

# How to terminate employees who have been out on workers' comp

Terminating an employee who has been out on workers' compensation leave is a high-stakes process that requires carefully considering many factors. How well you handle it can affect your ongoing workers' compensation liability—and could also subject you to claims of wrongful discharge or retaliation.

It's made all the more complex by the fact that your workers' comp carrier's goals may conflict with yours.

The carrier generally wants to get the injured employee back to work as soon as possible. That reduces its liability for wage benefits—temporary total or partial disability payments. As the employer, you may not want the worker back at all for a variety of reasons: a history of poor work performance, a tendency to be accident prone (and the corresponding likelihood that there will be another workers' comp claim) or the fact that the employee may return with work restrictions that compromise your operations.

In short, your carrier's goals are not yours. Therefore, don't rely on any employment law advice your carrier or its attorney may offer you.

## Medical improvement

Many workers' compensation rules govern an employee's return to work and the possible termination.

The employee's return to work generally follows an assessment of his or her maximum medical improvement (MMI). MMI is the basis for deciding whether the employee is no longer disabled.

If the employee is not totally disabled, the employer will generally offer the employee suitable work. "Suitable" means the employee can do the work considering his age, education, physical limitations, vocational skills and experience. The job cannot be "make-work" or a job specially created for this employee. If the employee refuses suitable work, the carrier can move to stop making temporary total or partial disability payments.

If the employee, however, can show that not accepting the offer of suitable work was reasonable, the carrier will have to keep paying benefits.

If the employee can't show it was reasonable to turn down truly suitable work, you should be able to terminate the employee with little risk.

## Constructive refusal of work

But let's say the employee does return to work—with less than complete success. How would termination work?

If the employee engages in misconduct or fails to properly perform his or her job, that may constitute a constructive refusal of suitable employment, and the carrier can seek to terminate benefits. In such cases, you have the initial burden of establishing that you terminated the employee for misconduct or fault—unrelated to

the compensable injury—for which a nondisabled employee would ordinarily have been terminated.

Then the burden shifts to the employee to show that his inability to find or hold other employment of any kind (or work at a wage comparable to that earned before the injury) is due to the work-related disability.

## **Performance and REDA**

In addition to issues related to workers' compensation liability, there are employment law concerns.

The North Carolina Retaliatory Employment Discrimination Act (REDA) prohibits employers from retaliating against employees in all kinds of situations, including matters related to workers' compensation benefits. REDA protects employees who exercise their workers' compensation rights.

If an employee has workers' compensation protected status, you can still discharge or take other adverse employment action. However, you must be able to prove by the greater weight of the evidence that you would have taken such action absent the protected status.

REDA provides for an administrative process to investigate claims. An employee may initiate a proceeding by filing a complaint with the North Carolina Department of Labor, Workplace Retaliatory Discrimination (WORD) Office.

## **Threat of civil action**

Following the administrative process, an employee can file a civil action in superior court. If the employee is successful, the court may award the following types of relief:

- An injunction to stop the improper conduct
- Reinstatement of the employee to the same or an equivalent position held before the improper conduct
- Reinstatement of fringe benefits and seniority
- Compensation for lost wages, lost benefits, and other economic losses caused by the misconduct.

If the court finds the employer's actions were willful, it can triple the amount of compensatory damages.

In addition to a claim under REDA, a discharged employee can file a civil action in superior court for wrongful discharge against public policy. The violated public policy is REDA's prohibition against discrimination related to workers' compensation matters. The claim would be similar to a retaliation claim under REDA, but would not have the administrative and other limitations set forth in REDA.

Employees who have pending workers' compensation claims commonly allege retaliatory discrimination or wrongful termination. Thus, you must be careful when taking employment action against an employee in this protected status. Communicate with your carrier to coordinate how you will handle those cases.