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Employment Law Update March 2013

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TABLE OF CONTENTS

Falling Down the Injured Worker Rabbit Hole: The Intersection Between Workers' Compensation and Other Employm

By: Joshua L. Schwartz

Human Resource professionals are often lucky enough to avoid much involvement in workers' compensation cases. Viewed as the realm of safety managers and insurance adjustors, workplace injuries seem distinct, at first glance, from non-work-related medical conditions. But the reality is that the Workers' Compensation Act merely adds another layer to an already tricky area. Employers not only have to deal with the nuances of the workers' compensation system; they must also deal with unique wage-and-hour, discrimination, and other requirements that apply when workplace injuries are involved. Here are six steps employers should, but do not always, consider when dealing with injured workers:

1. Offer modified or light duty.

A workplace injury may render the injured worker unable to perform his regular job but not totally disabled. In these cases, at least talk to the employee about the possibility of light duty. Almost all physical restrictions can be accommodated in some way as a temporary measure: Eliminate a lifting requirement by staffing another employee as a "helper." Give the injured worker a comfortable chair or stool. Make him or her a "greeter."

The light duty offer serves two primary purposes. First, under the Workers' Compensation Act, you may be able to cut off wage loss benefits even if the employee chooses not to come back to work. Employers can suspend benefits (or refuse to reinstate them) if work remains available within the employee's physical restrictions but the employee refuses the work in bad faith.

More importantly, an injured worker with physical restrictions lasting more than a few weeks very likely falls under the protection of the Americans with Disabilities Act. You therefore have an obligation to engage in an "interactive process" with the employee to determine whether you can "reasonably accommodate" the injury. A light duty offer can start this interactive process. Keep in mind that, if the employee refuses the offer, you should have follow-up discussions to determine whether an alternative accommodation is feasible.

Of course, you cannot force light duty, and in many cases you cannot lay off the injured worker for refusing light duty.

Which leads us to the next step

2. Don't forget the Family and Medical Leave Act.

The FMLA applies to any employee who has worked for a covered employer at least 12 months and at least 1,250 hours during the 12-month period immediately preceding the time off. To be a covered employer, there must be at least 50 employees within 75 miles of the relevant employee's worksite. The FMLA entitles covered employees to up to 12 weeks of unpaid leave per year for, among other things, "the employee's own serious health condition." "Serious health condition" is defined broadly to include any condition that requires inpatient care or continuing treatment by a healthcare provider, so it encompasses most work-related injuries that require time off.

FMLA leave may run concurrently with workers' compensation leave, but the FMLA requires notification to the employee within five business days. Failure to designate the leave under the FMLA (and to notify the injured worker) tolls the FMLA entitlement and may result in an injured worker receiving more than 12 weeks of protected leave. I have received calls from multiple employers who have been surprised to learn that employees who have just returned from months of workers' compensation leave are still eligible for FMLA leave because an FMLA designation notice was never provided.

The FMLA's intricate certification and notice requirements are beyond the scope of this article. However, employers should note that injured workers need not return a separate "medical certification" for FMLA purposes if it is obvious the work-related injury constitutes a "serious health condition." It is perfectly acceptable to treat workers injured on the job differently than other employees in this context. And speaking of medical treatment

3. Ensure payment for hours spent in on-site or mandated off-site medical treatment.

The Fair Labor Standards Act requires that nonexempt employees receive at least the federal minimum wage for all hours worked and overtime pay at one-and-one-half times their regular rate. Hours "worked," for these purposes, include (1) time an employee spends waiting for medical treatment or an exam for a work-related injury while on the employer's premises, as well as (2) time an employee spends waiting for off-site medical treatment or an exam, provided the treatment or exam was directed by the employer.

Imagine the following scenario: You are a large manufacturer and have an on-site nurse's office. Your minimum-wage employee sustains a work-related injury and treats primarily on-site. The employee remains working full-time and is, thus, not eligible for workers' compensation wage benefits. The treating nurse asks the injured worker to stop by every other day to monitor his progress, and his supervisor requires that this happen before his regular shift. The employee clocks in after seeing the nurse.

The above scenario results in a wage violation because the employee is waiting to see the on-site nurse but isn't being paid his hourly rate. In addition, if the employee is working full-time outside the treatment times, the violation is even more significant because you are not paying overtime for the waiting period. Accordingly, ensure that employees clock in prior to receiving any on-site treatment, and ensure that they remain clocked in if they are injured and receive on-site treatment mid- or post-shift. You also may want to include sign-in sheets at on-site nurse's offices to ensure accurate payment for waiting time. Keep in mind that no payment is required if the treatment is for non-work-related conditions.

An off-site exam creates even more potential pitfalls because the employer may not always be aware that an insurance adjustor has scheduled an independent medical examination. If an employee is working full-time and has an independent medical examination after work, he or she may need overtime pay for time spent waiting for the exam to start. And by the same token, an employee who is off work and not receiving benefits (for example, an employee whose benefits have been suspended) needs to be paid at least minimum wage for time spent waiting in the doctor's office for the independent medical examination to begin.

Given these risks, it is imperative that employees keep track of their waiting time for any off-site mandated examinations. You may want to confirm entries with providers where the time seems excessive. And do not be confused by the requirement: The Fair Labor Standards Act only applies where the exam is employer-mandated; off-site appointments with a treating physician, even for a compensable work injury, do not require wage payment.

Being aware of mandated independent medical examinations is only one way you should

4. Make sure the workers' compensation adjuster keeps you in the loop.

Employers are entitled to information about the status of claims, medical treatment costs, and the employee's ability to return to work. An adjustor is the employer's agent and should be willing to discuss claims, medical records, and litigation strategy with the employer and the employer's counsel. If an adjustor is unwilling to disclose information or discuss strategy with the employer, it's time to get a new adjustor.

Communication is key in another area, as well

5. Cooperate with third-party-claim investigations.

If the work-related injury results from the negligence of a third-party (other than a co-worker), the injured worker may bring an independent claim against that third party. The injured worker and her counsel may demand certain information from the employer, including investigation reports, business contracts, and insurance information, and may request a site visit for an expert to examine equipment or facility layout.

I typically advise employers to cooperate with these requests as fully as possible. For one thing, employers are entitled to a lien against any third-party recovery for monies paid out through the workers' compensation system, so a third-party claim generally will benefit the employer. For another, injured workers with potential third-party claims are entitled to this information and can generally obtain a court order, if necessary. The employer has more flexibility to protect proprietary and confidential information if it cooperates before a court order is issued. Employers should involve counsel in responding to these requests.

Finally, now that you've gotten through the injury period successfully

6. Do not retaliate!

Do not take adverse action against an employee because of a work-related injury. Pennsylvania law recognizes a claim for workers' compensation retaliation, and the contours of this judicially-created claim remain unclear. Therefore, the existence of a work injury cannot be a factor in performance reviews, pay or promotion decisions, RIF decisions, or discipline. Likewise, you cannot lay off an injured worker or alter his job duties based solely on the fear that he will sustain additional work injuries. That's not only worker's compensation retaliation, but could also buy the employer an ADA "regarded as disabled" lawsuit.

This is not to suggest that you cannot consider an injured worker's misconduct in employment decisions. If the work injury occurred because the injured worker violated safety protocol or another workplace rule, he should be disciplined, and this discipline can affect other employment decisions. But an employee cannot be punished solely because of his involvement in a workplace accident.

These are just a few of the issues that arise when an employee sustains an injury. The attorneys at Barley Snyder can assist you in managing the interplay between workers' compensation and other employment areas.

Back To Top

Out of the Frying Pan . . . But Still in the Fire Part II Important Differences Between the Federal FLSA and Pennsylvani

By: Jill Sebest Welch

Employers are aware of the Fair Labor Standards Act's exemptions for so-called "white collar" workers-those professionals in executive, administrative, outside sales, and learned professional roles, as well as computer and highly compensated professionals. Employers in Pennsylvania must also be aware that Pennsylvania has its own exemptions that don't always mirror the federal exemptions. Because the Fair Labor Standards Act (FLSA) does not preempt state or local laws that meet or exceed the FLSA's requirements, employers must consider both the federal and Pennsylvania regulations when evaluating whether a position qualifies for exempt status. Some of these important differences are highlighted below.

Time Spent on Non-Exempt Work

One major difference between these laws deals with how much time an employee can spend on non-exempt tasks and still be properly classified as exempt under the executive, administrative, or professional exemptions. Under FLSA regulations, the employee may be properly classified as exempt if the employee's "primary duties" involve exempt work. "Primary duty" means the principal, main, major, or most important duty the employee performs. This test is generally satisfied if the employee spends more than 50% of time performing exempt work, although this is not the sole determinant. In contrast, Pennsylvania applies a more restrictive requirement that the employee must not devote more than 20% of working hours to tasks outside the applicable exemption (except that administrative employees in retail or service establishments may spend up to 40% of time on duties not directly and closely related to exempt duties without losing the exemption). As a result, an employee who qualifies for an exemption under the FLSA's "primary duties" test, might perform too much non-exempt work to qualify for the same exemption under Pennsylvania law.

Inapplicable Exemptions

Pennsylvania does not have a corollary to the FLSA's computer or highly paid professional exemptions. Employees who qualify for those FLSA exemptions must be evaluated to determine whether they qualify under one of Pennsylvania's white collar exemptions. If not, the employee should be classified as non-exempt.

The Required Salary for Exempt, Administrative, or Professional Employees

Both the FLSA and Pennsylvania law require that executive, administrative, or professional employees be paid on a salary or fee basis. The difference between these two laws lies in the minimum amount such employees must receive.

Under Pennsylvania law, the employee must receive at least $155, $170 or $250 per week, depending upon the exemption. The FLSA, however, requires that employees receive at least $455 per week to qualify for the FLSA's executive, administrative, or professional exemptions.

Pennsylvania's "White Collar" Exemptions

Executive Exemption

To qualify for Pennsylvania's executive exemption, the employee's primary duties must consist of (1) the management of the enterprise in which he or she is employed, or of a customarily recognized department or subdivision, and (2) customarily and regularly directing the work of two or more other employees. The exempt employee must also have the authority to hire or fire employees or make suggestions (given particular weight) regarding other employees' hiring, firing, advancement, promotion, or any other change of status.

Administrative Exemption

To qualify for the administrative exemption under Pennsylvania law, the employee's duties must include (1) the performance of office or non-manual work directly related to management policies or general operation of the employer or the employer's customers, (2) customarily and regularly exercising discretion and independent judgment, (3) regularly and directly assisting an employer or an employee employed in a bona fide executive or administrative capacity, and (4) performing (under only general supervision) work along specialized or technical lines requiring special training, experience, or knowledge, or executing (under only general supervision) special assignments and tasks.

Professional Exemption

An exempt professional primarily performs work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized instruction and study, or the performance of work that is original and creative in character in a recognized field of artistic endeavor.

Outside Sales Exemption

An outside salesperson's primary duty is making sales, including (1) any sale, exchange, contract to sell, consignment for sale, or other disposition or selling, and delivering articles or goods; and (2) obtaining orders or contracts for the use of facilities for which a consideration will be paid by the client or customer. An outside salesperson customarily must spend more than 80% of his or her work time away from the employer's place of business. As a general rule, an outside salesperson may not spend more than 20% of any workweek on activities not directly related to and in conjunction with the making of sales. Work performed incidental and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, is not regarded as nonexempt work.

More than ever, businesses must evaluate their compensation practices to ensure compliance with both the FLSA and applicable Pennsylvania white collar exemptions. Mistaken pay practices in this arena expose an employer to significant financial liability and expensive collective and class action litigation. Conducting a wage and hour audit is an important proactive step that can save thousands in litigation costs and penalties down the road. The attorneys at Barley Snyder can assist employers with such an audit or other wage and hour compliance issues. Part III of this series will discuss significant legal developments under Pennsylvania's wage and hour laws.

Back To Top

2012 The Year of the NLRB Apocalypse?

By: Richard L. Hackman

Although employers successfully dodged the Mayan apocalypse, 2012 might become known as the year of the "NLRB Apocalypse," due to two decisions from the National Labor Relations Board (NLRB) significantly limiting employers' ability to control confidentiality during internal investigations of employee misconduct. As readers are no doubt aware, employers customarily instruct employees involved in internal investigations to maintain confidentiality, which avoids witness collusion, maximizes cooperation, minimizes disruption, and prevents potential retaliation by the accused. These concerns are particularly acute when employers are investigating claims of harassment or discrimination, because federal and state anti-discrimination laws also hold employers liable for retaliation against employees who complain about such treatment or participate in investigations. The NLRB's decisions in *Banner Health System* and *American Baptist d/b/a Piedmont Gardens*, however, could make internal investigations significantly more difficult and less effective.

In *Banner Health System*, the employer's human resources representative asked a complaining employee to refrain from discussing the matter with coworkers while the investigation proceeded. This instruction was also set forth in the employer's standard complaint used to document witness interviews. The NLRB held that this general confidentiality rule violated Section 8(a)(1) of the National Labor Relations Act (NLRA). By way of background, Section 8(a)(1) makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of "their right to form labor unions, collectively bargain with employers, or to otherwise engage in "concerted activities" regarding their wages, working hours, and other terms and conditions of employment. According to the NLRB, Banner Health System's confidentiality request "had a reasonable tendency to coerce employees, and so constituted an unlawful restraint of "the employee's right to engage in concerted activities, even though the employer had not threatened disciplinary action for breaching confidentiality.

Pursuant to the NLRB, "an employer's generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' rights." Instead, the employer's need for confidentiality must be established on a case-by-case basis to determine whether it is justified by the need to protect witnesses, evidence, or testimony, or to prevent a coverup. If any of these concerns exists, an instruction to maintain confidentiality would be justified.

The NLRB continued its assault on the confidentiality of workplace investigations in the *American Baptist* case. For over 30 years, the NLRB maintained that witness statements obtained during workplace investigations are exempt from disclosure in pre-arbitration discovery. As discussed in the *Anheuser-Busch, Inc.* decision (1978), this rule encourages witnesses to make statements without fear of reprisal or intimidation. In *American Baptist*, however, the Board suddenly reversed course and deemed the *Anheuser-Busch* decision "flawed."

Instead, the NLRB now endorses a vague "balancing test," requiring employers to weigh their interests supporting confidentiality (witness coercion and the potential for retaliation) against the union's need for the information. Under this newly-adopted test, if the information requested by the union is relevant (which the Board will frequently deem it to be), the employer will bear the burden of proving that a "legitimate and substantial confidentiality interest exists" which outweighs the union's need for the information.

Astonishingly, the NLRB acknowledged that decreased confidentiality could make witnesses reluctant to give statements due to the risk of employer or union retaliation. The NLRB, however, swept aside those concerns, concluding it was "not persuaded that a balancing test enhances those risks or discounts the EEOC guidelines" designed to protect employees from retaliation.

The *Banner* and *American Baptist* decisions imply that, prior to interviewing witnesses, an employer should identify specific reasons or factors warranting confidentiality during that particular investigation. One way to preserve confidentiality might be to ask complaining employees and witnesses whether they wish to keep the matter confidential or whether they fear retaliation. If they respond affirmatively, document those concerns as part of an investigatory statement. It could also prove beneficial to explain to witnesses why confidentiality is important, such as encouraging employees to express their complaints and the need for an objective investigation. Ultimately, however, the recent NLRB decisions will likely result in witnesses being more reluctant to express complaints.

Will there be any relief in 2013? Perhaps. Just this past January the Court of Appeals for the District of Columbia, in the case of *Noel Canning v. NLRB*, held that President Obama exceeded his Constitutional authority by making three "recess" appointments to the NLRB. That ruling could ultimately result in the invalidation of all NLRB decisions issued since those appointments in January 2012, including the *Banner Health System* and *American Baptist* decisions. The Noel Canning decision, however, is subject to appeal. Until the United States Supreme Court rules, the *Banner Health System* and *American Baptist* decisions stand.

In the meantime, the NLRB will continue to process petitions and unfair labor practice charges, relying on these recent decisions as precedents. Accordingly, employers should review their policies and practices regarding workplace investigations and remove any written statements-and refrain from making verbal representations-prohibiting witnesses from communicating about investigations in all circumstances.

Stay tuned. We will continue to update you as these issues unfold.

Back To Top

New Affordable Care Act Guidance Facilitates Employers' Preparations For 2014

By: David J. Ledermann

With both the U.S. Supreme Court decision upholding the principal provisions of the Patient Protection and Affordable Care Act ("ACA") and the reelection of President Obama in 2012, the federal regulatory agencies charged with primary responsibility for implementing the ACA-the Departments of Labor, Health and Human Services, and Treasury-have been busy formulating and publishing rules and guidance under the statute, including for employers sponsoring, or failing to sponsor, group health plans for their employees and dependents. Perhaps the most significant consideration for many employers going forward is whether to continue, or to begin, offering group health plan coverage in 2014, when health care exchanges ("affordable insurance exchanges") become operational and excise taxes ("shared responsibility payments") for failing to provide adequate coverage become effective. Employers should begin to consider now the likely impact the new rules will have on them, as well as how best to manage the opportunities and burdens presented by the regulations and other official guidance under the ACA.

Beginning in 2014, employers having at least 50 full-time or full-time equivalent (FTE) employees that do not offer to their full-time employees "affordable" health coverage that provides "minimum value" may be subject to a shared responsibility payment if at least one full-time employee receives a premium tax credit for purchasing individual coverage on one of the new affordable insurance exchanges. There are actually two separate shared responsibility payments under the ACA. One applies to employers that do not offer coverage (the so-called "free rider payment"), and the other applies to employers that offer coverage that is "unaffordable" or fails to provide "minimum value" (the "unaffordable coverage payment"), both explained more fully below.

Determining the employer's number of FTE employees involves dividing the total monthly hours worked by all part-time employees by 120 and adding to this quotient the number of full-time employees (i.e., those working on average at least 30 hours per week). Although part-time employees' hours count in determining whether an employer has at least 50 FTE employees thereby subjecting the employer to potential liability for a shared responsibility payment, the employer is not required to offer coverage to its part-time employees. Employing organizations under common or related ownership (like some parent subsidiary corporate relationships or joint ventures) must combine their employee counts. If these total 50 or more FTE employees, each member organization will be subject to the employer shared responsibility payment provisions, even if no single member has 50 FTE employees.

Employers will determine, based on the number of their employees in the current year, whether they will be considered a large employer for the following year. For example, if an employer or a group of related employers has at least 50 FTE employees for 2013, it will be considered a large employer for 2014. In determining whether an employer has at least 50 FTE employees, the employer averages the number of employees across the months in the year to see whether the threshold is met. Under transition relief available for 2014, rather than being required to use the full twelve months of 2013 to measure whether an employer has 50 FTE employees, the employer may use any period of six consecutive months in 2013 to make this determination.

Through the affordable insurance exchanges, premium tax credits will be available to help pay for health coverage of individuals and families with household incomes between 100% and 400% of the federal poverty level, so long as they are not eligible for coverage through a government-sponsored program such as Medicaid or CHIP, and they are not eligible for employer-provided coverage or are eligible only for employer coverage that is "unaffordable" or that does not provide "minimum value." In 2014, where an employer large enough to be subject to the shared responsibility provisions fails to offer health coverage to at least 95% of its full-time employees, the employer will be liable for a free rider payment equal to the number of the employer's full-time employees in excess of 30, multiplied by $2,000, provided at least one full-time employee receives a premium tax credit. If the employer is a member of a group of related employers, then the 30-employee exclusion is allocated among the employers in the group. After 2014, the employer must offer coverage to at least 95% of its full-time employees and their dependents, though not spouses, to avoid potential liability for the free rider payment.

An employer that offers coverage to 95% or more of its full-time employees and their dependents, thereby avoiding the free rider payment, may yet be liable for the separate unaffordable coverage payment. The unaffordable coverage payment applies if (1) a full-time employee receives a premium tax credit when purchasing coverage on an affordable insurance exchange, and (2) the employer either did not offer coverage to that employee or the coverage offered was "unaffordable" or did not provide "minimum value." The annualized unaffordable coverage payment in this circumstance is equal to the number of full-time employees who receive a premium tax credit multiplied by $3,000, though the payment is capped at the number of the employer's full-time employees in excess of 30, multiplied by $2,000. The cap ensures that the unaffordable coverage payment will never exceed the free rider payment that would apply if the employer offered no coverage at all.

As suggested from the above, whether or not coverage under the employer's group health plan is affordable plays a significant role in the analysis of an employer's potential exposure to liability for a shared responsibility payment. Coverage is deemed affordable if a full-time employee's required contribution for self-only coverage does not exceed 9.5% of the employee's household income for the year. Because the employer typically will not know employees' household incomes, the Internal Revenue Service permits an employer to account only for the employee's W-2 wages from the employer providing coverage. Two other regulatory safe harbor methods for determining affordability are also available.

For purposes of the shared responsibility payment provisions, a group health plan is deemed to provide "minimum value" if the plan's share of the cost of benefits is at least 60 percent of the plan benefits' total cost. The Department of Health and Human Services has provided an online calculator to assist in the determination of whether a plan provides minimum value. The employer can input plan information, including deductibles and copayments, to establish whether the plan covers at least 60 percent of the total allowed benefit costs expected to be incurred under the plan. If the result falls below 60 percent, an employer may decide to reduce the employees' cost sharing to bring the calculation up to the 60 percent threshold.

Employers have considerable flexibility in designing their group health plans and can generally avoid any shared responsibility payment obligation if they choose. In some instances, an employer may find it more advantageous to expose itself to the risk of incurring a certain level of shared responsibility payment than to offer coverage that is affordable and that provides minimum value, given the costs of providing such coverage. Myriad considerations may go into the determination of an optimal plan design, and employers should look to a qualified advisor for assistance. The attorneys of Barley Snyder's Employee Benefits Group are prepared to assist employers in the process of evaluating their options and implementing their choices in this challenging area.

Back To Top

Local Workforce Investment Boards Provide Employers with Valuable Services

In the midst of the on-going recovery from the recent recession, finding talent with appropriate skills has become a major issue for employers. Technology has changed the way business is done regardless of the industry, requiring better literacy and foundation skills along with occupational skills that are specific to job requirements.

Over the last ten years, the public workforce system has moved from its traditional labor-exchange function focused almost entirely on jobseekers to a more demand-driven role of producing potential employees who are more job-ready and who have the skills that employers need.

The PA CareerLink of Lancaster County and its sister organizations in the region offer jobseekers and employers one-stop opportunities to meet employment and training needs. Services include the following:

Connecting with Job Gateway, the Commonwealth of Pennsylvania's labor exchange site to post job openings.This can be done directly by the employer or with the assistance of a Business Service Representative;

Assistance in finding qualified applicants through staff screening of applications and on-site interviewing;

More specific screening for employment using the WorkKeys and other assessment processes;

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Direct connection with the recipients of the National Career Readiness Credential and graduates of occupation skill training conducted by the PA CareerLink;

Briefings and training that are offered in conjunction with the Bureau of Unemployment Compensation and the Lancaster County Association for Human Resource Management;

Consultation around the human resource component of expansions and contractions; and

Data on virtually any aspect of economic development in which a company might be interested.

For more information, visit the website at www.jobs4lancaster.com or contact Anna Ramos, CareerLink of Lancaster County at 717-509-5613.

Back To Top