Welcome to

Risky Terminations

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Meet Your Presenters







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Agenda

- Risks involved with terminations in consideration of legal statutes and case law
- Practical claim guidance in preparation for a termination
- Case studies
- Employment law considerations with a practical checklist to assist in your termination decision
- Questions





Workers' Compensation

Life of a Claim

- RCW 51.04.010: Allowance of work-related claims without assessment of fault. This can be an industrial injury or an occupational disease.
- WAC 296-20-01002: Proper and necessary treatment until maximum medical improvement.
- Claim Closure: Medical Fixity & Vocational Resolution
- Vocational Resolution
 - Return to job of injury without restrictions
 - Return to job of injury with permanent modifications
 - Return to another job with the employer
 - Employable based on transferable skills
 - Completion of vocational retraining complete





Concerns from a Litigation Perspective

- What happens if we terminate the worker *prior* to claim closure?
 - Challenges with demonstrating medical fixity
 - Deconditioning
 - Secondary gain
 - Mental health component
 - Challenges with demonstrating vocational resolution
 - Light-duty and/or permanent offers
 - Timing of termination In re Chad Thomas, BIIA Dec.,0010091(2001)
 - If worker terminated from a modified position for disciplinary reasons, it is not necessary to reinstate time-loss compensation if the disciplinary termination was administered for reasons unrelated to the industrial injury and the discipline would have been administered to other employees in similar circumstances.





Financial Impact of an Open Claim

- Continued time loss exposure
- Pension
- Impact on experience modification rate
- Impact on retrospective rating refund
- Litigation closure, valid light duty, PPD, pension







Retaliation

- RCW 51.48.025 An employer cannot terminate or discriminate a worker for filing a claim or exercising
 rights as part of their claim.
- Best Practices
 - Document the non-claim related reason for termination.
 - Ensure termination is consist with disciplinary policy and correlates with prior actions taken against former workers.
 - Mindful of communication tone and attitude.
 - Consider whether actions can be characterized as discrimination: reduced schedule; not providing a light duty position offered to another worker.
 - Safety & Health.
- Consequences
 - Complaint to the Department director.
 - Investigation determining violation, action by director in Superior Court.
 - Investigation determines no violation. Worker can still directly institute action in Superior Court.





Best Defense is in the Preparation

- Medical
 - Tedious although crucial to confirm treatment recommendations
 - Confirm and question activity prescription form releases
 - Request the medical opinions needed to move the claim forward
 - Direct impact on available light duty options
- Documentation
- Consideration for separation agreement
 - Not intended to take away or preclude future benefits









Valid Light-Duty Job Offers & Documentation

What is Light Duty?

RCW 51.32.090:

Provider Releases Injured Worker to Light Duty

Interim Policy 6.50:

Determining the Validity of a Light Duty Job offered by the Employer of Record







Why Offer Light Duty?

- Protection from eligibility for time-loss, minimize claim costs and risk and protects against increase in EMR/rates and negative impact to retro refund
- Minimize Potential for Long Term Disability, Plan Development, Pension
- Keeps Injured Workers Engaged in Work Force
- Incentives for State Fund Employers (Stay at Work Program, Preferred Worker)





Valid Light Duty Job Offer: Two Essential Components

- 1. Approved Job Description
 - Get Provider Approval Job Description Must be Sent to Certifying Health Care Provider and the Injured Worker
 - Best Practice is to send the job description to the Attending Physician
 - Obtain Approval from the Attending Physician
- 2. Written Job Offer Letter
 - Light-Duty Job Description (refer to example)
 - Review APF restrictions
 - Draft the Light-Duty Job description based on APF (Activity Prescription Form)





- Generated by the attending physician
- Check for accuracy
- Work status date required
- Physical restrictions
- Follow-up visit

Download this form here



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Work Status

- Released to job of injury
- Worker may perform modified duty
- Worker is not released to any work





State Fund Claim: Department of Labor and Industries PO Box 44291 Olympia WA 98504-4291 Fax to claim file: 360-902-4567

Self-Insured Claims: Contact the Self Insured Employer (SIE)/Third Party Administrator (TPA) For a list of SIE/TPAs, go to www.Lni.wa.gov/SelfInsured



Activity Prescription Form (APF)

Billing Code: 1073M (Guidance on back)

Reminder: Send chart notes and reports to L&I or SIE/TPA as required. Complete this form only when there are changes in medical status or capacities, or change in release for work status.

nfo	Worker's Name:	Patient ID:	Visit Date:	Claim Number:
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	Push / Pull	L, R, B	lbs	lbs	lbs	lbs	lbs	





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Is the follow-up visit scheduled?	Red:	Copy of APF given Signature:	to worker Discussed three Doctor ARNP PA-C scription Form (APF) 10-2018	ee key messages on back of form with pa	tient ()Phone RESET Index: APF





- Use the Activity Prescription Form (APF) as a guideline
- Provide a mental picture of what the worker will be doing

Download this form <u>here</u>





Department of Labor and Indu	stri	es			2	Employ	er's Job De	escription
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Phone Number:						Fax Number:		
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Hours/Days

Be clear on the number of hours and days you are requesting. Request the maximum that the job requires, not to exceed the worker's hiring schedule.





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Department of Labor and Industries	Employer's Job Description
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worker per day.	Light Duty/Transitional
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Company Name:	Job Title:
Phone Number:	Fax Number:
Hours per day:	Days per Week:
Essential Job Duties:	
Machinery, Tools, Equipment, and Persona	al Protective Equipment:

Essential Job Duties

Write a narrative description of the job to give the medical provider a mental picture of what the worker will be doing.





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Physical Demands Use the Activity Prescription Form (APF) as a guideline and be sure to complete the Description of Task.



Employer Signature

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Walking					
Heights/Ladders/Stairs					
Twisting at the Waist					
Bending/Stooping					
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Handling/Grasping					
Fine Finger Manipulation					
Foot Controls					
Driving					
Repetitive Motion					
Vibratory Tasks H L					
Lifting () lbs.					
Carrying () lbs.					
Pushing/Pulling () lbs.					
Comments/Other:					

Date

A Valid Job is...



- A job with an employment pattern that at least matches the worker's employment pattern on the date of injury or date of manifestation of the occupational disease
- Consistent with the worker's physical and mental restrictions as provided by the worker's health care provider
- A job that pays at least minimum wage
- Within a reasonable commuting distance





A Valid Return-to-Work Offer Must be in Writing

- The employer's written job offer to the worker should include:
 - A copy of the job duties consistent with the worker's physical and mental restrictions as provided by the worker's health care provider
 - A statement that the employer reasonably expects the job to continue in the future
 - A reasonable start date (14 days' notice)
 - Work shift
 - Location of the work site

APPROACH manager

- Who the worker will report to/supervisor
- Wages





Temporary Job Offer

Download this form here

(On company letterhead; deliver in-person or via certified mail with return receipt) Fill spaces, (delete)

(Date)

(Injured Employee Name) (Address) (City, State & Zip)

Re: Return-to-Work Job Offer L&I Claim No.:

Dear _____ (employee first name),

I am pleased to offer you transitional/light duty employment that will accommodate your current physical capacities. Your duties are described in the approved job description and are consistent with all physical limitations established by your attending provider. Your supervisor has also been advised accordingly. A copy has also been sent to your Claim Manager (CM) at The Department of Labor and Industries (L&I).

The details to report to work are as follows:

- You must report _____ (date and time) at _____(location)
- Your supervisor is ______ and their phone number is ______
- Your work schedule is ____ (start time) to _____ (end time), from _____(day) to _____ (day)
- Your wages will be _____ per _____(hour/day/week) and applicable benefits are unchanged

Except when covered by state or local Paid Family & Medical Leave rules, you are expected to schedule any medical and therapy appointments around your work schedule, as you will not be compensated for time absent from work by L&I. You are also expected to comply with all company work rules and attendance policies.

Our goal is to provide all employees with a safe work environment. If you experience trouble performing these duties, please inform your supervisor immediately.

We require that you work within the physical capacities given by your attending provider. If anyone asks you to perform tasks beyond your physical capacities, you should decline and let your supervisor know immediately. Consistent with these expectations, you may be subject to disciplinary action if you choose to work beyond them.

Please review this offer and contact me at ______ (phone) to discuss arrangements. If you do not report to work, that will be considered as your decision to reject this offer of employment and your time loss benefits may be affected.

Sincerely,

Employer name & signature

The Job Offer can be for the Employer of Record

- The work being offered by the employer:
 - Can be for any work performed at the employer's place of business, work sites and training facilities.
 - Does not need to be related to the worker's job duties at the time of injury; and
 - Should provide a meaningful and respectful work environment.
- Time-Loss continues until 1) the provider releases the injured worker to the job and 2) time-loss ceases, effective the start date of the light-duty job OR effective the start date even if the injured worker refuses the job
- Time-loss will not resume if the injured worker is unable to perform the job for reasons unrelated to the industrial injury or occupational disease





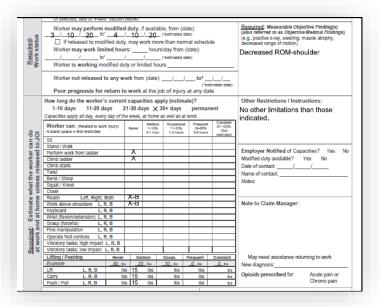
Termination of Injured Workers: In the Context of Light-Duty Job Offer

Ensuring that For-Cause Terminations are Wholly Unrelated to the Industrial Injury or Occupational Disease and that the Injured Worker is Treated the Same as Any Other Employee:

- Would the light-duty job be available but for the actions of the injured worker which were unrelated to the industrial injury or occupational disease?
- Would discipline have been administered to other employees without open LNI claims?
- Did the employer follow their Employee Handbook Guidelines and Rules as they would for any employee (clear documentation/description of the violation of company policy, documentation of two verbal warnings followed by three formal write-ups communicated to the injured worker and signed off on by the injured worker)?











45-Year-Old Male, Laborer

Description of Injury: Knocked over on jobsite by an excavator (employer had strong reason to believe that the claimant deliberately placed himself in front of the excavator, claimant was going through a divorce at the time of the II, employer's jobsite camera was not working on this day, no proof to fight claim allowance)

Allowed Conditions: Multiple rib fractures, lumbar sprain, sacral sprain, adjustment disorder, major depressive episode

Terminated for cause with open claim, restrictions in place at the time of termination, written valid light duty job offer in place (approved light-duty job description and light-duty job offer letter). The claimant was found to be ineligible for time-loss.

Termination for cause was backed up by an abundance of supporting documentation:

- 1. Employee Handbook Policies that were in violation were specifically referenced and a copy of each specific policy was provided to the claim manager (unauthorized overtime, deliberate falsification of hours on timecards, engaging in verbal misconduct with supervisors and co-workers).
- 2. The claimant received two verbal warnings followed by 6 formal write-ups in the form of a Disciplinary Notice.
- 3. The verbal warnings and formal write-ups were all substantiated with specific dates/times of the violations, witness statements and supporting documentation.
- 4. Termination Letter 5.31.2021- termination effective immediately, letter stated the reason for the termination (continuous disruptive activities and disrespectful conduct).





Worker Name:					Claim Number:		
Company Name:					Job Title: Covid-Distance Monitor, Gen'l		
Phone Number:					Fax Number:		
Hours per day: 8					Days per Week: 5		
are no more than 10 people durit devices, or water cooler. If neede face masks and gloves. Regulate update the training regularly. Rej Coordinate with other Covid plan Possess training in First Aid. Machinery, Tools, Equipment,	ng f ed, e tr por i ef	traii pro affic t in fort d P	ning ovid c to cide s ar ers lapt	gs, meetings ar e visual marker prevent unauti ents to manage nd managemer onal Protectiv op or tablet. La	ensure people follow 6 ft minimum distance and gatherings d breaks. Do not allow sharing of pens, PPE, electronic rs for workers to accurately judge distance. Regulate use of horized persons without PPE. Provide training on policy, ment. Keep visitor logs, preferably electronically, t. Work with team to manage language differences. re Equipment: pipoptablet, training and language aids. Trained in first aid 20% of the time) Q: Occasional (11 – 33% of the time)		
F: Frequent (34 – 66% of the tim Physical Demands:	e)			Constant (67 -	100% of the time)		
Sitting				S	Sit for computer or log duties		
Standing				0-F	Sit or stand to monitor		
Walking				0-F	Tour facility		
Heights/Ladders/Stairs				s	Stairs if multiple levels are monitored		
Twisting at the Waist				Ň	Not required		
Bending/Stooping				S	Enforce 6 ft distance policy		
Squatting/Kneeling				s	Set visual cues or tape		
Crawling				Ň	Not required		
Reaching Out				N	Not required		
		R	В		Monitor and train others		
Working Above Shoulders	7	ñ			Not required		
Handling/Grasping	╡	H	-	1 0	Can be done with simple grasping or one arm		
Fine Finger Manipulation	+	H	┢	ŏ	Type, use computer, can use voice activated		
Foot Controls	+	H	1	i Ň	Type, and comparer, can all voice activated		
Driving	╡	H	-	N N			
Repetitive Motion	+	H	F	1 N			
Vibratory Tasks H	+	H	┢	N	1		
Lifting (1-10) lbs.	+	H	┢		Supplies, can be modified		
	+	H		t ŏ	Supplies, can be modified		
		片	F	i š	Supplies, carts, can be modified		
Carrying (1-10) lbs.	-						
Carrying (1-10) lbs. Pushing/Pulling (1-10) lbs. Comments/Other:	strie	ctio	ns.		e if there are some activities that cannot be performed.		

63-Year-Old Male, Lineman Foreman

Description of Injury: Fell getting out of the back of a 1-ton truck, hit shoulders, neck, upper back.

Allowed Conditions: Cervical disc disease, cervical spondylosis, adjustment disorder, left shoulder sprain, shoulder tear.

Terminated for cause without any communication to the CM or to the TPA. Light-Duty Job Description was approved for only 4 hours per day; however, written light-duty job offer was for 8 hours per day and therefore invalid. The claimant was found eligible for time-loss.





- 1. Employee Handbook Policy was vague about the violation that the injured worker was terminated for (gas card theft). The language in the handbook did not specifically address how/when the company gas card could be utilized. The claimant was allegedly putting non-work-related gas charges on the company credit card for his company vehicle.
- 2. The claimant never received any verbal or written write-ups in the form of a Disciplinary Notice even though the alleged theft went on for more than 2 years. The claimant was terminated over the phone and with a formal written separation agreement sent to him via certified mail.
- 3. The employer had a difficult time "proving" that the gas purchased was for personal purposes and the claimant claimed that he didn't realize that what he was doing was wrong.
- 4. The lack of formal communication with the claimant leading up to the termination for cause and the lack of documentation regarding the violation was problematic.
- 5. The light-duty job offer was found to be invalid. The claimant was only released by his Attending Provider to work 4 hours per day, the written job offer was for 8 hours per day.

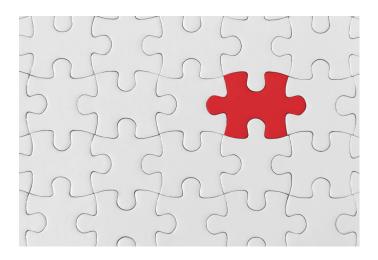




Risky Terminations: General Employment Perspective

Pre-Termination

- Process for termination should start well in advance of termination
- Think through all aspects of a termination before doing it







Documentation

- Document and support the decision
- Goal to have documented evidence of non-discriminatory and non-retaliatory basis for termination
- If not enough support consider establishing it prior to the termination
- Establishing support may take more time but will help to avoid or defend against a claim





Recent Claim or Complaint

- Must be extra cautious when terminating an employee who has made a (recent) claim
- Focus on business reasons for decision unrelated to claim
- Particular focus on objective factors, not subjective
- Has the employee been given notice of the issue and an opportunity to correct it?





Separation and Release Agreement

- Control risk related to terminated employee's future claim of discrimination, retaliation, or other employment-related claim
- Must give terminated employee something more than they are otherwise entitled to receive
- "Payment" can be \$\$, goods (keep the laptop), stock, etc.
- In exchange, get a release of employee's claims against the company





Check Handbook and Employment Agreement

- Follow employment agreement, handbook, collective bargaining agreement
- Check for:
 - Notice
 - Severance
 - Pay unused vacation days
 - Stock vesting or re-purchasing
- Generally, treat people in similar circumstances the same way (ex. severance pay)





Handling the Termination



- Handle termination professionally
- Tell the truth
- Consider presence of a witness in the termination meeting
- Document termination/meeting





Post-Termination Employee Obligations

- Non-competition agreement?
 - Review current WA law and salary thresholds before enforcing
- Non-solicitation agreement?
- Confidentiality issues?
- Return of company property?
- Consider reminding employee of these obligations
- Termination Checklist (download here)

TERMINATION CHECKLIST (Washington)			
Pre-Termination Issues and Considerations			
While employment in Wishington is at-will, a company sumost leminate in employee for an llegal assess, such as discrimination, or in retallation for the amployee having associated a legal right, nuch as requesting an accommodation or filing a worker's compensation diam. If you nursues "no" to a question below, if does not man thut you cannot terminate the employee, but voi should emissible transfer future or get legal advice.	inpany after termination for c a recent complaint or is the and Release Agreement. zsources or legal coursel (if		
The process for termination should attart well in advances of the terminative by individually should an appear of termination shorts do sing it, advancessing and experiment for decision, and if not enough support raises, potentially collability the necessary support prior to the termination. For level we employed violation, and an advances of the support of the stream with respect to the termination including paties periods, networks context context periods and projects, study context property and paties periods, networks context context periods and provides study context periods and provides the stream of the stream of the stream of the provides study context periods and provides and the stream of the stre	e. When there is no time to ce, which involves who will issionally and not in a heated		
Are you treating this employee similar to other employees in similar circumstances?	minution meeting.		
 Is the employee being terminated after making a recent claim? If so, the company should have adequate documentation of the legitimate business reasons for the termination, unrelated to the claim. The further apart in time from the claim to the termination the better. 	t few minutes of the meeting, letail or to overly explain the lose attention to what is said ion. Keep the meeting short.		
 Was the rule or policy the employee violated a written rule? Did the employee ever receive a written copy of the policy? If any other employees violated this rule or policy, did they receive the same dieciplinary action? If the c.an you articulate a good reason why this employee is receiving harsher discipline (i.e., repeated violations, problem employee, etc.)? 	eting.		
If the decision to terminate is based on poor work performance, has the poor performance been documented and has the employee been given the opportunity to improve? Ins the employee received any warnings, verbal or written, previously? Have alternatives to	ely or, if any property is not nvelope or box).		
discharge been considered (lesser discipline, training, transfer, etc.)?	d physical location (office).		
 Does the documentation in the personnel file support the terminition? All documentation of verbal and written warnings should be retained in the employee's personnel file. Who will replace the employee? Someone significantly younger than the 60 year old 	rpropriate. The email should and should not provide any ave a business need to know. at.		
employee? Someone who is a Caucasian male instead of the terminated program female from another country?	ust make such file available		
 Consider whether a third party (for example a judge) would find the termination to be reasonable given all the circumstances. 	one by having the terminated If the file to the employee.		
	r termination in writing, the) days.		
82-81-6-071	regularly scheduled payday.		
82-374-031			







Thank You







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Access handouts and slide deck: https://approachms.com/2022shrm