Settlements of Workers' Compensation Claims: Potential Adverse Impact on Employment-Related Claims

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BIOGRAPHY

Robert ("Bob") Brian Fitzpatrick is the principal in the law firm of Robert B. Fitzpatrick PLLC in Washington, D.C. where represents clients in employment law matters. Mr. Fitzpatrick has concentrated his practice in employment law disputes for more than fifty years. He has represented clients in individual and class actions. He has represented clients in employment discrimination, workplace harassment, retaliation, age discrimination, FMLA, ADA, whistleblower, wrongful termination, non-compete, trade secrets, Computer Fraud and Abuse Act, and wage and hour claims, among others. He counsels numerous executive clients regarding employment agreements and compensation issues. He has negotiated literally thousands of severance agreements. He is also a frequent speaker on employment law topics, and has written countless articles on employment law, a few of which can be found on his website and his blog, Fitzpatrick on Employment Law.

Prior to entering private practice, Mr. Fitzpatrick served as a staff attorney in the Jackson, Mississippi office of the Lawyers' Committee for Civil Rights Under Law in the late 1960's; as a staff attorney in the Office of General Counsel of the Equal Employment Opportunity Commission in the early 1970's; and with the Washington Research Project (now the Children's Defense Fund) training minority attorneys in the Deep South to litigate employment discrimination cases. He has been in private practice in Washington, D.C. since 1970. He is an avid hiker and kayaker. He is a Fellow of the College of Labor & Employment Lawyers, having been inducted as a Fellow at the first annual induction ceremony in 1996. He has been listed as one of The Best Lawyers in America® for at least 25 continuous years.

He is admitted to practice in all courts of the District of Columbia (Superior Court, D.C. Court of Appeals, and the Federal District Court of the District of Columbia), the Federal District Court for Maryland, the Federal District Court for the Northern District of Mississippi, the Supreme Court of the United States, the Federal Circuit, the Court of Federal Claims, and the United States Courts of Appeals for the District of Columbia as well as the Fourth and Sixth Circuits.

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The Workers' Compensation ("WC") and Employment bars need to interact more frequently to better assure that neither inadvertently settles on terms that undermine the other's pursuit of claims on behalf of the client. Injured workers oftentimes have separate counsel representing them- one firm handling the WC claims and another the employment-related claims, for example, ADA and FMLA claims. And sometimes the two firms inadvertently do not effectively communicate with one another. Sometimes clients fail to advise their employment lawyer that they have a WC lawyer and sometimes counsel do not ask the client whether s/he is pursuing a WC claim separate and apart from the ADA or FMLA claim.

As an employment lawyer, on my checklist with new clients is whether there is a workplace injury- recognizing that there can be a plethora of potential WC claims, including so-called mental-mental claims under D.C. WC law. If there are such claims, I need to communicate immediately with the client's WC counsel or to refer the client to WC counsel, and then assure that both sets of lawyers are working together and sharing any proposed settlement language that might impact on the other's ability to proceed unimpaired with the client's claims.

Employer's counsel are increasingly aware of the opportunity to use a WC settlement to shut down ADA or FMLA claims. See [citation to Littler article]. The Third Circuit in *Zuber v. Boscov*, 871 F.3d 255 (3rd Cir. September 11, 2017) held that the language in the Compromise and Release Agreement entered into in that case under the Pennsylvania Workers' Compensation Act did not preclude pursuit of an FMLA claim (www.palaborandemploymentblog.com/2017/10/articles/workers-compensation/workers-compensation-settlements-protected-future-employment-claims/) and the district court similarly held in *Bing v. Iron Mt. Secure Shredding, Inc.,* 2018 U.S. Dist. LEXIS 7929 (E.D. Pa. January 18, 2018) that such language did not preclude an ADA claim. But, quite recently, a federal district court in Louisiana in *Peddy v. Aaron's, Inc.,*, 2019 U.S. Dist. LEXIS 27512, 2019 WL 763510 (E.D. La. February 21, 2019) (www.natlawreview.com/article/broad-workers-compensation-release-agreement-bars-disability-discrimination-claims) held that the language of the WC release in that case barred plaintiffs ADA claim. So, clearly the language of the WC release can be critical to the continued viability of the clients other claims under the ADA and/or the FMLA.

In *Peddy*, the language that the court relied upon to preclude pursuit of the plaintiff's ADA claim read as follows:

The settlement agreement released the employer from "all liability of any nature whatsoever, whether past, present or future, … including all claims arising under … the laws of Louisiana … the laws of the United States … [or] the Louisiana Tort Law, as a result of the [2009 workplace injury]." The settlement agreement also prohibited the employee from filing any claims against the employer "arising from" the 2009 workplace injury.

Whereas in *Zuber* and *Bing*, the language was the stock language approved by the Pennsylvania WC commission and read as follows:

In *Zuber*, the release specifically stated that it constitutes a "full and final resolution of all aspects of the 8/12/2014 alleged work injury claim and its sequela whether known or unknown at this time. The settlement further stated that in exchange for a payment of $10,000, "Employee forever [relinquishes] any and all rights to seek any and all past, present and/or future benefits, including, but not limited to, wage loss benefits, specific loss benefits, disfigurement benefits, and/or medical benefits for or in connection with the alleged 8/12/2014 worker injury claim…"

So, how should we as WC and employment lawyers approach these issues? I would recommend the following:

1. Lawyers should determine whether there is a workplace injury. Employment lawyers may need some guidance from WC lawyers on being better able to evaluate what constitutes a workplace injury that might be compensable in the WC system.
2. If a workplace injury is identified, counsel should always ask their client whether there is another claim in some way related to their workplace injury and whether they are represented by counsel in that matter;
3. Employment lawyers in ADA and FLMA cases in particular should be attuned to the possibility that the client already has a WC claim with other counsel or if not so, the client should be referred to WC counsel to evaluate the viability of a companion WC claim;
4. WC counsel should do the same, that is, inquire and consider whether there are potential employment claims under the ADA or the FMLA, and where appropriate, refer the client to counsel who handles such matters;
5. Counsel should keep current and in communication with one another, and participate in the drafting of any settlement of a related claim;
6. And the language of any WC settlement should clearly and unmistakably carve out any employment-related claims. Any such WC settlement should never contain language as broad as that discussed in the *Peddy* case;
7. The WC and Employment bars ought to sponsor programs to educate one another on such matters as identification of potential claims and how best to cooperate with one another;
8. And the WC commissions should be advised by both the WC and Employment bars, acting jointly, that such commissions should not approve broad settlements that impair pursuit of employment claims like those under the ADA, FMLA, and District of Columbia Human Rights Act.

Other Resources:

Employment General Releases are Interconnected to WC Claims

Broad Workers' Compensation Release Agreement Bars Disability Discrimination Claims

Implications of General Releases in Massachusetts Workers' Compensation Law

Subcontractor Release and Waiver of Liability Form

Camacho v. Target Corp., 24 Cal. App. 5th 291, 2018 Cal. App. LEXIS 529, 2018 WL 2750784

Risco USA Corp. v. Alexander, 91 So. 3d 870, 2012 Fla. App. LEXIS 7547, 2012 WL 1673182

Workers' Compensation Settlements: Are You Protected Against Future Employment Claims?

Employees with Disabilities: The Ada, Fmla, and Workers' Compensation

Minnesota Supreme Court Reverses Course: Employees May Assert Claims Both for Workers' Compensation Benefits and for Disability Discrimination

Daniel v. City of Minneapolis

The Tangled Web We Weave: The Intersection of Workers Compensation and Labor and Employment Laws- Part II