EMPLOYEE INJURIES & ILLNESSES TRIGGER COMPREHENSIVE ANALYSIS OF LEGAL ISSUES

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Employers are stymied regularly trying to comply with the myriad of laws which apply to them, many of which overlap and, at times, conflict with each other. These situations arise most frequently with employee injuries and illness and the leaves which accompany them.

The following hypothetical illustrates how one employment "situation" requires a thorough analysis of many different statutes and legal theories in order to properly legally and practically address it.

This may appear amazingly similar to a law school or bar exam question as an "issue-spotting" opportunity, yet it is the type of incident which often arises and provides some guidance as to appropriate analysis and resolution.

Hypothetical

ACME Company has a plant which runs a three-shift operation. It has a disability leave policy which allows employees to go out on medical leave, holds their jobs for them for up to six months. If they return to work within those six months, they are entitled to return to the job they vacated.

Joe Smith worked as a material handler for ACME on the first shift and suffered a right shoulder injury which was covered by workers' compensation. The doctor kept him out of work for eight weeks, at which time he released Joe to return to full duty without restrictions.

Joe went back to work and one month later, injured his left shoulder, which was also covered by workers' compensation. Joe stayed out for five weeks. The doctor again released him to return to work to full duty.

Naturally, ACME is reluctant to put him back on that job since he has already suffered two work-related injuries. ACME has another third shift job available in a job which pays the same rate of pay as that of the material handler. It would prefer to put him in that position to avoid risking his health.

What potential laws or legal theories are impacted and what should ACME do?

Workers' Compensation – Regardless of what job ACME places Joe in, if any, ACME will violate no workers' compensation laws, unless it discharges Joe for having filed the workers' compensation claim in the first place. The workers' compensation laws do not require an employer to return an employee to any specific job.

Joe is entitled to receive workers' compensation weekly benefits for the thirteen weeks he missed from work as a result of the shoulder injuries. He can also receive an award of permanent partial disability to each shoulder if he has permanent impairment caused by his injuries. Typically, the treating physician will render an opinion regarding the degree of permanent impairment. If ACME places Joe in a job which pays less than his previous position, Joe may be entitled to workers' compensation benefits to replace this lost earning capacity.

The Family and Medical Leave Act – It appears that ACME has given Joe at least the 12 weeks to which he is entitled under the FMLA, if not more, assuming he was eligible for it. The question is whether ACME properly designated Joe's workers' compensation leave as FMLA leave also, identifying the two as running concurrently. Additionally, ACME's policy must notify employees that FMLA leave runs concurrently with workers' compensation leave. To the extent that this designation has not occurred, if Joe is not returned to his position or an equivalent one, he may claim that ACME has violated the FMLA regulations. Joe will be able to legitimately claim that the third-shift job is not equivalent. Even though Joe has received the 12 weeks (and more) he was entitled to under the statute, he may try to take the position that he was some how wronged by not receiving the appropriate notice of designation. Even though the U.S. Supreme Court has determined that this type of claim may not be viable under *Ragsdale v. Wolverine*, Joe may still attempt to raise such an issue.

Assuming ACME has provided the appropriate notice, there is nothing under the FMLA prohibiting it from refusing to allow Joe to return to work at all since he exhausted his 12-week entitlement. Clearly, there is nothing under the Act prohibiting it from placing Joe in another job other than the one he left. Thus, under those circumstances, the third-shift job would be acceptable.

If ACME chooses to do that however, it should review its practices in terms of how it has traditionally applied the FMLA and whether it has allowed other employees to return to work who have exceeded their 12-week allowance. If it has, they should attempt to maintain consistent practices or it could impact some laws other than the FMLA.

The Americans With Disabilities Act – While it appears at first blush that Joe is not covered by the ADA since his injuries have been temporary, Joe may attempt to assert an ADA claim based on the presumption that ACME "regards him" as being disabled. To the extent he can successfully show that ACME perceives that he has a disability and is treating him adversely as a result of that, he may be able to establish such a claim.

Additionally, while the ADA does not require that Joe be returned to the job he vacated or that one be created for him, it may require an extension of the 12-week FMLA leave as a reasonable accommodation and that he be placed in another vacant job. So if ACME decided to terminate him after he exceeded his 12 weeks under the FMLA, the Company may be risking an ADA claim for failure to accommodate even though it is in compliance with the FMLA.

Breach of Contract as it relates to Company Policy – Even if ACME determines that it has complied with the remainder of the laws and theories identified above, it must then determine whether or not it has inadvertently created a contract of employment by virtue of its policies and procedures which it has communicated to employees. To the extent ACME promises to treat employees in a certain way pursuant to such policies, and has not adequately complied with the South Carolina statute regarding the creation of contracts through the use of handbooks, it is very possible that ACME may be bound by its own policy and will be forced to return Joe to his previous position. At that point, it should consider revising its policies.

Disability Discrimination – While the ADA has already been addressed, this issue can arise in another way as it relates to following company policy. Even if ACME determines that its policy does not constitute a contract of employment, if ACME elects to vary from that policy with regard to Joe, but has not done so with regard to non-disabled employees, Joe may be able to make out a claim that he is being treated adversely because ACME perceives him to be disabled.

This hypothetical is simply an illustration, however, a very common one. It is the type of situation employers find themselves in on a regular basis. It is critical for employers to be able to identify potential issues which arise through the course of each seemingly simple incident.