



Beyond Workers' Compensation: Injured Workers and Employment Law Risks

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Injured workers expose an employer to overlapping legal obligations. An employer potentially must satisfy the obligations imposed by three laws: (1) the workers' compensation law, (2) the Americans with Disabilities Act (ADA), and (3) the Family and Medical Leave Act (FMLA). Each of them defines covered employers and covered employees differently. Each also has its own distinct purpose.

To manage its liability risks, an employer must understand when these three laws apply, which employees have rights under them, and the purposes that each of them has. First, the workers' compensation law covers any employer in Illinois. In Missouri, this law's coverage reaches any non-construction industry employer that has at least five employees and construction industry employers with at least one employee. The workers' compensation law gives injured workers the right to medical treatment, disability pay and rehabilitation services. Finally, it forbids retaliation against workers that exercise their workers' compensation law rights. Consequently, an employer cannot lawfully fire an employee because he or she has pursued a workers' compensation claim.

Second, the Illinois Human Rights Act (IHRA), Missouri Human Rights Act (MHRA) and the ADA prohibit discrimination against persons with disabilities. For purposes of disability discrimination, the IHRA requires an employer's employment of only one employee. The MHRA covers employees with six or more employees. The ADA imposes its obligations on employers with 15 or more employees. Each of these laws imposes substantially the same obligations on employers to avoid disability discrimination and to make reasonable accommodations to an employee's disabilities. Thus, as a practical matter, the laws protecting employees with

disabilities cover the vast majority of covered employers under the workers' compensation laws.

Only some injured workers, however, have disabilities. The ADA, IHRA and MHRA define disabilities as a past, current or perceived physical or mental impairment that substantially limits a major life activity. Examples of major life activities include: seeing, hearing, talking, eating, sleeping, breathing, learning, standing, bending, lifting, working, communicating, reading, concentrating and thinking. Functions of the immune system, such as normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions offer examples of major bodily functions. Disabilities exclude illnesses or injuries that normally heal in a relatively short time period, such as broken bones, influenza, common colds, infections, muscle sprains, bruises, burns and lacerations. Effectively, if a physical or mental impairment substantially limits a major life activity or a major bodily function for six months or more, then a worker has a disability.

Third, the FMLA exempts many employers that the workers' compensation law covers. Employers must employ at least 50 employees for FMLA coverage. A FMLA eligible employee must work at a site either (a) where the employer employs at least 50 employees or (b) located within a radius of 75 miles of other work sites where the employer employs a combined total of at least 50 employees. The FMLA allows a maximum of 12 weeks of unpaid leave in any period of 12 consecutive months. The eligible reasons for FMLA leaves relevant to injured workers include either inpatient medical care or continuing medical treatment by a health care provider, or both. At the end of a FMLA leave, the employer must reinstate the injured worker to the same job he or she had immediately before the leave started.

A FMLA-eligible worker, furthermore, must meet length of service and hours worked requirements. An eligible employee must have completed at least 12 months of employment with the employer, although not necessarily 12 consecutive months. An eligible employee must have also worked at least 1,250 hours in employment with the employer during the 12 months immediately before the leave starts.

The overlapping of the workers' compensation law, ADA and FMLA occurs in the context of three issues that the management of an injured worker's injury raises. Those issues involve:

1. Whether the employer allows the worker excused absences from work for medical treatment and recuperation,
2. Whether the employer permits the injured worker to return to work, and
3. Whether the employer ultimately reinstates the worker to the job that she or he had when her or his injury happened.

To understand its legal obligations, an employer must consider how each of these laws regulates its conduct toward an injured worker. Specifically, the workers' compensation law requires neither leaves of absences nor job reinstatement. The law's prohibition against retaliation, as a practical matter, prevents employers from terminating the employment of injured workers hastily after they suffer an injury. The workers' compensation law, however, allows employers to terminate the employment of injured workers because of their unavailability to work. For example, employers can enforce a uniformly applied policy that terminates the employment of any inactive employee, including an injured worker, who has not worked in a stated period, such as six months. In Illinois, however, the termination of an injured worker before both he or she resumes working and the final disposition of his or her workers' compensation claim could expose an employer to additional and often very large wage differential liability in that claim.

An injured worker may also have a disability. If he or she has a disability, the employer must make reasonable accommodations to his or her disability. Either a leave of absence or the extension of a leave beyond the FMLA's 12 weeks may provide a reasonable accommodation. Employers have no duty to continue the employee's health plan benefits during such a leave. However, they must reinstate the injured worker to substantially the same job held before the leave began, including employee benefits. As a practical matter, that obligation may cause employers to provide health plan benefits to an injured worker that receives a leave as a reasonable accommodation.

Injured workers may also have FMLA rights. An injured worker eligible for FMLA may take an unpaid leave of absence for a maximum of 12 weeks during any 12-month period. The employer must also continue the employee's health plan participation during a FMLA leave on the same terms as the employee participated before the leave. At the end of a FMLA leave, an injured worker has a right to reinstatement in the job held immediately before the leave began.

In addition, light duty assignments raise workers' compensation, disability discrimination and FMLA issues. Neither the ADA nor the FMLA specifically address light duty. Such jobs often do not satisfy the FMLA's requirement of restoration to a job with the same duties, pay and benefits as the employee had before the leave started. FMLA-eligible injured workers may refuse light duty assignments and take FMLA leave instead. The employer may then reduce such an injured worker's temporary total disability benefits in accordance with the workers' compensation law without violating the FMLA. The injured worker still has a job restoration right when his or her FMLA leave ends. If such a worker cannot return to work at the end of the FMLA leave, then he or she loses his or her job-restoration right.

Under the ADA, light duty may provide a reasonable accommodation as a temporary transfer to a job that the injured worker can do despite his disability. Employers have no duty to create jobs for employees with disabilities. The ADA, furthermore, recognizes the right of employers to limit light-duty assignments either to a specific length of time or to employees with work-related injuries, or both. If an employer assigns an injured worker to a light-duty job, then it must make reasonable accommodations to the light-duty job, if necessary. Finally, however, an open-ended light-duty assignment puts an employer at the risk of redefining the employee's essential job duties to those of the light-duty assignment.

Depending on the circumstances of an injured worker's leave of absence, he or she may have a right to job restoration. Such a worker's unavailability to work for an extended period provides a lawful reason for the termination of his or her employment without liability for workers' compensation retaliation. In Illinois, however, such an employment termination could have the unintended effect of creating a large wage differential claim in the employee's workers' compensation claim. Employers generally must reinstate injured workers that take leaves in accordance with their FMLA rights or as a reasonable accommodation. Both the FMLA and ADA, however, recognize exceptions to an employee's reinstatement right if an injured worker cannot do a job's essential functions without posing a risk of harm to one's self or others.

In sum, employers must exercise caution in their dealings with injured workers. The laws governing an employer's obligations to its injured workers mesh unevenly. For instance, an injured worker may lack any right to reinstatement to the job that he or she held before his or her injury under the workers' compensation law and even the FMLA, but may still have that right under the ADA. To avoid unintended adverse consequences, employers must analyze their decisions affecting injured workers under each of the workers' compensation law, ADA and FMLA. Such an analysis will usually include the employer seeking the advice of its labor and employment law counsel. To minimize liability risks, the law that gives the most protection to the injured worker under the circumstances should guide the employer's decision-making.

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