be reviewed to understand the scope of what the employer can do vis a vis the continuing employment relationship.

Employer takeaways

As always, an employer should consult with its insurance carrier and counsel before making a decision about the retention of an employee who has filed a workers' compensation claim.

While there are many employment release agreements readily available online, an employer should fully understand the applicable state laws to determine whether an employment release clause can be included in a workers' compensation settlement agreement, whether a separate release is needed, or whether employment termination is even an option.

While there is no current law in Georgia, Mississippi, and Rhode Island regarding retaliatory termination, public policy is ever changing, and an employer should take precautions to avoid a potential claim by an injured worker.

Alan G. Brackett is a regular contributing columnist on workers' compensation law for Reuters Legal News and Westlaw Today.

About the authors

Alan G. Brackett (L) is the managing member of the defense firm **Mouledoux, Bland, Legrand & Brackett** in New Orleans. His practice focuses on the defense of claims arising under the Longshore and Harbor Workers' Compensation Act, Defense Base Act, War Hazards Compensation Act, Jones Act, and Louisiana Workers' Compensation Act. He can be reached at abrackett@mblb.com. **Ava Wolf** (R) is an associate attorney at the firm. Her areas of practice include the defense of employers and insurance carriers for claims arising under the Longshore and Harbor Workers' Compensation Act, Defense Base Act, and War Hazards Compensation Act. She can be reached at awolf@mblb.com.

This article was first published on Reuters Legal News and Westlaw Today on December 21, 2022.