Winning with the Post-Termination Defense

Presented by

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The issues:

- Rumors of layoff are common, and early notice of layoff or termination may be required by law or company policy. This can create a risky time gap between the notice and the effective date of separation.

- Notice may result in the filing of retaliatory WC claims.

- Special defenses apply to post-termination or post-layoff WC claims, and to stress claims resulting from layoffs or terminations.

- Layoffs and terminations may also result in discrimination claims.
Informal Notice of Layoff or Termination

- Rumors of an imminent separation from employment are common. However, these are generally bad for the employer because they:
  - Are not viewed as sufficient notice to trigger legal defenses;
  - May trigger preemptive injury claims;
  - Are bad for moral, and may not even be true!
Formal Notice of Layoff

- An employer planning a layoff or termination may be required to provide prior notice to employees in compliance with:
  
  - Federal or state law, including WARN rules;
  
  - Collective bargaining agreements;
  
  - Company policies.
Early Notice Requirements

- WARN (the Worker Adjustment and Retraining Notification Act) generally applies to employers with 100 or more employees, requires notice be given at least 60 calendar days in advance the first layoff, and is triggered by a “plant closing” or “mass layoff.”

  - A “plant closing” is a single site of 50 or more employees for at least 30 days;
  
  - A “mass layoff” is one resulting in employment loss at a single site for 3 days involving 33% of the employees (at least 50) or 500 employees.
Other Early Notice

- Terminations for cause may require notice, the presence of a union representative or even a formal hearing under the terms of a Collective Bargaining Agreement.

- Even purely “at-will” employees may take notice of imminent termination through rumors, or the scheduling of a 4 pm Friday afternoon meeting with the boss in the HR department.
Post-notice WC claims

Workers’ comp claims filed after notice of layoff or termination are subject to special defenses:

- Physical injury claims filed after notice of layoff or termination may be barred under Labor Code sec. 3600(a)(10).
- Psyche claims filed after notice of layoff or termination may be barred under Labor Code sec. 3208.3(e).

The purpose of the defense is to protect the employer from retaliatory or fraudulent claims made by employees who have been terminated or laid off. 

*CJS Co. v. WCAB (Fong) (1999) 64 CCC 954.*
What is “notice”? 

- Formal written notice, like one required by WARN or a Collective Bargaining Agreement, or clear verbal notice, “you’re fired,” will qualify for the post-termination defense;

- “Constructive” notice through rumor or innuendo, or less than clear written or verbal notice, probably does not qualify.
What is a “termination”?

- “Terminations” that trigger the post-termination defense generally include all *employer-initiated* separations.

- Voluntary resignations or retirements usually don’t qualify, unless the employee is given a clear choice of either quitting or getting fired, and chooses to resign.
What is a “termination”?

- Simply not showing up for work will be viewed as a constructive resignation, unless the employee is actually terminated for job abandonment.
  - What does the employee handbook say about it?
  - Consider sending a termination letter to AWOL employees.

- The termination must be permanent or indefinite – a seasonal layoff won’t qualify.
Post-Termination Defense: Physical Injuries

- Under Labor Code sec. 3600(a)(10), when a physical injury is claimed, the employer must prove that:
  - The claim was filed after receipt of the notice of termination or layoff; and
  - The claim alleges an injury that occurred earlier, prior to the notice, or else after the effective date of termination or lay-off.
Post-Termination Defense

- The employer must first establish the elements of the defense, probably through manager/supervisor testimony and documentation.

- The employer must show that there was effective notice and also establish the date/time of the claim of injury.

- Thereafter, the burden of proof shifts to the applicant to prove, by a preponderance of the evidence, that a statutory exception applies.
Exceptions

- An authorized employer representative was aware of the injury before the notice;

- Evidence of the injury is contained in medical records that were in existence prior to the notice;

- There was a cumulative trauma injury with a date of injury after the termination; or

- The employee sustained a specific injury subsequent to the notice, but prior to the effective date of termination.
Example

- Applicant was called into a meeting in her supervisor’s office right before lunch. She was told that she was being terminated for cause. She disagreed with the basis for the termination. She was handed her final paycheck.

- Applicant asked to be able to come back after 5:00 pm to collect her personal belongings. She didn’t want to do so in front of co-workers. Her employer agreed.

- Applicant stood up, walked out and just outside of her supervisor’s office, she allegedly tripped, fell and hit her head.
Example


- The judge reasoned that the alleged injury occurred after an effective termination, even though she may have been allowed to come back to work later to collect her things.

- At the time of injury, the Judge noted, the applicant was no longer an employee.
Post-Termination Defense: Psyche Injuries

- Pursuant to Labor Code sec. 3208.3(e), an employee is not entitled to compensation for a psyche injury claim filed after receipt of notice of termination or layoff, and claimed to have occurred before that notice, unless:
  - the employee proves that the actual events of employment were the predominate cause of the injury; and
  - one of the exceptions to the rule applies.
Post-Termination Defense - Psyche Injury Exceptions

- The injury is caused by “sudden and extraordinary events of employment;”

- An authorized employer representative was aware of the injury before the notice;

- Evidence of the psyche injury is contained in medical records in existence prior to the notice;

- Continued...
There is a finding of sexual or racial harassment by any Trier of fact; or

The applicant proves that the date of injury is *subsequent* to the date of notice of termination, but *prior* to the effective date of termination or layoff.

A cumulative trauma (CT) psyche claim alleged to have occurred after the termination is barred, unlike a physical injury CT claim.
Beware the 60-day rule!

- A notice of termination or layoff that is not followed within 60-days by the actual termination or layoff shall not be subject to the post-termination defense.

- This 60-day rule applies to both physical and psyche injury claims - LC 3600(a)(10) and 3208.3(g).
Don’t forget the Good-Faith Personnel Defense

- A psyche injury claim will also be barred if the employer can prove that it was substantially caused by a lawful, nondiscriminatory, good-faith personnel action, such as a legitimate layoff or termination. LC 3208.3(h).

- Substantial cause is defined as at least 35% of all sources combined, which includes other-industrial and non-industrial factors.
  - If at least 35% of the stress is a reaction to a good-faith termination, the claim may be barred.
Good-Faith Personnel Defense

- The defense should be considered any time a psyche claim is filed in conjunction with a notice or even a rumor of layoff.
  - Constructive notice *is* relevant.

- This is separate and independent from the post-termination defense. Therefore, even if the timing of events doesn’t support the post-termination defense, the employer may still prevail if the psyche claim is largely due to a lawful termination.
Good-Faith Personnel Defense

- Once the substantial cause threshold has been met with medical evidence, the employer has the burden of proving that the actual events of employment were non-discriminatory and taken in good faith.

- The convincing testimony of an employer witness is almost always necessary. The employer must show that it was following a written policy or the handbook, or observing the terms of a bona fide seniority or merit system when it made the layoff or termination decision.
A word about Discrimination Claims

- An employer may be faced with a discrimination claim under Labor Code sec 132(a), or other state or federal civil rights laws, after a layoff or termination.

- Defenses to those charges include:
  - The decision was based on business necessity;
  - The decision with regard to the particular employee was made based on reasonable factors other than the employee’s workers’ comp history, age or other protected status;
  - The employer could not reasonably accommodate the employee’s disability, after completing the interactive process in good-faith.
Best Practices

- Stop rumors of layoffs or terminations until official notice is given or sent;
- Don’t violate the 60-day rule;
- Be sure the 5020 form notes the date & time of the first knowledge of injury;
- The employer should make sure the adjuster is aware of the notice & separation when the claim is reported;
- Terminate for job abandonment, and say so in the handbook;
- In any post-termination case, also consider raising “employment” as a defense;
- Remember the good-faith personnel defense.
Thank You!

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