

Key Strategies to Limit Workers' Compensation Retaliation Claims



LAUBER MUNICIPAL LAW

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Introduction/Background

Lauber Municipal Law



- ④ Your worker has been injured on the job, now what?
- ④ Supervisors, human resource staff, and employees need to understand the roles, responsibilities and rights under Missouri's workers' compensation law.
- ④ Staff must also understand and recognize retaliation and how to avoid and prevent it.

Who is Covered?

- ④ Any employer with more than five (5) employees must provide workers' compensation for its employees.
- ④ Can be insured by 3rd party or self-insured
- ④ Applies to government entities (§ 287.030 RSMo.)



Who is an Employee?



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- ④ An “employee” is defined as a person in the service of any employer under any contract of hire, whether express or implied, verbal or written, or under any appointment or election.
- ④ The employer must have control over the employee.

What is Covered?

Ⓜ Accident

- Ⓜ Accident is defined as
“unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.”



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What is Covered? (cont.)

- ④ What does that mean?
 - ④ Not an injury from usual and customary work duties over time.
 - ④ Not an injury that could have happened outside of employment (i.e. meniscus tear from walking)
 - ④ Can include working on feet all day that resulted in tripping at and stumbling at work. The Court held that the employee was exposed to a hazard at work.



What is Covered? (cont.)

Ⓜ Injury

- Ⓜ An injury alone does not constitute an accident.
- Ⓜ To be compensable as one arising out of and in the course of the employment, the employee must sustain an injury, and that injury must be caused by an accident.
- Ⓜ The accident is the cause; the injury is the result.



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What is Covered? (cont.)

- ④ Occupational disease
 - ④ An identifiable disease arising with or without human fault out of and in the course of the employment.
 - ④ Injury or death by occupational disease is compensable if occupational exposure was the prevailing factor.
- ④ Does not have to meet the same requirements as injury by accident.



What is Covered? (cont.)

Ⓜ Includes:

- Repetitive motion injury
- Loss of hearing
- Radiation disability
- Diseases of the lungs or respiratory tract, hypotension, hypertension, or disease of the heart or cardiovascular system (fire fighters and police officers)
- Psychological stress (fire fighters or police officers)
- Contagious or communicable disease if exposure arises out employment
- PTSD (first responders)

When is the Employer Liable?

- ④ Accident or occupational disease arising out of and in the course of employee's employment.
 - ④ Three-prong test:
 - 1. The injury must be caused by an *accident* or *occupational disease*.
 - 2. The injury must *arise out of the employment*.
 - 3. The injury must occur while the employee is *in the course of employment*.
 - ④ Must be the *prevailing factor*.



When is the Employer Liable?

(cont.)

- ④ An injury occurs "in the course of employment" if the injury occurs "within the period of employment at a place where the employee reasonably may be fulfilling the duties of employment." *Shinn v. Gen. Binding Corp., Koelling Metals Div.*, 789 S.W.2d 230, 232 (Mo. App. E.D. 1990).
- ④ Employee has the burden of proof.

When is the Employer Liable?

(cont.)

- Ⓜ Prevailing Factor
 - Ⓜ Courts will look to the activity that caused the injury.
- Ⓜ Acts of God (to be compensable must arise out of employment)
- Ⓜ Unprovoked violence or assault against and employee by any person
 - Ⓜ Related to dangerous nature of employee's duties
 - Ⓜ Irrational and unexplained incidents of neutral origin that occur in the course of employment

When is the Employer NOT Liable?

Ⓜ Examples:

Ⓜ Idiopathic injuries (hematoma, dizzy spell).

Ⓜ Ordinary diseases.

Ⓜ Illnesses from normal aging.

Ⓜ Activities of a personal nature.

■ Is the activity/risk related to employment?

■ Is there a mutual benefit?

When is the Employer NOT Liable?

(cont.)

Ⓜ Example of Activities of a Personal Nature

- Horseplay – is the event expected or foreseeable?
- Employee's use of alcohol or nonprescribed controlled drugs in the workplace.
- Failure to use safety devices.
- Failure to follow employer
- Intentional Injury
- Injury sustained while commuting.
- Voluntary participation in a recreational activity. (Exception – employee ordered to participate, employee paid wages/travel while participating, or injury occurred on employers' premise due to unsafe conditions.

When is the Employer NOT Liable?

(cont.)

- Mental illness
 - Work-related stress unless work related and extraordinary and unusual.
 - Not arising out of employment unless resulted from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination or any similar action taken in good faith by the employer.
- Injuries sustained while committing a crime.
- Non-work-related exposure or event outside the workplace that causes an injury or illness that begins to surface while you're at work.

Overview of Procedure

- ④ If the employee is injured on the job, they must report the injury to the employer within 30 days.
 - ④ Your policy should set out the procedure of who the employee notifies.
 - ④ The employee should notify the hospital or clinic the injury is work-related when seeking medical treatment.
- ④ Workers' compensation includes:
 - ④ Medical care.
 - ④ Rehabilitation.
 - ④ Wage replacement.
- ④ The employee files a claim with the Division of Workers' Compensation.

Pitfalls for Employers

- Ⓜ Retaliation - The law protects an employee from termination or discrimination for filing a workers' compensation claim.
 - Ⓜ Employee can file a civil case against the employer for money damages.
- Ⓜ An employee can be terminated post-injury for misconduct.
 - Ⓜ The misconduct should be documented and unrelated to filing a claim.
- Ⓜ If an employee is unable to physically perform their job post-injury, the employer is not required to find the employee a different job.



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Retaliation

- ④ What is retaliation?
 - ④ An employer's illegal interference with the rights of individual employees to enforce their personal legal rights under the law and to support others who enforce their personal legal rights under the law.
 - ④ Retaliation occurs when an employer takes an adverse action against a covered individual because the employee engaged in a protected activity.



Adverse Actions

- Ⓜ Adverse Employment Action significantly impacts the terms, conditions, or privileges of an individual's employment.
- Ⓜ It must be a *tangible change* in working conditions that produces a *material* employment disadvantage. *Clegg v. Ark. Dep't of Corr.*, 496 F.3d 922.
- Ⓜ Examples include:
 - Termination;
 - Refusal to hire;
 - Denial of promotion;
 - Changes in benefits;
 - Changes in compensation;
 - Threats;
 - Negative performance appraisals, and
 - Increased monitoring.

Adverse Actions

Ⓜ Indicators of retaliation include:

Ⓜ Termination

- Being fired shortly after filing a workers' compensation claim.

Ⓜ Demotion

- A change in job title or duties, especially when it involves a decrease in pay or responsibilities.

Ⓜ Reduced Hours

- A reduction of hours or assignments to less desirable shifts.

Ⓜ Retaliation does not include temporary assignments without changes to compensation or benefits.

Claims of Retaliation

- ④ Employee may file a claim with:
 - ④ Missouri Commission of Human Rights
 - Missouri courts have interpreted retaliation more broadly than under federal law
 - “Actual damages under the MHRA in an employment-discrimination claim may include awards for emotional distress, humiliation, and suffering.” *Wilkins v. Bd. of Regents of Harris-Stowe State Univ.*, 519 S.W.3d 526, 538 (Mo. App. E.D. 2017)
 - ④ EEOC
 - ④ Federal Court - 42 U.S.C. § 1983
 - ④ Even if the alleged wrongdoing was committed by a different employer, the current employer cannot take retaliatory adverse action.

Ways to Avoid Retaliation and Prevent Complaints

- ④ Understand employers' responsibilities.
- ④ Adopt a no retaliation policy that includes:
 - ④ Zero tolerance for retaliation.
 - ④ A system for reporting retaliation.
 - ④ A statement that complaints will be promptly investigated and resolved.
 - ④ A statement that complaints will be kept as confidential as possible.
- ④ Train employees on the no retaliation policy and on the procedures for reporting complaints.

Ways to Avoid Retaliation and Prevent Complaints

- ④ Investigate complaints.
- ④ Apply the policy consistently.
- ④ Address and document performance issues.
- ④ Carefully review discipline and termination decisions.
- ④ Be honest about the reason for the adverse action.
- ④ Consider a new neutral decision maker if an employee has complained about a supervisor.
- ④ Reconsider and fix bad decision.

Adapted from Ten Strategies for Reducing the Risk of Retaliation Claims by the Missouri AGO



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