



# The interaction between civil disability-discrimination cases and WC claims

*Where they overlap and the impact on your civil case*

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Many employees who have civil disability-discrimination cases and medical-leave claims are simultaneously proceeding through a state disability or workers' compensation process. Understanding and anticipating issues that can arise due to the crossover in these areas will safeguard and improve your client's civil case.

## **Workers' compensation leave can proceed simultaneously with FMLA/CFRA**

When an employee is off of work due to an industrial (on the job) injury, the employee and employer often simply refer to the employee being out "on a workers' comp leave." However that "comp leave" may also qualify as a job-protected medical leave under the California Family Rights Act ("CFRA"). The CFRA was drafted based on and often parallels the Federal Family Medical Leave Act ("FMLA"), and as such, California courts adopt and rely on FMLA regulations and interpretations as needed.

Federal FMLA regulation 29 CFR 825.702(d)(2) addresses the potential overlap between "comp leave" and FMLA leave: "An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employer)." (29 CFR 825.702(d)(2)).

When an employee is out on a "comp leave," employers often fail to provide proper notice regarding their rights and

obligations related to job protected medical leave under the FMLA/CFRA. If an employee is eligible for an FMLA/CFRA leave (because they have worked for an employer of the requisite size for a sufficient amount of time), an employer is required to "provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations." (29 C.F.R.825.300(c)(1).) A failure by an employer to provide an employee with notice of the fact they are guaranteed up to 12 weeks of leave and return to the same or a comparable position upon the termination of the leave can constitute a violation (referred to as "interference") with an employee's leave rights under the FMLA/CFRA. (See Gov. Code, § 12945.2(a), 29 CFR 825.300(e), and *Mora v. Chem-Tronics, Inc.* (SD CA 1998) 16 F.Supp.2d 1192, 1220-1228.)

## **A leave longer than 12 weeks is often required**

Disabled employees (including those who are disabled due to a workplace injury) may require more than the 12 weeks off work that are provided for by the FMLA/CFRA. When that occurs, the reinstatement protections of the FMLA/CFRA drop out of the picture, and attention should turn to whether an extended leave of absence is available as a form of "reasonable accommodation" under California's Fair Employment and Housing Act ("FEHA"), which is based on, but more expansive than, the Federal Americans with Disabilities Act ("ADA").

Employers often assume that once an employee's 12-week FMLA/CFRA leave expires, they are no longer required to

hold the employee's job. That is not the case: "holding a job open for an employee on a leave of absence or extending a leave provided by the CFRA, the FMLA, or other leave laws, or an employer's leave plan may be a reasonable accommodation provided that the leave is likely to be effective in allowing the employee to return to work at the end of the leave, with or without further reasonable accommodation, and does not create an undue hardship for the employer." (2 Cal. Code Regs. § 7293.9(c).) It is well settled that "holding a job open for a disabled employee who needs time to recuperate or heal is in itself a form of reasonable accommodation and may be all that is required where it appears likely that the employee will be able to return to an existing position at some time in the foreseeable future." (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 263; see also *Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1338.)

## **"100 percent healed" policies are unlawful**

When an employee is able to return to work following a leave of absence (regardless of what type of leave it is, i.e., workers' comp, FMLA/CFRA, or an extended leave as a form of reasonable accommodation for a disability), it is common for an employee to be unable to return to "full duty" (i.e., working the full number of hours and performing all of the job duties that they were prior to taking leave).

This is another prime area where employers often (incorrectly) decide to rely solely on workers' compensation reports and disability ratings, requiring that an employee be "100 percent healed" or



“permanent and stationary” (i.e., injury not expected to worsen in future) before they be returned to work.

This is a clear violation of the FEHA, which provides that a disabled employee must be provided with reasonable accommodation upon return from a leave of absence, which expressly can include “job restructuring, [and] part-time or modified work schedules.” (Gov. Code, § 12926(m); Cal. Code Regs. § 7293.9; *Prilliman v. United Air Lines, Inc.*, (1997) 53 Cal.App.4th 935, 947.) Reasonable accommodation must be provided unless it would cause the employer a financial or logistical “undue hardship.”

FEHA requires that employers engage in an “interactive process” to make an “individualized assessment of the employee’s ability to perform the essential functions of the job with or without accommodation.” (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 49.) Therefore, having a “100 percent healed” policy is unlawful, because it necessarily means that the employer refused to conduct any form of personalized assessment to determine if job modifications would allow a disabled employee to return to work. (*Humphrey v. Memorial Hosp.* (9th Cir. 2001) 239 F.3d 1128, 1138; *McGregor v. National Railroad Passenger Corp.* (9th Cir. 1999) 187 F.3d 1113, 1116. An employer “cannot simply point to the medical reports in [an employee’s] file, and automatically absolve itself of liability under FEHA . . . an employer cannot slavishly defer to a physician’s opinion.” (*Gelfo* at 49-50, fn11.) Notably, an employer cannot fail to engage in the interactive process, then argue that had they done so it would have resulted in a conclusion that no accommodation was possible: “the interactive process could reveal solutions that neither party envisioned.” (*Wysinger v. Automobile Club of Southern Cal.* (2007) 157 Cal.App.4th 413, 424.)

An employer or other covered entity shall assess individually an employee’s ability to perform the essential functions of the employee’s job either with or without reasonable accommodation. In the absence of an individualized

assessment, an employer or other covered entity shall not impose a ‘100 percent healed’ or ‘fully healed’ policy before the employee can return to work after an illness or injury. (Cal. Code Regs., § 11068(i).)

### **A forced leave of absence is unlawful**

From another angle, requiring an employee to be 100 percent healed in order to return to work often results in an employee who could work (albeit part time or with modified duties) being forced to remain on a leave of absence. This is unlawful: “When an employee can work with a reasonable accommodation other than a leave of absence, an employer may not require that the employee take a leave of absence. (2 Cal. Code Regs. § 7293.9(c), see also *County of Fresno v. FEHC* (1991) 226 Cal.App.3d 1541, 1555, holding that placing an employee on a forced leave violated state law; *Bostean v. LAUSD* (1998) 63 Cal.App.4th 95, 110, holding that placing an employee “on [an] involuntary leave of absence without pay...was tantamount to a suspension without pay.)

Another issue that arises in the return to work context is an employer’s purported concern that if a disabled employee returns to work, the employee will hurt themselves and make their condition worse (i.e., that returning to work would pose a health or safety risk). California Regulation 7293.8 addresses this issue head on, providing that it is not acceptable for an employer to merely assert that a future risk could arise: “so long as the condition or disease does not presently interfere with his or her ability to perform the job in a manner that will not immediately endanger the individual with a disability or others, and the individual is able to safely perform the job over a reasonable length of time.” (Cal. Code Regs., § 7293.8 (c)-(e).)

Note, however, that if an employer can demonstrate that (even after reasonable accommodation is provided) “the job imposes an imminent and substantial degree of risk” to the employee herself, and/or that returning the employee to

work would “endanger the health or safety of others,” then a valid defense to a failure to accommodate claim exists. (Cal. Code Regs., § 7293.8 (c)-(e).) This situation/assessment is common when dealing with police, fire, and other safety sensitive positions.

In sum, an employer must offer more than mere speculation or fear that potential harm could occur. An employer must actually prove that the employee’s performance poses a threat to his or her own safety or the safety of others based on “the most current medical knowledge and/or on the best available objective evidence.” (29 CFR 16302(r); see also *Raytheon Co. v. California Fair Employment & Housing Comm’n* (1989) 212 Cal.App.3d 1242, 1252.) In order to determine whether a threat is real, an employer must first engage in an interactive process to determine if reasonable accommodation could mitigate any potential threat. (*Nunes v. Wal-Mart Stores, Inc.* (1999) 164 F.3d 1243, 1247-1249.)

### **Connection between employer and WC administrator**

If you are representing a disabled employee who also has a workers’ compensation claim, be aware that information regarding your client’s condition and restrictions may have been shared with the employer by the employer’s third-party workers’ compensation administrator. (See Lab.Code, § 3762, permitting disclosure of “medical information regarding the injury for which workers’ compensation is claimed that is necessary for the employer to have in order for the employer to modify the employee’s work duties.”) Because this information is commonly shared, employers are often on notice of an employee’s need for accommodation even without receiving a direct request from the employee herself.

This can assist your employee’s civil case, because if an employer becomes aware, through any means (including from its workers’ compensation representative), that employer has an affirmative duty to investigate whether an accommodation is available that would permit the employee to work. (*Prilliman v. United Air Lines* (1997) 53 Cal.App.4th 935.) It is not necessary for the



employee herself to come forward and ask for accommodation or refer to any disability discrimination law. (*Ibid.*)

Even if discovery shows that your client's condition and restrictions were not shared between the employer and the employer's third-party workers' compensation administrator, the employer may still be on the hook for information that its workers' comp representative possesses under the theory that that representative obtained that information while acting as an agent of the employer: "An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency." (Civ.Code, § 2295.) In the workers' compensation context, a "third-party administrator" is expressly defined as "an agent under contract to administer the workers' compensation claims." (8 Cal. Code Regs., § 10100.2.) As such, the workers' compensation administrator "acts as an agent and its conduct is attributable to the insurer." (*McCormick v. Sentinel Life Ins. Co.* (1984) 153 Cal.App.3d 1030, 1040; see also *Diaz v. Federal Express Corp.* (C.D. Cal. 2005) 373 F.Supp.2d 1034; see also Civil Code section 2332, "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other.")

### "Totally Disabled" assertions to WC

"Totally disabled" assertions to workers' comp and the State do not close the door on your civil disability case. In order to obtain workers' compensation benefits, an employee (likely through her physician) often declares that she cannot return to work because she is "totally disabled." (This same issue can arise when disabled employees apply for California State disability benefits through the Employment Development Department aka the "EDD.") When this occurs, defense counsel in your civil disability case may argue that this sworn statement that the employee is "totally disabled" means that the employee

was completely unable to work and therefore cannot successfully argue that they were able to perform the job they previously held. This is a "judicial estoppel" argument, because the employer is asserting that the employee took a position in her workers' compensation case that is contrary to her position in her civil case.

Courts have recognized, however, that because workers' compensation and state disability systems do not take into account whether the employee would have been able to perform in their position had reasonable accommodation been provided, such a statement of "total disability" in another context does not bar civil disability claims. (See *Prilliman v. United Airlines, Inc.* (1997) 53 Cal.App.4th 935, "the receipt of such disability benefits does not answer the question as to whether [employer] violated the FEHA"; see also *Bell v. Wells Fargo Bank, N.A.* (1998) 62 Cal.App.4th 1382, explaining that judicial estoppel is applied only against a party that has taken positions or made statements that are "totally inconsistent"; see also *Saffle v. Sierra Pacific Power Company* (9th Cir. 1996) 85 F.3d 455, 459-460, application for disability benefits does not consider whether reasonable accommodations possible; see also *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 190, "In many workers' compensation cases, a person has a 'total disability' when s/he is unable to do certain tasks, even if those tasks are marginal functions or if s/he could perform them with reasonable accommodation.")

Be cautious, however, of a situation where no form of reasonable accommodation would permit the employee to perform in her position: in such a circumstance, judicial estoppel would likely apply and a "totally disabled" employee's civil disability claim would fail. (*Jackson, supra.*)

### Response to a WC exclusivity assertion

Employers consistently assert, through an affirmative defense, that an employee's civil disability claims are barred because they fall within the

workers' compensation arena, i.e., they argue workers' compensation exclusivity. When your employee has actually brought a workers' compensation claim, employers may push this argument further and raise it through a summary judgment motion.

A series of precedential decisions are helpful to employees in this area. For example, the California Supreme Court has held that claims brought under FEHA "exceed the normal risks of the employment relationship, and are, therefore, not preempted by the Workers' Compensation Act." (*Livitanos v. Superior Court (Continental Culture Specialists, Inc.)* (1992) 2 Cal.4th 744, 756; see also *City of Moorpark v. Sup. Ct. (Dillon)* (1998) 18 Cal.4th 1143, stating that disability discrimination "falls outside the compensation bargain and workers' compensation is not the exclusive remedy," see also *Accardi v. Superior Court (City of Simi Valley)* (1993) 17 Cal.App.4th 341, 352 (disapproved on other grounds), "The Legislature ... did not intend that the employer be allowed to raise the exclusivity rule for the purpose of deflecting a claim of discriminatory practices.") As such, an employee's "emotional distress claims are not barred by the exclusivity rule to the extent they seek emotional distress damages for the alleged work-related injury discrimination." (*Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478.)

Common law claims (for example, for wrongful termination and IIED) may also lie outside of the reach of the workers' compensation system so long as the employee's injury is due to an employer's violation of a fundamental public policy. (*Cabesuela v. Browning-Ferris Industries of California, Inc.* (1998) 68 Cal.App.4th 101, 113, addressing viability of IIED claim, "where a plaintiff's emotional distress claim is premised upon his employer's violation of a fundamental public policy of this state, such misconduct lies outside of the exclusive remedy provisions of the Labor Code"; see also *Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1418-1419, "where an employer's conduct implicates considerations of substantial public policy,



interests beyond those of the employer and employee are involved. These interests are not protected by workers' compensation law and therefore must be accommodated outside the compensation bargain"; see also *Phillips v. Gemini Moving Specialists* (1998) 63 Cal.App.4th 563; see also *Kovatch v. California Casualty Management Co.* (1998) 65 Cal.App.4th 1256, 1277-1278 see also *Maynard v. City of San Jose* (9th Cir.1994) 37 F.3d 1396, 1405, IIED claim not preempted because employee claimed conduct violated California's fundamental public policy against retaliation for opposing discrimination.)

Even an employee's claim that she suffered physical injury due to an employer's discriminatory conduct may avoid workers' compensation preemption. (*Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344; see also *Jones v. Los Angeles Community College Dist.* (1988) 198 Cal.App.3d 794, 809.)

### Collateral source/offsets

Employers often attempt to argue that any financial compensation an employee received from workers' compensation, or state disability benefits, should be taken into account when calculating claimed damages in the employee's civil case. An employee should attempt to prevent such a credit/offset from occurring by asserting (in written discovery, depositions, and through a pre-trial motion in limine) that such benefits constitute a collateral source.

In 2011, the California Supreme Court summarized the collateral source rule as follows: "If an injured party receives some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor." (*Helpend v. Southern California Rapid Transit District* (1970) 2 Cal.3d. 1, 20-21.) Put another way, "Payments made to or benefits conferred on the injured party from other sources [i.e., those unconnected to the defendant] are not credited against the tortfeasor's liability, although they

cover all or a part of the harm for which the tortfeasor is liable." (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 551-52, *emphasis added.*)

The collateral source rule has been applied to the receipt of worker compensation benefits, see *Pacific Gas & Electric Co. v. Superior Court (Allen)* (1994) 28 Cal.App.4th 174: "Unlike the situation involving payment of collateral benefits by plaintiff's insurer, [FN67] the plaintiff/employee does not directly contribute to the workers' compensation fund providing the benefits. Nevertheless, the employee constructively pays for the benefits through his labor. [FN68] Benefits are part of the employee's wages. Accordingly, workers' compensation benefits fall into the category of 'actual or constructive' payment of benefits by the plaintiff and application of the Rule has been justified on this basis." (*Pacific Gas & Electric*, citing California's Collateral Source Rule, 37 Hasting L.J. at 675.) See also *DeCruz v. Reid* (1968) 69 Cal.2d 217, "the negligent employer should not profit by his own wrong and take advantage of the reimbursement remedies provided him by the Labor Code.")

Note, however, that the court may permit such a set-off/credit to occur in order to avoid a purported double recovery, especially if the employee receives a settlement or award through the workers' compensation system. (See *Johns-Manville Prod. Corp. v. Sup. Ct.* (1980) 27 Cal.3d 465, 478-79 and *Felix v. Workmen's Comp. Appeals Bd.*, (1974) 41 Cal.App.3d 759.) Note that if the court decides that an offset will occur, the employee should request that that offset be calculated post trial so as to avoid prejudice before the jury; this is proper as the offset is "mere arithmetic" and "can be achieved by a simple calculation made by the court after the verdict has been rendered." (*Shepherd v. Walley* (1972) 28 Cal.App.3d 1079.)

### Effect of settlement of WC case on your civil case

Workers' compensation cases may only be settled if the settlement is

approved by the Workers' Compensation Appeals Board ("WCAB"). That generally occurs by having the employee sign a standard form "compromise and release" document, which releases "all claims and causes of action, whether now known or ascertained, or which may hereafter arise or develop as a result of the claimed injury." Some employers may attempt to argue that by signing this form, the employee also released her civil claims.

To cut this argument off before it begins, the best practice is to contact her workers' compensation attorney and request that the attorney expressly "carve out" your employee's civil claims in any workers' compensation settlement. This can be achieved by simply including a one-sentence addendum in the workers' compensation release stating that it does not apply in any manner to the employee's ongoing or potential civil claims.

If you pick up a case where a workers' compensation settlement has already occurred, or the workers' compensation attorney failed to include such carve-out language in the workers' compensation release, do not fret. *Claxton v. Waters* (2004) 34 Cal.4th 367, 371 makes clear that the workers' compensation release form language should be narrowly construed. It releases "only those claims that are within the scope of the workers' compensation system and does not apply to claims asserted in a separate civil action." (*Ibid.*) *Claxton* explains that if the settlement was intended to apply to claims outside of the workers' comp system, "the intended settlement of claims outside the compensation system would have to be reflected in a separate document." (*Id.* At 378.)

*Lopez v. Sikkema* (1991) 229 Cal.App.3d 31 is in accord: "If the mandatory compromise and release form executed by [plaintiffs] was intended to cover claims which are not compensable under the workers' compensation act, it should have contained express language to that effect. Indeed, since the civil action was pending at the time the parties executed the compromise and release, the settlement document would be expected to



recite that the release included the particular lawsuit. It does not.” See also *Asare v. Hartford Fire Ins. Co.* (1991) 1 Cal.App.4th 856, finding that workers’ comp release did not apply to pending civil action as “no explicit reference to the [civil action] appears in the release.”

### Conclusion

The interaction between an employee’s civil and workers’ compensation

claims should not be ignored. While the overlap between these areas can be challenging, it also often creates notice and liability arguments that will assist your client. Talking to your client from the beginning about these issues and working in conjunction with your client’s workers’ compensation attorney is key.



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