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# Best Practices For Legally Handling Workers' Compensation Situations

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# Today's Agenda

- I. Basics of WC**
- II. Hiring Pitfalls and Best Practices**
- III. Handling WC Issues During the Employment Relationship**
- IV. Handling WC Issues at the End of the Employment Relationship**
- V. Common WC Questions/Issues**

# **I. Basics of WC**

- **WC absences can be very problematic (declining production, staff shortages, morale problems, higher premiums, etc.).**
- **WC Act's four primary components (two in my practice):**
  - 1. Provides “no fault” system to cover medical and other costs associated with work-related injuries or illnesses.**
  - 2. Has anti-retaliation provisions.**
  - 3. Poster requirement.**
  - 4. Record keeping requirements.**
- **WC provides a cap on what employees can be compensated for – limits employer liability (except for intentional tort).**

## **II. Hiring Pitfalls and Best Practices**

- **Never, ever ask about prior or pending workers' compensation claims/injuries.**
- **Don't ask prior employer about WC claims either (but can ask about applicant's safety practices).**
- **Ask questions that are ADA compliant.**
  - **Can you, with or without reasonable accommodation, perform essential functions of job?**
  - **If disability is obvious or disclosed, you can ask about accommodations.**
  - **Can make job contingent upon passing job-related physical exam.**

- **Have a written job description outlining essential functions.**
- **Be careful with background search – can't perform workers' compensation claim search until post offer.**

# **III. Handling WC Issues During the Employment Relationship**

## ***(Best Practices)***

- **Ensure work environment is safe as possible (OSHA implications).**
- **Maintain clear reporting requirements of work-related injuries.**
- **Zero-tolerance policy for any type of fraud.**

- **Require employees to report any type of injuries immediately, no matter how minor. (Illinois law requires 45 days)**
- **If employee is out 3 or more days, notify the IWWC.**
- **Encourage reporting of suspicious injuries.**
- **Train and post required workers' compensation notices.**
- **Be careful when questioning validity of claim – can't really discharge over dispute about extent of injury. (*Clark v. Owens-Brockway Glass Container, Inc.*)**

- **Look for trouble signs (always on Mondays, etc.) – have insurer or other expert investigate.**
- **Report the claim immediately to the insurer (beware of paying directly or delay in reporting).**
- **Remember that WC leave can and should be concurrent with FMLA.**
- **Maintenance of medical information related to WC claim.**
- **Consider invoking COBRA rights to get employee back to work.**
- **Consider early return-to-work programs (light duty).**

## ***(Suspicious Circumstances/Red Flags)***

- **Employee gives conflicting or vague information.**
- **No witnesses to the alleged incident.**
- **Incident happened in an area where the worker normally isn't supposed to be.**
- **Injury occurred during performance of a task the employee normally doesn't perform.**

## ***(Suspicious Circumstances/Red Flags)***

- **Injury occurred first thing Monday morning (or any work day).**
- **Injury occurred just before a strike, disciplinary action, or layoff.**
- **Employee has a history of injury claims, especially involving hard-to-prove injuries, such as soft-tissue injuries.**
- **Employee avoids medical treatment, misses doctor appointments, etc.**

## ***(Suspicious Circumstances/Red Flags)***

- **Worker is known to be disgruntled.**
- **Employee isn't helpful or cooperative.**
- **Employee is unusually familiar with WC claims, vocabulary, procedures, or laws.**
- **Worker can't be reached by phone while on leave; spouse repeatedly says, "He/she just stepped out."**

# **IV. Handling WC Issues at the End of the Employment Relationship**

- Illinois is an “at will” state – terminate for any reason as long as long as it doesn’t violate law.
- One exception is for exercising rights under WC Act.
- Retaliation claims are usually biggest problem – both against discharged employees or witnesses.
- Potential retaliation damages – back pay, future wage losses, mental anguish, attorneys’ fees. Punitive damages when conduct is willful and wanton.

- **Prima facie case of WC retaliation: (1) Plaintiff must be an employee of the Defendant before the injury occurred, (2) Plaintiff must have exercised or threatened to exercise a right granted by the WC Act, and (3) Plaintiff's termination must have been causally related to the exercise of the WC Right (as opposed to showing employer's reason was false).**
- **The causation element is not met if the employer had a valid non-pretextual basis for discharging the employee.**

## ***(Best Practices to Avoid WC Retaliation)***

- **Don't terminate an employee immediately after finding out about injury/WC claim.**
- **Document the real reason for the termination (make sure it passes the “smell” test).**
- **Be certain of the classification of your employees (employee v. independent contractor).**

## ***(Best Practices to Avoid WC Retaliation)***

- **Remember that the underlying injury (not necessarily the claim) can trigger the protected activity.**
- **Remember that protection extends to witnesses and participants/witnesses.**
- **Honest belief that employee is not telling truth does not prevail (legal determination of fraud or independent conclusion of fraud is suggested).**

# **V. Common WC Questions/Issues**

- 1. Should we pay the WC claim directly?**
- 2. Why do very few WC cases go to trial?**
- 3. How is the average weekly wage (AWW) calculated?**
- 4. Drug & alcohol use and workers' compensation claims (sole cause v. primarily caused).**
- 5. Can/should an employee be kept on the payroll during WC leave?**

# Questions?

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