

## Impact of Layoffs on Workers' Compensation

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Layoffs are on the increase during these difficult economic times. In November 2008 the national unemployment rate was at 6.7%, a fifteen year high. By February 2009, just three months later, the national unemployment rate had reached 7.6%. Georgia has seen program highs in the number of weekly unemployment claims filed. The unemployment rate in Georgia is currently 8.6%, the highest seasonally adjusted rate recorded in Georgia since 1976.

More and more employers are being forced to lay off employees, including employees pursuing workers' compensation claims. Very often employers end up laying off workers' compensation claimants for reasons completely unrelated to a work injury, and simply because of necessary economic downsizing. Below is a checklist of items to consider during a layoff which will affect a workers' compensation employee.

### **Factors to Consider in Initially Making Layoff Decision**

- Be mindful of treating one employee differently from other employees
- Make sure you are not laying off employee for being a "whistleblower?"
- Do not lay off employees in retaliation for their using their legally protected rights.
- Is the employee currently pursuing a workers' compensation claim?
- If yes, is the employee still working at the time of the layoff?

### **Effect of Laying Off Employees with Workers' Compensation Claims**

The mere fact that an employee is terminated or laid off does not bar that employee from recovering workers' compensation benefits. In fact, laying off or terminating an employee can actually assist the employee in recovering workers' compensation disability benefits if the employee can prove he sustained a work-related injury. The impact of a layoff depends upon whether the employee is still working at the time of the layoff. Consider the following:

1. ***Employee no longer working and receiving workers' compensation disability benefits at the time he is laid off.***
  - The layoff itself does not affect employee's continued receipt of workers' compensation benefits. The benefits continue until employer/insurer is otherwise able to suspend them.
  - Laying off the employee confirms that the employer cannot offer suitable limited duty work for the employee and therefore may be limited in ways of getting employee back off disability benefits (which can affect ability to resolve claim reasonably).
2. ***Employee still working at the time of the layoff and not receiving workers' compensation disability benefits.***

An employee with a workers' compensation claim who is still working at the time of his layoff is not automatically entitled to workers' compensation disability benefits, **but:**

- Laying off an employee because of a work-related injury typically has a negative impact on the employer's defense in the workers' compensation claim. In addition, such actions can invite separate claims under the Americans with Disabilities Act (ADA).
- If employee establishes a compensable work-related injury, he can recover workers' compensation disability benefits if he:
  - (1) proves he has at least some restrictions due to that injury and
  - (2) proves he was terminated or laid off because of the work-related injury.
- If employee was laid off for reasons *unrelated* to the injury, he can still recover workers' compensation disability benefits if he establishes he:
  - (1) has sustained a loss of earning capacity due to a work injury,
  - (2) has at least some restrictions due to a work injury and
  - (3) has made a diligent but unsuccessful effort to find suitable employment elsewhere.
- In Georgia it is easy for employees to establish they have made a diligent job search following a layoff. This makes it easier for an employee who already has evidence of work restrictions due to a work injury to obtain workers' compensation disability benefits after the employee is laid off.
- Advantages of not terminating or laying off an employee who is pursuing workers' compensation claim, if the employee is not working.
  - (1) If claim is disputed the employer/insurer likely will not be paying disability benefits anyway.
  - (2) There may be no economic downside for the employer to keep the employee on the books as an employee.
    - The employer likely is not paying wages to the employee anyway,
    - The employee should not receive unemployment compensation benefits since he is still employed.

3. ***Other factors to consider when considering layoff of employees with workers' compensation claims:***

- Continuing employment benefits
- Morale issues involved with keeping "problem" employees with workers' compensation claims employed while others are laid off.
- Equal treatment issues involved in keeping employees with workers' compensation claims employed while others are laid off.

### **Effect of Unemployment on Workers' Compensation Benefits**

Once an employee is laid off he may file for unemployment compensation benefits with the Georgia Department of Labor. Recent federal legislation was passed which extends the number of weeks during which unemployed workers can potentially receive unemployment benefits. Typically workers could receive up to 26 weeks of unemployment benefits before this new legislation was passed. The new legislation extends unemployment benefits by another seven weeks in all states, and extends them for another 13 weeks on top of that in states in which the unemployment rate has averaged over six percent in the last 3 months. Since Georgia falls into that category, workers in Georgia are now potentially entitled to up to 46 weeks of unemployment benefits.

An application for unemployment benefits does not in any way bar an employee from also pursuing a claim for workers' compensation disability benefits for the same time period. However, consider the impact an employee's receipt of unemployment benefits can have on his workers' compensation claim:

- Employees applying for unemployment compensation typically certify that they are *ready, willing and able* to work, and employers can potentially use this statement to their advantage particularly if the same employee pursues workers' compensation benefits and asserts he is totally or partially disabled by a work injury.
- An employee's receipt of unemployment benefits may lessen the amount of workers' compensation disability benefits an employer has to pay:
  - (1) Georgia law provides that if an employer provides unemployment compensation benefits to an employee during that employee's period of work-related disability, the employer is entitled to a credit against any payments of weekly workers' compensation disability benefits which may be due.
  - (2) The amount of the credit for unemployment cannot exceed the amount of weekly disability payments due.
  - (3) However, the extension of the number of weeks during which employees can receive unemployment benefits will directly impact employers' exposure for payment of disability benefits, since employers should now be allowed a credit for up to 46 weeks of unemployment benefits, to the extent such benefits are paid during the employee's period of work-related disability.
  - (4) The amount and duration of unemployment benefits still varies depending upon wages earned and time worked.

## Looking Ahead

Some estimates indicate layoffs and unemployment in Georgia will continue to rise at least until 2010. Given this trend employers will need to be mindful of the impact that layoffs actually have on workers' compensation claims.

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