

Louisiana Employment Law Letter

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Highlights

- Help — my employee has fallen and I can't answer this question!
- Fifth Circuit doesn't buy salesman's pitch that he was nonexempt
- As the worm turns: Rejected applicant revives retaliation claim on appeal
- Risky business: assessing your exposure for violent attacks on employees
- Supreme Court allows employers to favor older workers

Q & A

Help — my employee has fallen and I can't answer this question!

When are your employees entitled to workers' compensation? How long do you have to hold jobs for employees out on comp? How long do you have to pay their health insurance? Those are questions frequently asked by our readers when employees are out because of job-related injuries. Here are some answers.

Q: We have a kitchen employee who moonlighted one evening for another employer and earned \$50 cash — casual labor. While working there, he fell and injured his knee. Shouldn't his injury be covered under the other employer's workers' comp?

A: Absolutely. The other employer's comp insurance should cover the tab. Your kitchen employee's injury shouldn't be covered by your comp insurance because he wasn't working for you at the time of his injury or, as we lawyers say, his injury didn't occur in the "course and scope" of his work for you.

Under Louisiana's comp law, if an employee working for different employers gets hurt on the job, the comp insurance for the employer he was working for at the time he was injured should cover the claim. Whether the other employer has comp insurance is another story. Luckily, that's its problem, not yours.

Q: Our company policy requires that workers' comp and Family and Medical Leave Act (FMLA) leave run concurrently. We have an employee who got hurt back in October. His 12 weeks are up, and he's still off-duty because of his doctor's orders. What do we do?

A: The first thing you should consider is whether your company has a policy or practice governing how long you keep a position open for someone out on comp or for any other reason. Have you kept another employee's job open for a longer period of time? What were the

circumstances? You may have created an expectation by this employee and others that their jobs also will be held for the same amount of time.

Before you make any decisions, thoroughly review your company's policies and past practices to make sure you're not treating the employee less favorably than other employees who missed work for a similar length of time for reasons other than a comp injury. Unequal treatment could lead him to speculate that you dealt with him differently because of his comp status — a potential dispute and lawsuit you're much better off avoiding.

If you don't have a policy or established practice, you may want to consider creating an absence control policy setting forth how long your company will hold a position for any employee who's out on any type of medical or personal leave, not just comp. Most policies like that require automatic discharge if an employee fails or is unable to return to work within a specific period of time, usually no less than the 12 weeks required under the FMLA for eligible employees. That allows you to treat all your employees the same, regardless of whether the reason for their absence is an FMLA-qualifying condition, a job-related injury, disability, or some other type of personal leave. A neutral policy applied consistently is the best way to reduce your risk of unhappy employees who question your motives (and sue you) based on *ad hoc* decisions that don't seem fair.

If you aren't required by a policy or practice to continue to employ this person, you have the option of discontinuing his employment if you have verified that all of his available FMLA leave has been used. The law doesn't prevent you from firing an employee who's out on comp if you have legitimate business reasons, such as an absence control policy. What you can't do under the law is fire someone or otherwise retaliate against him because he's made a claim for or received comp benefits.

Finally, your decision may also require you to consider the Americans with Disabilities Act (ADA). If your employee is a qualified individual with a disability under the ADA, you may be obligated to engage in an "interactive process" with him to determine if you could make a reasonable accommodation to help him perform the essential functions of his job, such as additional time off from work or a job modification. We don't know enough about his medical condition to determine if he's "disabled" under the ADA. If he can't perform the essential functions of his job with or without a reasonable accommodation, you don't have to hold his position open any longer under the ADA. Just be sure you have enough information about his abilities and whether you can do anything — within reason — to help him perform his essential job functions before making a decision.

Resolving employee medical leave issues is a difficult task that usually depends on the specific facts of each case. It may also involve the interplay of the FMLA, the ADA, workers' comp, disability insurance, your policies and practices, and/or state law. A consistently applied, lawful policy may serve you well, but with all the potential land mines along the road to your final decision, consulting with your labor attorney is a precaution you should always consider taking.

Q: We have an employee who has been out on workers' comp for 15 weeks. His FMLA leave is gone. We are making him pay his portion of his health insurance (25%), but how long do we have to pay our portion? When can we offer COBRA and not have to carry the burden of paying the 75 percent of his premium the company pays?

A: The answer depends on the language of your health insurance plan. You need to review the plan or speak with your insurance agent or provider. Many plans specify how many hours a week an employee must work to be eligible for coverage. If the employee isn't working at all or isn't working the required number of hours because of his injury, he may no longer be an eligible employee under your plan.

If such a qualifying event has occurred, you must notify your provider and send a COBRA notice to the employee as soon as possible. Of course, you may then discontinue paying for your portion of his benefits. Even if his absence or reduced hours haven't triggered COBRA, you may still opt to discharge him based on your company's policies or practices and after considering the ADA. Discharging him will trigger COBRA, and you won't be obligated to pay your portion of his premiums.

Q: We have an employee who has gone out on workers' comp and is upset that it won't start for a few weeks and that we didn't give him any of his sick and vacation time in the meantime. Were we supposed to? What do the regulations say?

A: There aren't any laws requiring you to allow an employee to use his sick or vacation time while he waits for his comp benefits to kick in. In Louisiana, benefits begin after a waiting period of seven days. If the employee's injury continues for six weeks after the initial date of his injury, he'll be paid retroactively to cover the initial seven days.

Although it isn't required, you may allow an employee to use sick or vacation time according to your policy or practices. It's up to you — just be consistent and treat employees on comp the same as you would handle employees who are out for other medical or personal reasons.

Find out more about the interplay between workers' comp, the FMLA, and the ADA in the subscribers' area of HRhero.com, the website for Louisiana Employment Law Letter. You have access to an HR Executive Special Report titled "FMLA, ADA, and Workers' Comp: Navigating the Treacherous Triangle." Just log in and scroll down to the link for all the Special Report titles. Need help? Call customer service at (800) 274-6774.

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