

# ADA, FMLA & WORK COMP OVERLAP

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# Employment and WC Issues

- COVID-19 Impact
- Public v. Private Employer
- Safety Sensitive Positions
- Labor Union Workers and Collective Bargaining Agreement



# ADA – Americans with Disabilities Act

- Essentially requires employers to avoid discriminating against workers with disabilities and to make reasonable accommodations where it will not cause an undue burden
- 
- Applies to employers who have 15 or more employees
- Applies to workers who have a “disability”



# ADA – Americans with Disabilities Act

- Questions to ask during a workers compensation claim:
  - Does the claimant's injury constitute a “disability”?
  - Does the employer have to accommodate the claimant's disability?
  - Can the employer terminate the claimant if he / she cannot perform prior job?



# ADA – Americans with Disabilities

- Does the claimant's injury constitute a “disability”?
  - a past, current or perceived physical or mental impairment that substantially limits a major life activity
- “Major Life Activities” include:
  - seeing, hearing, talking, eating, sleeping, breathing, learning, standing, bending, lifting, working, communicating, reading, concentrating and thinking



# ADA – Americans with Disabilities Act

- Is the employer required to accommodate the disability?
  - Must provide reasonable accommodations UNLESS they would result in an undue burden on the employer.
- Can the employer terminate the claimant if he/she cannot perform the prior job?
  - If he / she is not physically capable of working for the employer with or without accommodation



# FMLA – Family and Medical Leave Act

- Where applicable, requires an employer to provide up to 12 weeks of leave during a 12-month period for birth / adoption or serious health condition of claimant or family member
- At the end of the FMLA leave the employer must reinstate the injured worker to the job he/she had before the leave (or a job that is substantially the same).



# FMLA – Family and Medical Leave Act

- Covers employers who have at least 50 employees
- To be eligible, employee must:
  - work at a location where employer has at least 50 employees within 75 mile radius.
  - have completed at least 12 months of employment (not necessarily consecutive)
  - have worked at least 1,250 hours with employer during the 12 months immediately preceding leave





# FMLA – Family and Medical Leave Act

- Questions to ask during a workers compensation claim:
  - Does the injured worker have to accept an accommodated light-duty position within his / her restrictions?
  - Can the employer fire the injured worker if unable to return to work after 12-weeks of FMLA leave?
    - May possibly violate the ADA



# FMLA – Family and Medical Leave Act

- Questions to ask during a workers compensation claim:
  - Should employer provide FMLA paperwork during a work comp claim?
    - If / when injury qualifies as a “serious health condition”



# FMLA, ADA & WORK COMP

- Tips:
  - It is important to analyze each case under each set of laws when making decisions
  - Best practice is to comply with whichever law is most demanding
  - Involving work comp and employment law attorneys is wise



# Fit for Duty Exams

- Employment Law Considerations
- Workers' Compensation Considerations



# GLOBAL SETTLEMENTS

- Global Settlements
  - Common in cases where claimant has sustained multiple or serious injuries or has a high risk of re-injury
  - Pay additional consideration for an agreement to voluntarily resign and waive the right to bring any employment lawsuits
  - Agreement can include admission that claimant is physically incapable of performing the essential functions of the job



# WHAT IS A RESIGNATION AND RELEASE?

- A stand-alone contract sometimes entered into at the time a workers' compensation claim is resolved
- Must be negotiated separately
- Consideration paid must be separate from workers' compensation settlement
- Payment cannot be issued by workers' compensation insurance carrier or self-insured as a workers' compensation payment
- Should waive all claims related to employment relationship



# RESIGNATION AND RELEASE: EMPLOYER MOTIVATIONS

- The workers' compensation settlement contemplates temporary or permanent wage loss;
- Civil suit risk mitigation
- Post-separation documentation
- Corporate policy



# RESIGNATION AND RELEASE: RISKS

- The right of employees to make claims for, and collect, workers' compensation benefits is guaranteed in every state.
- As a result, employer cannot force a claimant to quit in exchange for workers' compensation benefits.
- And in Kansas and Missouri, employers who do not act in good faith are subject to civil and criminal penalties.
- Additionally, employers who do not act in good faith risk the employee filing a workers' compensation retaliation case.





# RESIGNATION AND RELEASE: AVOIDING RETALIATION LIABILITY

- Two different agreements with separate consideration
- Negotiated in good faith
- No policy that workers' compensation claims **MUST** contain a resignation clause
- Employee represented by an attorney
- Employee given opportunity to become fully informed of the terms
- Legitimate reasons **on the record** for the employer to require resignation **AND** for the employee to accept.



# RESIGNATION AND RELEASE: NEXUS STATE SURVEY

- **Kansas:** Permanent and total disability—wage loss can be considered.
- **Missouri:** Permanent and total disability “unable to engage in any substantial and gainful employment” but also considers ability to earn comparable wages.
- **Illinois:** Reduction in earnings and unable to return to “usual and customary” line of employment—but also entitled to benefits if no reduction in earnings.
- **Iowa:** It’s complicated.
- **Nebraska:** Loss of earning power is considered even if the worker returns to work for the same or higher wages
- **Oklahoma:** Inability to return to pre-injury or equivalent job. Lost wages has not yet been successfully argued in Oklahoma.
- **Arkansas:** Wage loss not typically a consideration in determining permanent impairment.



# RESIGNATION AND RELEASE: SHOULD YOU DO IT?

- **It depends.**
- The employer has obligations under the ADA and the FMLA too, these include reinstatement rights for the employee.
- The employer should evaluate each of these obligations separate from the workers' compensation claim.
- The employer must engage in an interactive process to determine if with reasonable accommodations he can remain employed.
  - Are there other positions available that have less physicality and require less mobility but otherwise are essentially the same job?
  - Can the employer modify the job responsibilities to allow worker to continue as employee?
  - Is worker qualified for another job with the employer without a significant reduction in pay or benefits?
- Any resignation and release must be a separate agreement from the worker's compensation agreement, and it must be made in exchange for separate consideration a.k.a. \$\$\$\$



# RESIGNATION AND RELEASE: TAKEAWAYS

- This is a highly fact dependent issue—consult with your employment attorney to determine the risks associated with offering a resignation and release in conjunction with a workers' compensation settlement.
- Remember your obligations under the ADA and FMLA.
- Act in good faith.
- It must be a stand-alone agreement with separate consideration.
- The employee should have an opportunity to seek legal counsel.
- Make a record of why the resignation and release is in the employee's interest.
- There should be a nexus between the degree of injury, wage loss, and the proposed resignation.





# QUESTIONS?

