

Ask the Attorney: Garnishment orders, worker's comp and remote worker regulations

In this roundup of Ask the Attorney, employment lawyer, Nancy Delogu answers tricky questions about wage garnishments, worker's compensation, remote worker regulations, and employee record retention.

How do we know when to obey a garnishment order?

Q: “We received an order directing us to withhold wages from an employee from ECMC (Educational Credit Management Corporation). Since this is not a government entity, are we required to process mandatory withholding that is listed on the Order of Withholding from Earnings?” - Julia, California

A: You should refer the matter to the employee whose loan is affected, as they may have the ability to object to the garnishment order. However, regardless of what the individual may say, it is likely you will need to follow a valid garnishment order.

Administrative agencies can on occasion garnish wages (for example, the IRS does this regularly) and the Higher Education Act authorizes the Department of Education’s guaranty agencies to garnish up to 15% of disposable earnings to repay defaulted federal student loans; when this occurs, federal garnishment law applies, but state garnishment laws will not.

The U.S. Department of Labor’s Wage and Hour Division may be able to answer your further questions; you can go to <http://www.wagehour.dol.gov> or call 1-866-4-USWAGE for advice.

What to do if an employee on workers’ comp stops paying for insurance?

Q: “We have an employee out on workers’ compensation who has stopped paying his portion of his medical insurance. We emailed him a reminder but he has failed to respond and he is suing us for his case, since he was denied workers’ compensation. I have not terminated him, but I would like to know if I can move his insurance to COBRA due to disability and non-payment?” - Kim, California

A: Maybe. There are a few different laws to consider here. First, your health insurance plan terms control who is covered and when coverage is lost. It is common for health insurance plans to state that a worker who is out of work (for whatever reason) and not working a minimum number of hours will no longer be eligible for coverage. If that is the case, and this employee has been out of work long enough to be ineligible for health insurance under your plan, and you do terminate his or her health insurance coverage, then the individual may be eligible to continue the insurance through COBRA.

However, you must also bear in mind the protections of the Family and Medical Leave Act. If an employee qualifies for FMLA leave, you are *not* permitted to terminate his health insurance while he is on leave, even if he does not make the employee co-pay while out. Any decision you make should not have any impact on the

outcome of his workers' compensation claim, but I think you would be well-advised to consult with your counsel on that matter before making a final decision.

Whose state regulations do remote workers abide by?

Q: "If our office is in New Jersey and we have an employee working in Georgia, does that employee fall under the New Jersey Family Leave Act? Is there a Georgia Family Leave Act that she is entitled to? How is coverage determined?" - *Marta, New Jersey*

A: Generally speaking, the law of the state in which the employee works is the law that is applied in employment situations, although the mobility of workers today, coupled with more work from home arrangements, means that determining which law applies can be a challenge.

The New Jersey Family Leave Act applies to workers who work for employers with at least 30 workers and who have completed 12 months of service and who have worked 1,000 hours or more in the most recent 12-month period. The law permits a covered worker to take time away from work to care for a family member's serious health condition, or for the birth, adoption, or placement of a child in foster care.

This leave is job-protected, meaning that the employee is entitled to return to his or her same position (or, in some cases, an equivalent position) after the leave in most circumstances, and the employee is entitled to continue his or her employer-provided health insurance while on leave.

The law is detailed and its provisions may intersect with other laws, such as the New Jersey Paid Family Leave Law, so take care to familiarize yourself with all of the potentially relevant provisions, as coverage will vary.

Georgia does not have a family leave law, but does have a "Kin Care" statute that requires employers with 25 or more workers to permit those workers to use up to five days of their own accrued sick leave to care for immediate family members. Of course, you can elect to extend benefits offered to New Jersey workers to remote employees as a matter of policy, even if a particular law does not mandate it; in this case, you might grant the employee time away to care for her family in circumstances that would meet the NJFMLA standards.

When have we kept employee records too long?

Q: "Is there any legal liability for an employer keeping employee records for too long? For example, seven years? I know they need to be shredded, but what if you are audited and it is found you have employee files from 15 years ago?" - *Anonymous, Texas*

A: Probably not. Keeping records in and of itself is not problematic. Keeping records you don't need could eventually lead to concerns— for example, if private information in those records becomes the subject of a security breach.