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Obtaining a Re-Suspension of Workers' Compensation Benefits Following a Period of Total Disability

By: Joshua L. Schwartz

Employers often approach us with the following scenario: An employee was injured at work, and he or she was ultimately released with restrictions. The employer made a job offer within these restrictions, but the employee refused to return to work, and this refusal has resulted in a suspension of benefits. (In another iteration, the employer has obtained a suspension of benefits because the employee was terminated for misconduct while on modified duty.) Recently, the employee has undergone surgery related to the work injury and is now entitled to total disability benefits. How can the employer obtain a re-suspension? Is a new job offer necessary every time an injured worker temporarily becomes totally disabled?

Caselaw in recent years has clarified answers to these questions, and there is good news and bad news for employers. The good news is that, where there is clear bad faith on the part of the injured worker, an employer is entitled to a re-suspension as soon as the injured worker has recovered sufficiently to perform the last offered job. No new offer is necessary, as the employer need not re-establish job availability. Indeed, in *Pitt Ohio Express v. WCAB* (Wolff)-the leading Pennsylvania Supreme Court case in this area- it was undisputed that the originally offered job was no longer available. So if an injured worker has been fired for willful misconduct or refused a job offer without basis, the employer generally need not contemplate bringing the employee back to work.

The bad news is that the answer is more uncertain in most cases, where there is a medical dispute over whether the injured worker was ever capable of performing the job offered. In these cases, typically a judge has adopted an independent medical examiner's opinion over that of the worker's treating physician and granted a suspension of benefits on that basis. The treating physician never approved the job offer and may have testified that the injured worker could not perform the associated duties. Under these circumstances, where an injured worker's "refusal" to return to work was based on the recommendation of a treating physician, a court may or may not deem the initial refusal "bad faith." The argument is frequently made that no job offer is necessary here, either, and there is caselaw and logic to support such a position; after all, if a judge has decided that the injured worker could perform particular

duties prior to surgery, then there is no reason to revisit this decision once the injured worker has reached the same condition following surgery. Nonetheless, because the caselaw is not entirely settled, the employer should consider making a new light duty job offer, where possible, as soon as the injured worker's restrictions can be accommodated.

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Supreme Court Backs Employee in Wage Complaint Case

By: Richard L. Hackman

As noted in our recent client alert, the United States Supreme Court's ruling in the recent case of *Kasten v. Saint-Gobain Performance Plastics Corp.* impacts how an employer responds to complaints from employees regarding wage and hour issues. Specifically, the Court ruled that the Fair Labor Standards Act (FLSA) may, under certain circumstances, shield workers from retaliation for verbal as well as written complaints. Previously, the FLSA's anti-retaliation provisions have been interpreted to apply only to written complaints to the Department of Labor, or in some cases, written complaints to an employer. The Court's holding should prompt employers to immediately review and to adjust their policies with respect to verbal complaints regarding wage and hour issues.

In *Saint-Gobain,* the company's handbook contained an internal complaint procedure which instructed the employee to first raise their complaint with his or her supervisor and then to subsequent levels of management, including human resources. The plaintiff, Kasten, had verbally raised his wage complaint with his shift supervisor. Subsequently, Kasten was terminated and he then sued the company claiming that he had been wrongfully terminated after his verbal protest to company officials.

The U.S. District Court for the Western District of Wisconsin initially concluded that Kasten's informal complaints did not constitute protected activity based on the plain language of the FLSA; however, in a 6-2 opinion, the Supreme Court ruled that Congress intended the FLSA to cover oral complaints as well as written ones. Essentially, the Court's ruling does not make all verbal complaints cognizable; specifically, the ruling would likely not protect an employee's non-specific or casual utterance since the Court's majority opinion held that a complaint must be clear and detailed enough for a reasonable employer to understand it.

Based on this ruling, cautious employers now need to be aware that, if an employee raises a concern in whatever form, about payment of overtime, calculation of time or any other payroll practice, the employer should be prepared to immediately address such complaints. Employers need to be aware that a verbal complaint from an employee may originate from outside of the normal internal reporting process, and, as such, supervisors who may receive such complaints should be trained as to what actions they should take in the event an employee raises such a complaint. Training to supervisors would include instructions as to reducing the complaint to writing and immediately contacting human resources.

Finally, it is important to remember that the complaining employee now enjoys a "super protected" status in that an adverse action taken against the employee such as termination will open the employer up to claims of retaliation. Consequently, employers will need to ensure that their employment decisions can be well defended against such potential claims of retaliation.

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Are you Prepared for the Perfect Storm of 2011?

By: Jill Sebest Welch

You don't need to read tea leaves to predict what lies in store for businesses on the labor front in 2011. The U.S. Department of Labor (DOL) has announced a more aggressive approach to investigations and enforcement, focusing on unlawful practices across entire industries and the misclassification of employees as independent contractors. In the early phases of its investigations, the DOL plans to use litigation tools like subpoenas and search warrants to gather information from employers, to target key cases for criminal prosecution, and to partner with private lawyers to enforce employee rights under the Family and Medical Leave Act (FMLA) and the Fair Labor Standards Act (FLSA). The DOL also plans to revise its regulations to expand coverage under these statutes.

Recent efforts of the National Labor Relations Board (NLRB) seek to change labor law through administrative decisions and rule making rather than relying on Congress. The agency has proposed measures to inform all employees of their rights to unionize and strike, has sued over an employee's right to criticize her boss on Facebook, and has taken on states that mandate "secret ballot" union initiatives.

Unprecedented Joint DOL-American Bar Association Referral Initiative Connects Employees with Private Attorneys to Pursue FLSA and FMLA Cases

Recognizing that it may not have the manpower to address all violations, the DOL has announced a partnership with the American Bar Association (ABA) that will likely add more wage and hour claims to the already active litigation dockets. In a move touted by the ABA as the "first of its kind partnership between a federal agency and the private bar," the DOL launched a referral system to assist employees in obtaining legal counsel to enforce their rights under the FLSA and FMLA where the DOL declines to pursue a complaint.

Not only will the employee be given a toll-free telephone number connecting him with an ABA-approved attorney, the DOL will also hand over access to the most relevant documents from its case file and a preliminary estimate of back pay that may be owed by the employer. These estimates are only preliminary and have not been thoroughly investigated by the DOL. They can be misleading and may encourage attorneys to file lawsuits-particularly expensive class action litigation. Indeed, the DOL recognizes that providing this information "will be very useful for attorneys who may take the case," with the prospect of costly private litigation as an incentive for employers to settle the claim.

More than ever, businesses need to evaluate their compensation practices to ensure that they are compliant with the FLSA and applicable state laws. Audit salaried managers and supervisors to make sure that they meet the exempt tests under federal and state wage and hour laws. Train managers, supervisors, and payroll employees to ensure that they understand how to comply with the applicable wage-hour requirements. If hit with a DOL investigation, businesses need to ensure that the information provided to the DOL is treated as confidential and protected from disclosure to the fullest extent possible.

DOL Revisions to FMLA and FLSA Regulations

On the regulatory front, the DOL has issued guidance and expects to revise rules on a number of FMLA and FLSA provisions that do the following:

And in a stealth move that expands the agency's reach without formal rule-making, the DOL has begun to issue sweeping "administrator interpretations" to clarify the law as it relates to an entire industry, a category of employees,

or to all employees. Businesses need to stay on top of these changes and to update employee handbooks and policies to reflect these changes.

NLRB Focuses on Employee Rights New Posting Requirement Proposed.

The NLRB has proposed a posting rule to ensure that all employees of businesses covered by the National Labor Relations Act will read about their rights to unionize on their employer's bulletin board. The notice would inform employees of the right to do the following:

- Organize a union to negotiate with the employer concerning wages, hours, and conditions of employment.
- Form, join, or assist a union.
- Discuss terms and conditions of employment or union organizing with coworkers or union.
- Join one or more coworkers to improve working conditions by raising work related complaints with the employer or with a government agency and seek help from a union.
- Strike and picket.
- Choose not to do any of these activities.

The poster also would inform employees of their right to solicit during their non-work time, to be free of interrogation and discrimination related to union activities, and to wear union hats, buttons, tee shirts, and pins. It also informs employees that the employer cannot promise or grant benefits to discourage employees from unionizing or spy on or videotape peaceful union activities.

If enacted, the posting requirement will ensure that employees are informed at all times about their rights to unionize and their additional rights to be free of unfair labor practices committed by their employer or a labor union.

Battle Over States' Secret Ballot Laws.

In response to card check legislation, a handful of states enacted "secret ballot amendments" that require employees to cast their votes to unionize in secret. These amendments eliminated alternative methods to recognize unions such as an employer's voluntary recognition. Arguing that such state enactments are inconsistent with the federal labor law and are unconstitutional, the NLRB acting general counsel announced that he would file lawsuits to invalidate the state provisions. If successful, such a move would help to keep the door open for future enactment of incremental card check provisions.

Expanding Employee Protected Speech on Social Networks. NLRB's recent lawsuit against a Connecticut ambulance company that fired an employee after she went on Facebook to criticize her boss is a signal to employers to review their internet policies. The NLRB argued that the employee's expletive-filled Facebook comments referring to her supervisor using the company's code for a psychiatric patient was protected speech under federal labor law. Because the case recently settled, it is not clear how far an employee can go to disparage an employer. But it is clear that the NLRB will look closely at employer policies that infringe on the right to discuss wages, hours, and working conditions with coworkers.

Pennsylvania Curtails Misclassification by Construction Contractors

Pennsylvania has joined the fight over the misclassification of employees as independent contractors. The Pennsylvania Construction Workplace Misclassification Act, effective this February, makes it both a civil and criminal

offense for a construction contractor to knowingly misclassify an employee as an independent contractor.

The Act establishes a strict three-part test and sets forth the specific criteria that will determine whether an individual is an independent contractor. The act also includes a requirement that the independent contractor maintain liability insurance and requires employers to post notices in the workplace.

The stakes of improperly classifying employees as independent contractors are high. The IRS can seek to recover back taxes, and the workers themselves can seek compensation for benefits. Under the FLSA, the DOL can request the payment of any back wages that are due to employees and an equal amount in liquidated damages, and willful violators may be prosecuted criminally and fined or even imprisoned. State agencies may seek to recover contributions for unemployment compensation insurance.

The upshot of the aggressive strategies of the DOL, the NLRB, and Pennsylvania means that businesses need to take a proactive approach in 2011 to prevent claims and to audit payroll practices to put themselves in the best position to manage the risk of litigation. If a DOL investigation does occur, employers should respond carefully, with the expectation that litigation may result. Businesses should also review and update employee handbooks and policies and train managers to understand the changes to the FLSA, the FMLA, and federal labor laws. And as the DOL and Pennsylvania turn up the heat on misclassification, businesses should review their agreements and relationships with independent contractors to determine whether they meet the strict test laid out by state and federal laws.

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EEOC Issues Long Awaited Regulations Under ADA Amendments Act

By: Jennifer Craighead Carey

On March 25, 2011, the Equal Employment Opportunity Commission (EEOC) published final regulations under the ADA Amendments Act (ADAAA). The regulations became effective on May 24, 2011. The ADAAA and its final regulations make it easier for an individual to establish a disability under the ADA. In fact, both the ADAAA and its final regulations make clear that whether an individual has a disability should not demand extensive analysis. Noteworthy provisions of the final regulations are discussed below.

1. Conditions virtually always found to impose a substantial limitation on a major life activity. The regulations identify certain conditions that by their very nature will, in virtually all cases, result in a determination of disability under the ADA because they pose substantial limitations in a major life activity. These include:

- Deafness
- Blindness
- Intellectual disability (formerly mental retardation)
- Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair
- Autism
- Cancer
- Cerebral Palsy

- Diabetes
- Epilepsy
- HIV infection
- Multiple Sclerosis
- Muscular Dystrophy
- Major depression
- Bipolar disorder
- Post -Traumatic disorder
- Obsessive Compulsive Disorder
- Schizophrenia

Consequently, while disability status continues to be analyzed on a case by case basis, it should be easily concluded that the above impairments meet the definition of disability.

2. What it means to be substantially limited in a major life activity.

An impairment is a disability under the ADA if it substantially limits an individual to perform a major life activity as compared to most people in the general population. The regulations underscore that "substantial" no longer has the same meaning under the law as existed pre-ADAAA. Rather, the term is to be broadly construed in favor of expansive coverage to the maximum extent permitted under the ADA.

a. Mitigating Measures.

The ADAAA and the regulations make clear that whether an individual is substantially limited in a major life activity must be considered without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses and contact lenses may be considered in determining substantial limitation. Examples of mitigating measures include, among others, medication, medical supplies, equipment or appliances, prosthetics, hearing aids and cochlear implants, mobility devices, and oxygen therapy.

b. Episodic Conditions.

The ADAAA and the regulations also state that episodic impairments or impairments that are in remission are disabilities. Thus, an individual with cancer that is in remission, or who has episodic flare ups of asthma under certain seasonal conditions, could meet the definition of disability under the ADAAA . Other examples of episodic conditions include epilepsy, multiple sclerosis, hypertension, diabetes, depression, bi-polar disorder and post-traumatic stress disorder.

c. Other Key Measures of Substantial Limitation.

The regulations provide that an impairment need only substantially limit one major life activity in order to be considered a disability. The regulations also refuse to put a time frame around how long a condition must last in order to be substantially limiting. The regulations go on to state that in determining whether an individual is substantially limited in a major life activity, it may be appropriate to consider such things as: (a) the difficulty, effort, or time required to perform a major life activity; (b) pain experienced when performing a major life activity; (c) length of time a major life

activity can be performed; and (d) the way an impairment affects the operation of a major bodily function. However, an impairment does not need to prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered a disability. Further, the focus should be on how a major life activity is substantially limited, not on what outcomes an individual can achieve.

3. Expansion of Major Life Activities.

The ADAAA added to the list of major life activities under the original ADA's list eating, standing, lifting, bending, concentrating, thinking, communicating, reading and sleeping. The final regulations add three additional categories to include sitting, reaching, and interacting with others. Moreover, the list of major life activities is not intended to be exhaustive.

The ADAAA also added a new category of major life activities described as "major bodily functions". The ADAAA lists immune system, normal cell growth, digestive, bowel, bladder, neurologic, brain, respiratory, circulatory, endocrine and reproductive. The regulations include added examples of hemic, lymphatic, musculoskeletal, special sense organs and skin, genitor-urinary, and cardiovascular systems.

The regulations underscore that in determining other examples of major life activities, employers should not apply a demanding standard; further, a major life activity is not determined by whether an activity is of "central importance to daily life" as existed pre-ADAAA.

4. Record of Impairment.

An employer is prohibited from discriminating against an employee who has a record of, or has been misclassified as having, a disability. The regulations state that an employee must still demonstrate the record of impairment is a disability as the term is defined for actual disability.

5. Regarded As Standard.

An employer is prohibited from taking adverse action against an employee because of the employer's perception that the employee has an impairment. The ADAAA and its regulations make clear that an employer does not need to regard the employee as having an actual disability, only that the employee is perceived as having an impairment that is both transitory (generally less than six months) and minor. Although an employer is prohibited from discriminating against an individual on the basis of perceived impairment, an employer does not have to provide a reasonable accommodation to an employee who is merely regarded as having an impairment.

The ADAAA and its implementing regulations greatly expand the definition of disability under the ADA. Therefore, it will be difficult for employers to challenge a claim on the basis that the individual does not have a disability. However, the ADAAA and its regulations leave intact the requirements that an individual is qualified for the job and further preserve the standards on reasonable accommodation and undue hardship that previously existed.

Employers will need to ensure that their management and human resources staff are appropriately trained in the new requirements and recognize when an ADA issue arises. In particularly, if an employee notifies a supervisor that s/he has a condition and requires some accommodation or adjustment, the employer needs to be prepared to have a careful process in place that includes engaging in a good faith interactive process with the employee to identify reasonable accommodations.

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