The Interaction of Workers’ Compensation, the ADA and Maximum Leave Policies
Work-Related Injuries

- Employers too often view work-related disability claims in isolation and fail to globally manage injured employees in conformance with the Americans with Disabilities Act ("ADA"), Workers’ Compensation laws, labor contracts, and leave policies.

- Global management of work-related injuries is essential in not only limiting liability under all applicable laws but also in managing your work force.
Global Management of Injury Claims

• Employers often lack necessary policies and procedures for globally managing employees who are on workers’ compensation leave.

• Today we will answer the most frequently asked work-related injury questions.

• We will conclude with recommended policies and practices for globally managing work-related injuries.
1. Can I ask an applicant about his workers’ compensation injury history in order to hopefully screen out workers with multiple past work-related injury claims?

2. Will a resignation letter accompanying a workers’ compensation settlement shield an employer from employment liability?

3. If my insurance company and/or workers’ compensation adjuster is handling all of my workers’ compensation claims, do I have to worry about potential ADA claims?
Most Often Asked Questions (cont.)

4. How long do I have to keep an injured worker on the employment rolls? Are maximum leave policies “legal”?

5. Should I designate workers’ compensation leave time as FMLA time?

6. Should I totally delegate the handling of a workers’ compensation claim to the attorney handling any workers’ compensation litigation?

7. My injured employee’s workers’ compensation attorney says I have no right to communicate with him. Is this correct?

8. Can I discipline and/or fire an injured worker who is out on workers’ compensation leave?
Global Handling of Injured Worker Issues

• When globally managing employees, who suffer work-related injuries, employers must review not only workers’ compensation issues but also look at the Family and Medical Leave Act (“FMLA”), the Americans with Disabilities Act (“ADA”), the employer’s leave policies, and any applicable collective bargaining agreement.
Global Handling of Injured Worker Issues

- Any workers’ compensation injury resulting in lost time of three days or more that involves continuing treatment is a serious health condition under the FMLA.
- Workers’ Compensation leave time should be designated as FMLA leave.
- Almost all lost time workers’ compensation injuries qualify as FMLA serious health conditions. The much tougher question is whether a work-related injury qualifies as a disability under the ADA.
• Many workers’ compensation injuries qualify as disabilities under the ADA. Easy examples are serious long term injuries such as chronic back conditions involving herniated discs, etc.

• The determination as to whether a particular injury constitutes a disability under the ADA involves a case by case analysis regarding the severity and duration of the injury.
ADA Overview

• The ADA prohibits employers from discriminating against “a qualified individual with a disability” with respect to hiring, firing, and other employment decisions.

• An employer is required to make “reasonable accommodation” to the known physical or mental “disabilities” of an otherwise qualified individual unless to do so would:
  - Impose an “undue hardship” upon employer; or
  - Pose a “direct threat” to the health or safety of the employee or others in the workplace.
Disability

• "Disability" under the ADA means:
  - A physical or mental impairment that substantially limits one or more of the “major life activities” of an individual; or
  - Having a record of such impairment; or
  - Being “regarded as” having such an impairment.

• The ADA protects any individual with a disability who, with or without reasonable accommodation, can perform the “essential functions” of the employment position held or desired.
ADA Litigation Focus

- Plaintiff’s bar workers’ compensation and employment attorneys focus on and litigate employer mistakes in handling crossover ADA/workers’ compensation issues.

- Mistakes often occur in handling ADA/workers’ compensation reasonable accommodation issues when employers outsource the handling of work-related injuries to insurance companies or third party administrators.

- The ADA is also a focus of the EEOC.
• Can I ask applicants about their workers’ compensation injury histories so I screen for candidates who do not have an established history of suing their former employers for workers’ compensation?
  - No. Employers, under the ADA, cannot ask applicants about their workers’ compensation claims history. EEOC ADA guidance views such questions as impermissible attempts to elicit disability information pre-offer.
Medical Exams & Inquiries

- Pre-offer, employer generally may not make medical inquiries; post-offer/pre-employment, employer may ask disability-related questions and perform medical examinations.

- Disability-related questions and medical exams do not have to be job-related as long as: (1) the question or exam is applied to all new hires in same job category; and (2) any medical information obtained is kept confidential.

- Cannot revoke job offer based on medical examination or inquiry unless criteria is job-related and consistent with business necessity and employer demonstrates employee cannot perform essential job functions even with a reasonable accommodation.
Refusal to Hire

• ADA prohibits employer from refusing to hire otherwise qualified applicant because he or she is disabled or perceived as being disabled.

• To be protected, individual with disability must be qualified to perform essential functions of the job, with or without reasonable accommodation.

• Employer can require applicant to meet job requirements for job-related standards, including educational background, work experience, skills, and professional certifications and licenses.

• ADA does not restrict employer’s right to hire best qualified applicant.
Question Two – Resignation Letter

• We had our workers’ compensation lawyer obtain a signed resignation letter from our disabled employee when the workers’ comp case was settled.
  - We can’t be sued, can we?
  - Yes, you can be sued. Resignation letter is not an employment release.
Resignation Letters Are Not A Release

- The only real protection from labor and employment grievances and lawsuits is an employment release.
- Resignation letter only provides a factual defense that can be defeated.
- Injured employee will argue he only signed a resignation letter under duress in order to receive a severance payment that he needed to pay his mortgage.
- His attorney may argue the resignation did not constitute a release because it lacked necessary consideration and legally required language.
What a Resignation Letter Does Not Prevent . . .

- Age, race, sex discrimination claims
- ADA, FMLA lawsuits
- FLSA claims
- Workers’ compensation retaliation claims
- Contractual grievances
- Wrongful termination/constructive discharge claims
- Unemployment claim
Employment Release Only Way to Resolve Employment Claims

- Employment release must contain consideration separate from any workers’ compensation settlement.
- Release must also contain specific technical language to guarantee release of all claims.
- 21 day waiting period for OWPA release.
- 7 day revocation period.
- EEOC release language releasing ability to profit from EEOC claim.
Practical Steps for Labor and Employment Release

• Release should be signed and timed so waiting/revocation periods run prior to workers’ compensation settlement hearing.

• Release consideration should be negotiated with claimant and his/her attorney prior to workers’ compensation monies being finalized.

• Labor and employment attorney should draft the release – not your workers’ compensation counsel.
I don’t have to worry about the ADA since my Workers’ Compensation Adjuster is handling this case. Do I?

- Yes, you do have to worry about the ADA. You must manage ADA reasonable accommodation issues and engage in the interactive process where appropriate.
Know the Americans with Disabilities Act

- Have your H.R. Professionals review all workers’ compensation medical reports and letters from attorneys for ADA accommodation requests.
- Medical Reports/letters can qualify as ADA requests.
- Magic words are not necessary for an accommodation request.
- It is not a defense to an ADA claim to say we sent the letters/reports to an insurance adjuster or I thought the adjuster was handling this.
Know the Americans with Disabilities Act

- Review all medical reports to make the initial determination if a workers’ compensation injury could qualify as a disability under the ADA.

- Communicate with your disabled employee on a regular basis in writing. Communicate in writing that the employee must inform the employer of any improvement in medical condition that enables the employee to perform his or her essential job duties with or without a reasonable accommodation and state that all requests for accommodation will be considered and discussed with the injured employee.
Americans with Disabilities Act

• Draft an updated ADA policy.
• Integrate ADA analysis into your workers’ compensation claims handling procedures.
• Understand the ADA and the ADA Amendments Act.
• Engage in the ADA interactive process.
• Be careful regarding maximum leave policies. Policy should be carefully drafted to comply with ADA and EEOC Guidance.
Question Four – Maximum Leave Policy

• We have a one year policy of terminating anyone who is unavailable for work. We apply it consistently so this eliminates all potential liability. Right?

- No. Maximum Leave Policy must be carefully drafted to avoid ADA liability.
Maximum Leave

- Any maximum leave policy must involve a flexible back and forth with the injured worker to determine if the injured employee can return to work in the foreseeable future.

- Any policy that puts a limit on leave and terminates employment must comply with the ADA.

- It is not acceptable to have an absolute, inflexible policy with a set termination date for employees who are out on workers’ compensation leave for a set period. Any policy must involve an individual case by case review and back and forth with the injured employee as to whether he or she can return to work in the foreseeable future.
Under the ADA, offering leave time to employees who have qualifying disabilities is a form of reasonable accommodation, absent undue hardship. According to the Equal Employment Opportunity Commission (“EEOC”), additional leave time – beyond the amount of leave time that the employer ordinarily provides – must be considered as part of the interactive dialogue before terminating an employee.

As a result, policies that mandate *per se* employment termination at a set time are considered violations of the ADA. Accordingly, any policy specifying the point in time when discharge otherwise would occur must include provisions for case-by-case analysis of whether the individual has an ADA qualifying disability, and if so, an opportunity for evaluating whether additional leave time would enable the employee to return to work in the foreseeable future and perform the essential functions of the job, with or without accommodation(s).
General Guidelines

• No uniform rule on how much leave is reasonable.
  - Some courts have found a full year of leave – or even more – is reasonable!

• Must conduct an interactive process to determine what leave would be a reasonable accommodation and whether extension of leave is reasonable accommodation.

• Leave as a reasonable accommodation does not mean paid leave, but use of accrued paid leave is a reasonable accommodation.

• Employers should consider other, less restrictive, accommodations, such as reassignment, reduced hours or an assistance device.

• Review workers’ compensation medical records and workers’ compensation testimony as part of any interactive process.
Indefinite Leave?

- Many courts have rejected indefinite leave requests as reasonable accommodation.
  - Most U.S. Circuit Courts of Appeals have held that indefinite leave is not reasonable accommodation.
  - However, a handful of courts have suggested indefinite leave could be reasonable, unless it can be shown to pose undue hardship.

- Third Circuit and Pennsylvania federal courts have consistently held that indefinite leave is not reasonable accommodation.

- Even EEOC concedes that employers “have no obligation to provide leave of indefinite duration. Granting indefinite leave ... can impose an undue hardship on an employer’s operations.”
**No Fixed RTW Date**

- Even if employee cannot provide fixed date to return to work, requested additional leave still may constitute reasonable accommodation, unless undue hardship.

- Undue hardship may derive from disruption to operations because employer cannot plan for employee’s return or permanently fill job.

- Where leave is granted without fixed RTW date, employer should require employee to provide periodic updates on condition and RTW – may reevaluate whether continued leave is undue hardship.

- Employer cannot automatically claim undue hardship if all employee can provide is *approximate* RTW date.
Sample of Recommended Leave Policy Language

• To provide employees with enough time to seek medical treatment and to recover to the point that they can return to work, if possible, employees absent from work for medical reasons may remain out on approved leave based on the Employer’s policies for _____ months. Subject to the case review procedures set out below, the employee will separate from employment at the end of the _______ month period.
• Case Review

- The Employer recognizes that there are cases in which an employee may exhaust the _____ months of approved medical leave but could return to work and perform the essential functions of his/her job with a reasonable accommodation, including an extension of the _____ month period. For this reason, the Employer will initiate a “case review” of any employee on medical leave before separation from employment occurs. The case review will be initiated within ninety days of the expiration of the ____ month leave period.
Sample of Recommended Leave Police Language

- The case review will involve the employee being contacted in writing to address the following issues . . .
  - Whether employee is a qualified individual with a disability.
  - Whether employee can resume his essential job functions in the foreseeable future if granted additional leave beyond the ____ month leave period.
  - Whether alternative reasonable accommodations are available.
  - Whether any such accommodations poses an undue hardship on the employer.
Question Five – FMLA Designation

• The Claimant is out on Workers’ Compensation Leave so I can’t designate this leave as FMLA Leave. Can I?

- Yes. Designate Workers’ Compensation leave as FMLA leave whenever possible.
FMLA

- Always designate workers’ compensation leave as FMLA leave (bargainable issue).
- FMLA leave must be exhausted before an employee is terminated.
- FMLA provides 12 weeks of job protection.
- FMLA allows injured workers job protection for twelve weeks even if he or she rejects a light duty job offer.
• My Workers’ Comp. Attorney is handling this. Can’t I just wait for a copy of the Judge’s decision?
  
  - No. Employers must globally manage injury claims and should not totally outsource this essential management.
Essential Knowledge For Attorneys Defending Your Workers’ Compensation Claims

- Collective Bargaining Agreements
- Policies and Procedures
- Job Descriptions
- Pension Plan – Ordinances
- Workers’ Compensation Policies and Procedures
- ADA Policies and Procedures
- Disability Policies
- Drug Testing Policies – DOL drug testing regulations
- FMLA policy

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Educating Your Attorneys

• Work site attorney visit.

• Workplace documents – policies, labor contracts, personnel files, medical files, claims files.

• Coordination with labor and employment counsel.

• Coordination with grievances, unemployment claims, EEOC and PHRC claims.
Question Seven – Communication with Employee

- My Employee is represented by a Workers’ Compensation attorney so I can’t talk to the employee. Can I?

  - Yes. Injured workers still have to comply with your employment policies and communicate with their employers.
Communication with Employees

• Workers’ compensation claimants still have to comply with employment policies and can be disciplined for non-compliance.
• Attorney-client privilege issues.
• Reasonable communication policy.
• HIPPA issues.
Question Eight – Discipline of Injured Worker

- Can I discipline and/or fire an injured worker who is out on workers’ compensation leave?
  - Yes. As long as the discipline/firing is for legitimate, non-discriminatory reasons.
Workers’ Compensation & Discipline

- Workers on disability leave should be investigated and appropriately disciplined just like any other worker. The Workers’ Compensation Act and the Americans with Disabilities Act (“ADA”) do not act as a shield from discipline. These acts only prohibit retaliation in treating disabled employees differently because they are disabled.

- Employee’s can sue under Pennsylvania law for terminations that occur in retaliation for the employer filing a workers’ compensation claim. See Shick v. Shirey, 736 A.2d 1231 (1998). However, employers can fire employees on worker’s compensations for legitimate non-retaliatory reasons.
A. Lessons Learned - Recommendations

1. Avoid tunnel vision such as this is just a workers’ compensation claim while ignoring the ADA, the FMLA, third party lawsuits, union grievances, disability insurance claims, subrogation issues, pension credits, etc.

   a. Recognize potential conflicts with insurance company/third party administrators whose focus is on settling workers’ compensation cases. Third party administrators insurance adjusters often have no knowledge of and no duty to consider your employment issues.
b. Set up a flow chart work-related injury claim procedure that all employees must follow.

(i) Require all employees to fill out an injury form.

(ii) Require all employees to list all of their treating medical providers and sign a medical release.

(iii) Require all employees to provide medical documentation of their injury.
(iv) Require all employees to attend a medical examination with a doctor chosen by the employer and to treat with the employer’s posted physicians for maximum period set out by workers’ compensation laws (90 days in PA).

(v) Investigate all injury claims:

(A) Interview all witnesses and take witness statements.

(B) Obtain all relevant documents such as accident reports if injury was caused by a motor vehicle accident.
(vi) Only issue a decision accepting or denying an injury claim after these steps have been taken.

(vii) Designate as FMLA leave all time an employee takes off from work due to work-related or non-work related injuries or disabilities.

(viii) Maintain a consistent light duty policy that complies with the ADA and the workers’ compensation Act.

(ix) Maintain a consistent leave policy that complies with the ADA and the FMLA.

(x) Monitor medical reports and communications from the injured employer and his/her attorney to ascertain whether reasonable accommodations have been requested.

(xi) Appropriately consider, review and communicate with employee regarding any accommodation requests.

(xii) Draft an ADA compliant Maximum Leave Policy.
2. Global resolution of all claims. Do not “settle” a workers’ compensation case without examining whether there should be a global settlement of all claims such as pension disputes, resignation from employment, union grievances, third party lawsuits, subrogation, etc.

   a. Avoiding the Lazarus syndrome.

   b. A Workers’ Compensation settlement approved by a workers’ compensation Judge solely settles the comp claim. The only way to resolve all of your employment issues is an employment release.

Conclusion

- Draft and update ADA, Workers’ Compensation, FMLA and maximum leave Policies and Procedures.
- Investigate all claims.
- Look at all claims globally - consider FMLA, ADA and workers’ compensation issues concurrently.
- Always look to globally resolve injury claims through workers’ compensation Settlements and a Labor and Employment Release with separate consideration.