WORKERS’ COMPENSATION, CIVIL CLAIMS, AND DISABILITY ACCOMMODATION

PRACTICAL TIPS ON MANAGING LEAVES OF ABSENCE, RETURN TO WORK, PRIVACY, AND “ACCOMMODATION” OBLIGATIONS

For: The California State University

Presenters:

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Risks from Cross-Over W/C and ADA Accommodation Obligations Have Become Major Risk Exposures

- Relates to Management of your Workforce and Operations
  - Morale
  - Absences
  - Successful Job Functions
  - Workplace Assignments
- Relates to Increased Liability and Enhanced Damage Risks
- Relates to Litigation/Claim Distractions from Workplace Disruptions
- Relates to Privacy Obligations - Probably the Hottest Topic Across Many Organizations
WHAT WE ARE NOT GOING TO TALK ABOUT ......

Unions and Collective Bargaining Agreements
Total Employment Complaints Filed by DFEH in 2014 – 7,632 Total Cases

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## DFEH Employment Complainants’ County of Residence

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The incidence of occupational injuries and illnesses in California remain at their lowest level in 13 years.

Survey of Occupational Injuries and Illnesses (SOII)
- 2014 – 460,000 reportable injury and illness cases
- 2013 – 468,400 reportable injury and illness cases

The rate for cases involving lost work-time, job transfer, or restriction-from-duty cases held steady at approximately 265,000 cases.

The rate for cases involving days away from work fell from 146,800 to 142,800.

Overall, the incidence of nonfatal occupational injuries and illnesses in California remains at its lowest level in the past decade.
Current and Trending Workers’ Compensation Rates

- For 2016, California Insurance Commissioner Dave Jones approved workers’ compensation rates 2% **below** the average approved in July, which was below prior filings and recommendations dating back to 2015:
  - Medical losses continue to develop favorably
  - Recent severity growth continues to emerge below projections
  - Increase in projected wage growth due to economic expansion

- The filing cautions, however, about:
  - Increasing loss adjustment expenses
  - High indemnity frequency rates
  - Increasing numbers of independent medical review requests
  - Spikes in lien filings
  - Persistent increases in temporary disability duration requiring continued monitoring
Indemnity Frequency Compared to Norms

Chart 15: Indemnity Claim Frequency by Region
Actual to Expected Indemnity Claim Frequency
Adjusted for Regional Wage Differentials and Industrial Mix

- North Coast & Mountains: 93%
- Sacramento Valley: 109%
- Sacramento/Stockton/Davis: 88%
- San Francisco Bay Area: 67%
- San Joaquin Valley: 117%
- Central Coast: 103%
- LA Basin: 120%
- San Diego: 90%
- Statewide: 100%
Coordinate vs. Segregate
You Actually Have to Do Both

- You Cannot Safely and Effectively Meet All of Your Obligations in Compartmentalized Units
  - Risk Management vs. Human Resources vs. Employee Benefits
  - “Return to Work” vs. Disability Management vs. Benefits Administration

- Yet, The Standards Are Different, and Information Cannot be Freely Exchanged without Potentially Violating Privacy Laws
  - W/C Gets Broader Access to Information (Because You are Challenging Liability or Apportionment)
  - Disability Management Only Gets Information/Can Consider Information Relating to the Disability for Which Accommodation is Sought
  - Benefits Only Gets (and Keeps) Information Relating to the Request and/or Administration of Benefits
Trying to Keep Up On New Regulations

- Clarified (?) Accommodation Obligations
  - “Affirmative Duty” to Commence the Interactive Process upon (i) a request by applicant/employee, (ii) an “observed” disability, or (iii) a report from a third party
  - To meet the “affirmative duty” employers must consider all possible accommodations, except ones that create an undue hardship. They must consider the preference of the applicant or employee, but have the right to select and implement an effective, alternate accommodation.
  - Disability – greatly expanded examples, now also including “learning disabilities” and “perceived potential disabilities”
Leaves of Absence

- CFRA vs. FMLA vs. ADA
  - No “Diagnosis” and No Right to Seek Updated Medical Certification Until Prior Certification Expires (FMLA)
  - Far Broader Informational Rights under ADA
- Timely and Complete Designations of Leaves (With new Employee Option on Designation)
- Monitoring Leaves/Ability to Return
- Managing Workplace Absences
  - Part-Time/Overtime/Temporary Replacement ($$$)
  - Impact on Other Workers
  - Return to Work (Which is Where we Now Take You ....)
So Our Goal For Today Is To …

Try and Provide Some Practical Examples and Tips to Help Keep you Out of Trouble By:


- Helping you Manage Conflicting Goals and Standards for Internal H.R./Risk Mgt./Legal and External Claims Management Personnel

- Providing you with Tips for Successful Integrating Workers Back into the Workplace (safely/timely/properly) … or, Keeping them Out of the Workplace (safely/timely/properly)
Easy Button –
“If this, then that”

Saves money on W/C exposures (Reduced TD)

Helps ensure Risk Manager/Supervisor buy in

Interactive Process requires individualized evaluations

Can create civil liability exposure for one size fits all Programs with no deviations

Supervisors/Managers may not be fully vested

What Happens If the Employee Objects? What if Supervisors/Managers do not Support?
**WC - Medical Restrictions**

- Cal. Med. Inf. Act (CMIA”) contains an exception for medical disclosures directly related to an existing workers' compensation claim that is necessary for the resolution of that claim.
- Status report content must be primarily limited to diagnosis, TD status and work restrictions.
- Some reports can be over inclusive in information.

**ADA - Workplace Capabilities**

- ADA/FEHA requires review of “capabilities” (not limitations).
- Fitness for Duty:
  - 100% “Full Release”?
  - 100% Disability Rating?
  - Remember Cuielette!!
- 100% Permanently Disabled (means nothing)

**Scope of Reviews By Internal Staff – Only Injury-Related or “Other Issues” Beyond an Accommodation Request?**

**Who is Involved?**

**What Can they Know or Share?**
Resignations/Separations

- Generally a C&R is not offered to current employees or those that are still covered risks
- Resignations include 1542 general release language that covers all claims
- May include waiver of interactive process
- Not shown to or approved by the WCAB

When do we separate?

Truly Cannot Accommodate

- Need to Separate for Business Reasons ("Undue Burden") — "Opened Ended" Leaves
- Separation Release Waiving W/C Rights/Benefits (No!?!)
- Concern for "Discrimination" and/or Retaliation

How do we separate?
Example 1 – PRIVACY

- Employee asserts a workers’ compensation claim for an injured back, managed by Risk Management and an external TPA
- Human Relations is managing the return to work/interactive process, which is solely related to the back injury
- Human Relations (properly) is also approving LOA through FMLA/CFRA
- In managing the W/C, the TPA learns of prior back injury and knee injury claim
- Human Relations learns during the interactive process of a newly diagnosed diabetic condition that may impact the ability to return to work or perform the same job functions.
From the Workers’ Comp. Side

- Broader informational sharing on non-current injury to avoid payment obligations
- Deposition – discovery of prior claims and medical conditions including information that applicant may have been working in a “self modified” position
- LC 3762. TPA/Risk Manager is prohibited from sharing “medical information” to an employer except for (i) diagnosis and (ii) medical information to modify work duties for the W/C injuries.

From the Civil/HR Side

- ADA/FEHA Inquiries/Evaluations Only for Disability for Which Accommodation is Sought
- Disability Accommodation/ LOA File Separate from W/C File
- No Authorization for Sharing
  - LOA (Can’t get Diagnosis)
  - Knowledge Use of Other Information Invades Privacy and/or Violates Disability Laws
What Do You Do as Risk Manager?

- Risk Manager works closely with Human Relations to provide legally appropriate information necessary for use during accommodation meetings/discussions.

- If medical information is discussed during the accommodation meetings could be deemed confidential (non-industrial conditions) have employee sign a release before allowing sharing information among other personnel.

- Do not solicit/and actively seek to prevent receipt of information regarding non-industrial issues relating to W/C claim and/or the Disability Accommodation Request.
Example 2 – SOCIAL MEDIA & E-MAILS

- Security guard injured her back breaking up a fight between two students – initial injury seemed genuine.
- Months later, physician is still issuing work restrictions for “light duty,” but the employee seems more capable than the restrictions suggest.
- Fellow employee says that a common friend (not an employee) says the injured employee’s Facebook page shows her digging holes and planting trees in her yard.
- The fellow employee also says the injured employee was issuing emails from the school’s computer system to her attorneys.
SOCIAL MEDIA & E-MAILS

Alignment of Interests

- **E-MAILS:**
  - *Holmes v. Petrovich/Work Systems and Work E-mails*
  - Airwatch (professional, not personal)
  - Personal E-mail – No Passwords or Invasions
  - Internet History/Traces
  - Downloads to Computer

- **SOCIAL MEDIA:**
  - Personal information on publicly accessible social media sites is useable
  - Co-workers and others may voluntarily (without coercion) disclose the contents of their “Friends” posts
  - Social media can be used when discussing limitations, capabilities, or discipline/termination
What Do You Do as Risk Manager?

- Report information received to TPA (for W/C, and possible sub rosa issues), HR (for “accommodation” and/or potential discipline issues), and Counsel (to provide overall guidance and protection).

- Prior to taking disciplinary action against the employee based on social media information, discuss with W/C and employment counsel on the impact of the information and consequences (Labor Code 132a, Civil Privacy, Retaliation, and/or ???).

- Remember, the “interactive process” and “accommodations” must be continued until a determination is made ….” Don’t put the CSU at risk by “stopping” that process prematurely.

What Do You Do as HR?

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Example 3 – “PREFERRED” RETURN TO WORK PROGRAMS

- CSU has a “preferred” modified duty program
- Mechanic in the Transportation Department hurts his back, leading to lifting and kneeling restrictions.
- “Preferred” program would have the employee return work on alternate duty and pick up trash
- Employee objects, stating it is “beneath him,” and maintaining the “stooping” would harm his back
- The Employee claims the modified duty assignment is “retaliatory,” and because he has no interest in doing a “good job,” the supervisor begins writing him up.
PREFERRED RETURN TO WORK PROGRAM

From the Workers’ Comp. Side

- We want to have him return to duty, and build toward a full return to work to reduce benefit payments

From the Civil Side

- We need to ensure the “individualized” assessment standard is met
- We ultimately still get to decide the modified assignment, with a “standardized” approach helping to avoid “retaliation” claim
- Have to make sure supervisor is “suited” to this type of assignment, and works effectively with HR
What Do You Do as Risk Manager?

- Ensure that all communications comply with “interactive process” standards … “positive,” “based on “capabilities,” and documented!
- Carefully note that the employee cannot choose his/her accommodations in a return to work program, and identify (if possible) the business reason for the “modified” duty role/value.
- Be “flexible” enough to recognize that a “deviation” might be appropriate, but don’t be “bullied.”
- Be on the “lookout” for threats … And then report them to counsel and get joint agreement/guidance on how best to proceed (helps to negate the “intentional” misconduct argument)
Example 4 – THE FRAUDULENT CLAIM

- Employee alleges that she slipped and fell in a hallway; there were no witnesses; there was Coke found on the floor, with the employee having an empty Coke can with her.
- Before notifying the employer, Employee goes to her chiropractor, whom she has seen for the last 10 years, who makes a diagnosis of “soft tissue injury arising from industrial accident.” He puts her off work for 10 days.
- Co-worker is eating dinner three days later, and sees employee out dancing. Employee sees Co-worker and pleads with her “not to tell anyone.”
- Employee tells Supervisor, saying “Don’t tell anyone; please, don’t tell anyone, I don’t to be involved or hurt anyone. And, I’m afraid she’ll retaliate against me.”
## FRAUDULENT CLAIM

### From the Workers’ Comp. Side
- If defendant has an articulable suspicion of fraud, an investigation can take place without threat of lawsuit.
- Take statements of applicant (if not yet represented), janitors, etc.
- If in formal proceedings, consider depositions and sub rosa, as well as Index ISO searches.
- Can lead to criminal prosecution, with such prosecution having a chilling effect on others who might seek to file frivolous claims.

### From the Civil Side
- Secondary interest, but not necessarily a complete defense.
- Serious concern - **timing**
- May not erase technical violations (particularly if involving different issues).
- But, any “factual finding” of dishonesty is helpful.
- There is nothing that is “off the record” – treating it that way violates your “fiduciary duty” to the employer.
What Do You Do as a Risk Manager?

- Risk Manager (and/or Human Relations Manager) need to conduct a reasonable investigation to confirm facts vs. “rumor.”

- Upon “reasonable” confirmation, notify TPA and counsel, and provide objective information so they can determine how best to proceed; do not “color” the facts in an effort to work toward a particular result.

- If there is an “interview” of the Co-Worker or Supervisor, HR should be present to “support” the person (attempt to avoid “chilling” effect”) and address obligations/protections.

- Keep “professional” and “complete” notes and documentation – in three files (a) W/C; (b) Disability Accommodation; and (c) Fraud Investigation – contents should be different, and should be entered only by the “responsible” party.

What Do You Do as HR?

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Example 5 – FELLOW-EMPLOYEE MISCONDUCT

- Employee on Return to Work is given extra breaks, a change in hours, and reduced work duties as part of initial “interactive process.”
- Supervisor is complaining (to management and to fellow employees) that she can’t get all work done due to the “preferential” work assignments; the supervisor has also been concerned that management does not believe she is meeting her job expectations.
- Fellow employee actually tells employee that “he’s tired of favoritism,” and accuses employee of being a “faker” and “lazy.”
- Employee complains about this “hostile work environment” to Human Resources.
FELLOW EMPLOYEE MISCONDUCT

Alignment of Interests

- Supervisor’s conduct may ultimately reach actionable “harassment”/hostile work environment
- Fellow employees and supervisors have a duty to prevent Hostile Work Environment
- Supervisor/employee subject to discipline if the conduct continues
- Failure to act on information may result in additional claims being added to the underlying workers’ comp claim such as psyche/stress

- Supervisor may need position reinforcement (if appropriate) that accommodation will not reflect negatively on his/her evaluation
- Individual Co-Workers may need a separate discussion on disability accommodation obligations, and their personal exposures
- Can Negatively Impact Interactive Process/Work Accommodations (Impairment by Others)
### What Do You Do as Risk Manager?
- “Listen” to supervisor and/or co-worker – it may be their view has merit (“injured” employee feels he/she is “untouchable” – which is unacceptable)
- HR needs to be clear with supervisor (must positively and proactively support the “accommodation” effort); similar but different conversation with employee (due to different roles in the workplace)
- Consider whether “Training” is needed on standards and expectations (department wide avoids “singling” out)
- Ensure documentation of remedial and preventative efforts (confirming actions as “defense” to a claim of inaction/incomplete action)

### What Do You Do as HR?
- What Do You Do as Risk Manager?
Example 6 – DISCIPLINE/TERMINATION

- Employee is on a legitimate workers’ compensation leave; prior to the industrial accident, however, the employee was marginal (at best).
- An agreed return to work program is implemented, but employee is making numerous, basic mistakes and is not showing a positive return to the workforce.
- Employee is also showing up late/leaving early, and taking what appears to be numerous personal calls.
- Employee has used “foul”/inappropriate language to supervisors and others. Some of these behaviors are consistent with pre-injury conduct; some are new and different.
Alignment of Interests

- Follow established protocols to interview/investigate the allegations
- Very objective ("facts only") documentation
- Labor Code Section 132a exposures
- "Bad Conduct" Still Grounds for Discipline or Termination
- FEHA Retaliation Exposures
- Potential for Cross-Over, "Disability-Related" Misconduct May Create Additional Accommodation obligations
- The "Automatic" Response is not Always the Best Response – But Early Intervention is Required
What Do You Do?

- Document the behaviors of the employee and the conduct that is occurring.
- Keep discipline in separate “silo” from worker’s compensation and be specific regarding infractions.
- If conduct rises to level of discipline or termination, contact counsel before taking action that may lead to 132a/Civil Exposures.
- Do not avoid discipline/termination when appropriate – It may/will only get worse, and create bigger and more costly problems.
Example 7 – FITNESS FOR DUTY/RETURN TO WORK EVALUATIONS

- Kitchen Staff employee on Workers’ Compensation LOA is cleared for partial return to work six months after back injury, although there remains a question as to potential future back surgery.
- Personal physician’s limitations raise concern, but are not overtly inappropriate.
- Employee is in the workplace, but Supervisor is very concerned with Safety/Potential for new/more significant workers’ compensation injury; in fact, the employee suffers an aggravating injury and goes out for another two weeks – then gets another clearance.
- Release is issued again, but when the employee returns, the Supervisor again expresses concern...
Fitness for Duty/Return to Work Evaluation

**From the Workers’ Comp. Side**
- Fitness for duty evaluations are routine in many professions (peace officers)
- A functional capacity evaluation can be focused on essential functions of the job
- Helpful where doctors provide various assessment regarding the employee’s work restrictions and employer does not know which they have to accommodate

**From the Civil Side**
- New Limitations on Obtaining Updated Medical Confirmations under FEHA
- “Second Opinion” – For Safety
- Never Done to Avoid W/C Claim/Aggravated Claim
Carefully Review Personal/MPN Physician’s Release to Duty –
- Does it make sense, particularly for “safety sensitive” situations?
- Is the Medical Care Provider an “expert” in the subject area?

Always look to “capabilities” and “limitations,” not to diagnosis or “disabilities.”

Reasonable belief of threat to own safety or others’ safety allows for additional reviews (but, it needs to be objectively written and established).

Employee’s subjective concerns about another employee’s safety risks is not grounds to take action.
PRACTICAL DO’S, DON’TS AND TIPS
WHEN IN DOUBT…GET A “WAIVER”

- If you cannot tell if you have a “right” to medical/private information, or to investigate a particular issue, request a waiver.

- Waiver must include:
  - Type of information
  - Length of waiver
  - Right not to execute
  - Purpose/Reason
  - Date/Name
  - Right to Revoke

- Format
  - Forms are nice/safer
  - But e-mail can work (especially after a verbal conversation)
    - “This is to confirm ….”
    - “If this does not match with our agreement, please let me know immediately”
RETURN TO WORK SAFELY

- **Fitness for Duty**
  - Job Description/Capabilities
  - Proper Doctor/Proper Release
  - Prescriptions/Emotional Limitations

- **Alternate Duty/Modified Duty that Works**
  - Structured programs must still be flexible
  - Match actual capabilities with actual duties

- **Interim vs. Permanent**
  - Looking for Interim Solutions in Most Cases
  - Some May be Permanent (if not negatively impacting Essential Functions/i.e., “permanent job restructuring”)
GET YOUR LEAVES STRAIGHT...ASAP

- **FMLA/CFRA (regardless of cause)**
  - Designate ASAP
  - Limited Right to Information – **Don’t Stop Here!**
  - Limited Right to Medical Confirmation Renewals
  - Use California Forms/Not Federal Forms!

- **ADA/FEHA**
  - Broader Informational Rights (But no Required Forms)
  - Limited to the Basis for the Accommodation Request

- **Collective Bargaining Agreements**

- **Must be Equally Applied – No Favorites/No Discrimination**

- **Get Your Paperwork in Order (and Documented What you Requested and When, Including Use of Your Forms)**
It is not proper/legal to treat similar industrial and non-industrial injuries/return to work situations differently (the “cause” does not matter in meeting LOA/Disability Accommodation obligations)

It is not proper/legal to deny return to work based on fear of workers’ compensation exposure - an email/file note mentioning this concern would create a presumption of disability discrimination

A Full/Complete Return to Duty Release is Not Required
- Violates legal obligations
- Can meet important business needs
- Change the mindset of illness
An Employee May Not Want to Provide Information

- Explain the consequences of “no” and determine if the conduct/lack of cooperation can be changed

- Not Every Rejection of Information Can Result in an Adverse Determination

- No, means “no” … fairly impose consequences without violating privacy

- Qualifiers (“maybe” or “I’ll think about it”) is a no – until later changed in writing.
PUBLIC IS PUBLIC...PRIVATE IS PRIVATE... DON’T CROSS THE LINE

- **Social Media**
  - The vacation pics while on leave (yes)
  - “Secret” friend requests, etc. (no)

- **WCAB or Civil Suits**
  - Filings (yes)
  - Subpoenas (yes)
  - “Off the record/Down the hall” (no)
    (And that includes cross-communications between “Claims” and W/C and Risk Management)
JEALOUSLY PROTECT PRIVACY

- Ensure that Laptops and Personal Cell Phones Containing Medical/Private Information ....
  - Are Encrypted
  - Have Sufficient Passcodes/Security Measures
  - Are not Accessed by Family/Friends
    - Can Result in Serious Penalties and Exposures
    - Maybe Not HIPAA, but CIMA, etc.

- Separated and Locked Files
  - Electronically
  - Hard Copy
Qualification

- Request Complete & Timely?
- Length of Service?
- Needed Documentation provided?

Administration

- Response (5 days) after request
- Regular Communication w/ EE
- Extensions
- Evaluate non-compliance

Closure of File

- Return to Work Release
- Accommodation Evaluation (ADA)

Leave Management

Notification

Direct Notification  Indirect Notification

LOA Forms

1. Workplace Leave Request (Unless Unable)
2. Certification of Health Care Provider (If Needed)
3. Response to Workplace Leave Request (Always)
4. Return to Work Release - Medical Leave Extension Certification
LOA and Disability Management

Injury or Disease
Industrial or NonIndustrial

1. Workplace Leave Request (Unless Unabl)

2. Certification of Health Care Provider

3. Response to Workplace Leave Request (Always)

4. Return to Work Release - Medical Leave Extension Certification

Closure
Permanent (if fully resolved)
Temporary (If Accom. Exists – Reg. Check)

5. Disability Accommodation - Medical Release Authorization

Can occur outside of leave process

Administrative Action Items

Forms
- Workplace Leave Request
- 2.A - Certification of Health Care Provider – EE
- 2.B - Certification of Health Care Provider – Family Member
- 3. - Response to Workplace Leave Request
- 4. - Return to Work Release or Request for Medical Leave Extension
- 5. - Disability Accommodation – Medical Release Authorization
Disability Management Process

End of LOA (Only if Needed)

Direct Request

Indirect Notification

Capabilities

Medical Information

Potential Accommodations

Communication!

Interactive Process

Essential Functions

- Essential Functions Analysis
  (Can they safely return to work/and perform essential functions, now or reasonable future)
  Job Description - Supervisor feedback
  - Business Needs -

- Discuss their capabilities (what can they do; not what can’t they do)
- Medical information may be necessary to determine capabilities

- Disability Accommodation
  Medical Release authorization (voluntary)
  - Clarify information with doctor (with authorization/HIPAA)

Focus on result -not method
- Ergonomic equipment
- Additional leave
- Change in position
- Change in hours
- Change in task
- Additional breaks

DECISION

Accommodation/Termination

- Decision should be written and timely communicated/Copy In ADA/Med. File
- Schedule follow-up to make sure decision is working

- Can be a simple 1 time/1 minute discussion, but it may take several meetings and discussions
- Multiple methods of communication can be used, but face-to-face is best
- This is “informal” and non-adversarial
INFORMATION SHARING & DETERMINATIONS

W/C – Return to Work (not 100% release)
Separate ADA File (Same person OK on Multiple Events)

W/C – Claim
Separate W/C File
Claim and RTW should not overlap, except at highest level

Non-Industrial Return to Work (not 100% release)
Separate ADA File (Same Person OK on Multiple Events)

FEHA/Civil Claim
Separate Litigation File
Claim and RTW should not overlap, except at highest level

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