Workers’ Compensation vs. Personal Injury: Key Distinctions that Every Employer Should Know

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Injuries occurring during the course and scope of employment (AOE/COE)

The California workers’ compensation system is the exclusive remedy against an employer for an employee’s injury or death. California LC 3600

Exceptions…
1. Dual Capacity

Applies when an employer has multiple duties towards employees

Example: Employer manufactures a product that injures employee. Employer bears civil responsibility if:

A. Employer manufactured a defective product;
B. Defective product was the proximate cause of employee’s injury;
C. Defective product was sold, leased or transferred to an independent third party for valuable consideration; and
D. The product was thereafter provided to the employee for use by a third party (LC 3602(b)(3))

Also applies when an employer serves a separate legal role or assumes an obligation not normally imposed by the employee-employer relationship.

2. Fraudulent Concealment

Applies where an employer fraudulently conceals a worker’s injury and its connection to employment whereby the concealment results in an aggravation of the injury. LC 3602(b).

Examples: exposure to mold, asbestos or toxic materials.
3. Employer Assault

Employee may bring a civil action against his/her employer where the employer has acted affirmatively either by willfully assaulting the employee or ratifying the assault by a co-worker.

LC 3602 (b)(1)
4. Power Press

When employer knows and ignores the fact that the manufacturer of a power press required a guard, the employer is civilly liable where it causes injury to an employee by its “knowing” removal or failure to install a manufacturer-required point of operation guard on the power press. LC 4558
5. Uninsured Employer

An employee injured in the course and scope of employment may bring a civil claim against his/her employer who had failed to secure workers’ compensation coverage as of the time of the injury. LC 3706
While the Labor Code states that the WC system is the exclusive remedy for workplace injuries, consider this…
Interaction Between Workers’ Compensation & the ADA /FEHA

• While the Labor Code states that the Workers’ Compensation system is the exclusive remedy for workplace injuries, consider this…

  • *City of Moorpark v. Superior Court*

    The California Supreme Court held that employees who suffer discrimination based on a work-related disability can sue for disability discrimination under the Fair Employment and Housing Act and for common law wrongful discharge

• **Rule**: Despite the exclusivity of work comp for the *actual injury* to the employee, employees can still sue their employers for “failing to accommodate” an industrial injury under the FEHA.
Impact of *Moorpark* Decision

- An injured worker had additional claims outside the comp system to bring against the ER

- Why are injured workers pursuing these claims?
  - Follow the $$-$ Applicants are looking for additional revenue streams following the WC reforms
  - Additional claims= more $$
  - The plaintiff’s bar is advising EEs of their rights under the ADA/FEHA
  - Remedies are more extensive under the ADA/FEHA than Labor Code section 132a
Why Do Employees Like “Failure to Accommodate” Claims Under the ADA/FEHA More than Labor Code 132a

- The remedies are different!!

- The FEHA allows significant additional remedies. Labor Code section 132(a) offers a limited remedy, while a violation of the FEHA allows the EE to seek compensatory and punitive damages!
Wrongful Termination Claim May be Based Upon a Work-Related Injury

Prue v. Brady Co./San Diego, Inc. (2015) 196 Cal.Rptr.3d 68

* The Findings of the WCAB in an action under LC 132a may constitute “res judicata” in a civil action. Ly v. County of Fresno (2017) 16 Cal.App.5th 134
Other Leaves of Absences

- Workers’ Compensation
- ADA
- FEHA
- PFL*
- Personal Leave
- Disability Leave*
- Maternity Leave*
ADA/FEHA Basics

• Individual with a disability
• Essential functions
• Interactive process
• Reasonable v. Undue hardship
• Time Frames
  • During WC Leave and prior to P&S designation
  • After P&S designation
  • After exhaustion of statutory leaves (FMLA, PDL, etc.)
• Document, document, document
Remarks That Can Lead Directly to Litigation….

• “Our company has a policy that modified work is not offered after 90 days…”

• “Our company has a policy that we do not offer permanent modified work”

• “Our company has a policy that an EE must be released to return to full duty before he/she can be reinstated.”

• “Our company has a policy that the EE must be 100% before returning to work.”

• “The injured employee has been declared permanent & stationary and still cannot perform his former job.”
• What is the “Test” for Returning a Disabled “EE” to Work Under the ADA/FEHA?

  • Test: An EE that is “disabled” as a result of an industrial injury has the right to be reinstated to an:

    • Existing job, Modified job, or Alternative job

  • If the EE can perform the “essential functions” of the position with or without a “reasonable accommodation.”
What Type of Accommodation is Deemed “Reasonable”?

- Job restructuring (i.e., assigning “non-essential” job duties to other employees)
- Part-time or modified work schedules
- Reassignment to vacant position
- Providing equipment or devices
- An accommodation that causes the ER “undue hardship” is not “reasonable”
  - Caveat- ER has burden of proof!
Who Needs to be Involved with Decisions Regarding “Reasonable Accommodations”

• Supervisors.

• Front line supervisors usually know and understand the real “essential functions” of each specific job better than Human Resources, Risk Management or upper management.

• ERs are required to consider permanent modified duty or alternative assignments for workers who are not expected to sufficiently recover from their injuries enough to permit them to return to their original jobs.

  • Who best knows the “essential functions of these various jobs, but the supervisors who oversee these functions on a daily basis?
When Can “Return to Work” be Denied?

If an injured EE is **not** returned to work, ER must demonstrate either:

- The EE cannot perform the “essential” functions of the job with or without “reasonable accommodation”, or
- The EE poses a direct threat to himself/herself or co-workers that cannot be reasonably accommodated.
How Much Time Off is Too Much?

- Is an “indefinite” leave of absence a “reasonable accommodation”?
  - No
  - What is the definition of “indefinite”?
Understand How the "Interactive Process" Works and When it is Triggered

• ERs need to understand their obligations under the ADA/FEHA – workers’ compensation is only one statutory scheme.

  • Workers’ Compensation is relevant because EEs sometimes become “disabled” as a result of industrial injuries

• Despite company policies, the law requires the ER and EE to engage in the “interactive process” to determine:

  • Whether the EE can perform the “essential functions” of his/her job with or without a reasonable accommodation.
From EEOC’s Website

- Regardless of cost, ER does not need to provide an accommodation that would pose significant difficulty in terms of the operation of the business.

  - **Example:** A store clerk with a disability asks to work part-time as a reasonable accommodation, which would leave part of one shift staffed by one clerk instead of two. This arrangement poses an undue hardship if it causes untimely customer service.
• **Example:** An employee with a disability asks to change her schedule arrival time from 9:00 a.m. to 10:00 a.m. to attend physical therapy appointments and to stay an hour later. If this accommodation would not affect her ability to complete work in a timely manner or disrupt service to clients or the performance of other workers, it does not pose an undue hardship.
From EEOC’s Website…

• An ER does **not** have to do any of the following:

  • **Provide an employee with a device that would assist him/her both on and off the job, such as a prosthetic limb, wheelchair, or eyeglasses.**

  • **Remove or alter a job’s “essential” functions.**

  • **Example.** A grocery bagger develops a disability that makes her unable to lift any item weighing more than five pounds. The store does not have to grant an accommodations removing its fifteen pound lifting requirements of doing so would remove the main job duty of placing items into bags and handing filled bags to customers of placing them in grocery carts.
An ER does **not** have to do any of the following:

- **Lower the production or performance standards.**
  - **Example.** A hotel that requires its housekeepers to clean 16 rooms per day does not have to lower this standard for an employee with a disability.

- **Excuse violations of conduct rules necessary for the operation of the business.**
  - **Example.** ER does not have to tolerate violence, threats of violence, theft, or destruction of property, even if the EE claims that a mental or physical disability caused the misconduct.
How Much Time Does an ER have to Provide?

- If EE is not eligible for FMLA/CFRA, how long can EE be off work on a WC leave?
  - *What is the impact of ADA and FEHA?*

- If the EE is eligible for FMLA/CFRA, the FLMA/CFRA requires at least 12 weeks off in a 12 months period.
  - *Is the ER obligated to provide leave beyond 12 weeks as a “reasonable accommodation”?*
HARD WORK, HONESTY, & DEDICATION