

**KCBA COMMERCIAL LAW SEMINAR-  
RETALIATORY DISCHARGE: FACTORING IN FEDERAL AND STATE  
STATUTES WHICH MAY IMPACT  
MAY 10, 2006-KANE COUNTY MULTICONFERENCE ROOM, JUDICIAL  
CENTER, ST. CHARLES, ILLINOIS**

**FACTUAL SCENARIO:** Your corporate client has an employee who sustained a work related injury and has been off duty with releases from his physician.

**Questions Posed:**

1. If the employee cannot return to work, how long before I should officially terminate his employment?
2. If the employee's physician recommends light duty, what should I do next?
3. Do I have to provide this employee with any reasonable accommodations?
  4. If I do terminate, what are the changes he could successfully bring a Common Law Retaliatory Discharge Claim?
5. Will the employee be eligible for unemployment compensation once terminated?
6. How do I apply the company's vacation pay policy with this employee?
7. How do I apply the company's severance pay policy with this employee?
8. How should I apply the company's bonus compensation plan to this injured employee?
9. When should I issue a COBRA Notice?
10. Who is responsible for the health insurance premiums?
11. Who determines if the employee is eligible for long term disability benefits?
12. Should I recommend that the employee apply for Social Security Disability Benefits?
13. Should I allow my worker's compensation insurance carrier to determine the employee's fitness for duty?
14. Should I follow the advice of the worker's compensation carrier's adjuster who wants me to bring the employee back to work as soon as possible even if the employee cannot perform his regular position?
15. The insurance company's physician says the employee is fit for duty but I have my doubts. Should I risk bringing the employee back only to have him hurt again in the near future?
16. Should I make an employment decision based upon this employee's impact on my health insurance rates?
17. This employee also called OSHA claiming an unsafe work environment. How can I bring him back when he has done that?

**FEDERAL AND STATE LAWS TO TAKE INTO CONSIDERATION**

Federal Family Medical Leave Act-28 USC Section 2601 *et. seq.*

1. Eligible Employee-Work for at least 12 months and at least 1,250 hours of service during prior 12 month period.
2. Eligible Employer-50 or more employees for each working day during each of 20 or more calendar weeks in the preceding calendar year.
3. Does employee have a serious health condition? In patient care in hospital or continuing treatment by a healthcare provider. 29 USC Section 2611.
4. Leave requirement (29 USC Section 2612). A total of 12 work weeks of leave during any 12 month period. Intermittent leave may be taken when medically necessary. See, 29 CFR Section 825.117.
5. Other FMLA issues:
  - FMLA leave is unpaid. (29 CFR Section 825.207)
  - Health insurance benefits are to be maintained. (29 CFR Section 825.209)
  - Employee entitled to return to an equivalent position. (29 CFR Section 825.215)
  - There are limitations on an employer's obligation to reinstate. (29 CFR Section 825.216)
  - Medical certification of "fitness for duty". (29 CFR Section 825.310)

Americans With Disabilities Act. (42 USC Section 12101)

1. Entities covered-15 or more employees under the Federal Act. Under the Illinois Human Rights Act, even one employee is enough. (775 ILCS 5/2-101(B)(1)(B))
2. Disabilities covered-physical or mental impairment that substantially limits one or more major life activities; a record of such impairment; or being regarded as having such an impairment. The Illinois definition includes "determinable physical or mental characteristic". Does not include conditions which are "transitory", "insubstantial" or "not significantly debilitating". (56 Ill. Adm. Code Section 2500.20) EEOC regulations provide guidance as to what they perceive as a qualified "impairment". (29 CFR Section 1630)
3. What is a reasonable accommodation? (29 CFR Section 1630.2)
  - Reasonable accommodations may include job restructuring
  - Open ended leaves for recuperation unless the leave would be an undue hardship. Case law provides that attendance is an important component of most jobs. Jovanovic v. In-Sink-Erator, 201 F.3<sup>rd</sup> 894 (7<sup>th</sup> Cir. 2000)
4. ADA Leave issues.
  - Unpaid leave could be an accommodation but an employer does not have to provide paid leave beyond that which is provided to similarly situated employees.
  - An employer can require an employee to use all accrued paid leave first and then unpaid leave.
  - An employer should not penalize an employee for leave which is taken as a reasonable accommodation (i.e. raises, promotions or benefits).

- If a disabled employee is on leave as a reasonable accommodation, the employer should keep that employee's job open unless it imposes an "undue hardship". See, Epps v. The City of Pine Lawn, 353 F.3<sup>rd</sup> 588 (8<sup>th</sup> Cir. 2003).
  - An employer does not have to wait indefinitely for an employee to return. Gantt v. Wilson Sporting Goods Co., 143 F.3<sup>rd</sup> 1042 (6<sup>th</sup> Cir. 1998).
5. A direct threat to safety and health. The risk must be to the health and safety of others that cannot be eliminated by a reasonable accommodation. 42 USC Section 1211(3). The EEOC interprets this to mean only the health and safety of other individuals in the work place. 29 CFR Section 1630.2(r). The employer must refrain from making blanket rules, assumptions or stereotypes based upon irrational fears. Bradley v. University of Texas, 3 F.3<sup>rd</sup> 922 (5<sup>th</sup> Cir. 1993).

**EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) 29 USC**  
**SECTION 1001 et. seq.**

ERISA applies to group insurance claims pertaining to any "employee welfare plan" or "welfare benefit plan".

1. ERISA claims are limited to the remedies available under the plan. Reilly v. Blue Cross and Blue Shield United of Wisconsin, 846 F.2d 416 (7<sup>th</sup> Cir. 1988). However, Section 1140 of ERISA provides that it is unlawful for an employer to discharge, fine, suspend, expel, discipline or discriminate against any participant in a employee benefit plan for the purpose of interfering with the attainment of any right to which such participant may become entitled under an ERISA plan.
2. A severance pay plan is subject to ERISA enforcement. 29 USC Section 1002(B)(i).

**SSDI**

Social Security Disability Income benefits.

1. To obtain Social Security Disability income benefits, a person must establish that he is unable to perform any job in the economic market place. 20 CFR Section 404.1505(a).
2. There is an inherent conflict between a claimant who says that he is able to work with a reasonable accommodation and a claimant applying for SSDI saying that he cannot do any job in the economic market place. See, The Intersection of the ADA and SSDI and the Risks of Legal Malpractice, William D. Goren, DCBA Brief, March 2006 (available online at DCBA.org). A claimant may also seek benefits under a ERISA plan and SSDI benefits. See, Social Security Disability and ERISA Disability Claims, James R. Comerford, DCBA Brief, March 2006.

## **ILLINOIS UNEMPLOYMENT INSURANCE ACT**

### **Illinois Unemployment Insurance Act.**

1. An individual shall be ineligible for benefits for any week with respect to which he is receiving temporary disability benefits under the Worker's Compensation Act. 820 ILCS 405/606.
2. An employee is ineligible for benefits for the weeks in which he receives accrued vacation pay. 820 ILCS 405/610.
3. Retirement pay benefits may or may not be "disqualifying income". 820 ILCS 405/611.
4. An employee is ineligible for "refusal of work". 820 ILCS 405/603.
5. A person is eligible for benefits if he is able to work and is available for work. 820 ILCS 405/500.
6. An employee is ineligible for benefits based upon voluntary leaving. However, if the employee is deemed physically unable to perform his work by a licensed and practicing physician or has left work voluntarily upon the advice of a physician that assistance is necessary for caring for a spouse, child or parent and providing such assistance will not allow him to perform his usual and customary duties of employment, it will not be deemed a voluntary leaving if he has notified the employing unit of the reasons for his absence. 820 ILCS 405/601(b)(1).

## **WORKER'S COMPENSATION ACT**

### **Worker's Compensation Act.**

1. It shall be unlawful for any employer, insurance company or service or adjustment company to interfere with, restrain or coerce an employee in any manner whatsoever in the exercise of the rights or remedies granted to him or her by the Act or to discriminate, attempt to discriminate, or threaten to discriminate against an employee in any way because of his or her exercise of the rights or remedies granted to him or her by the Act. 820 ILCS 305/4(h).
2. There must be a "causal link" between the Workers Compensation Act claim and the discharge. *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 160, 601 N.E.2d 720, 728 (Ill. 1992).
3. Unsupported assertions, opinions, conclusions and self serving statements are insufficient to establish the required causal link. *Davis v. Times Mirror Magazines, Inc.*, 297 Ill. App. 3rd 488, 697 N.E.2d 380 (1st Dist. 1998).
4. Although suspicious timing is evidence of retaliatory motive, it may not be enough. *Marin v. American Meat Packing Co.*, 204 Ill. App. 3rd 302, 562 N.E.2d 282 (1st Dist. 1990).