Understanding the Ins and Outs of the "Favored-Work" Doctrine Under Michigan Workers' Compensation Law

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Many people spend more time working at their jobs than they do engaging in any other activity during waking hours. It's inevitable, therefore, that workers will get hurt on the job. That's why we have workers' compensation, which is a form of insurance that provides compensation and medical benefits to employees injured in the course of employment. In exchange for the compensation and benefits, workers relinquish their rights to sue their employer for the tort of negligence.

But, as you might expect, within this framework there are a number of variables and nuances that arise in the real world implementation of the workers' compensation system.

What is "Favored-Work" or "Reasonable Employment"?

For example, the system allows a worker to receive compensation and benefits until they are healthy enough to return to their job. However, what if a worker is not ready to return to the job he or she performed prior to the injury or illness due to medical restrictions, but the employer provides an opportunity for the worker to return to a different position that *can* be performed despite those restrictions?

Under Michigan's workers' compensation framework, this is known as "favored-work" or "reasonable employment." Michigan law provides that an injured worker must accept an offer of "reasonable employment" or face the suspension of his or her benefits. But "reasonable employment" is not *any* employment. There are parameters of what "reasonable employment" entails.

Specifically, "reasonable employment" is work that is within an employee's capacity to perform that poses no clear and proximate threat to that employee's health and safety. The employee's capacity to perform work, however, is not limited to jobs in work suitable to his or her qualifications and training. In other words, the new job can involve different responsibilities than the old job.

"Reasonable employment" must also be within a reasonable distance from the worker's home. Let's assume, however, that after an injury a worker's employment is terminated, the worker leaves the state for other work at a lower rate of compensation, and the former employer then offers the worker favored-work.

Does the fact that the worker would be forced to move back to Michigan, make the favored-work offer unreasonable? Most likely, yes. Michigan Courts have ruled that it is unreasonable to force an employee to leave light work he or she found out of state in order to accept a favored-work offer in the state he or she left. However, the reasonableness of the offer may depend upon whether the offer was made before or after the employee left the state. In other words, if the worker was aware that favored-work was available, then decided to pursue an out-of-state opportunity anyway, a court may find that the worker is not entitled to benefits.

Striking a Delicate Balance Between Employer and Employee Rights

The favored-work doctrine that exists within the larger workers' compensation framework, and courts' interpretations of it, are meant to strike an appropriate balance between the rights and duties of employers and their injured workers. Employers must offer reasonable employment, and employees can't decline a reasonable offer simply because they have an aversion to the nature of the work.

While in certain circumstances courts may take non-physical factors into account in determining the reasonableness of the employee's refusal of a good-faith offer of favored work, dislike for or aversion to performing certain favored-work is not a basis to refuse the job so long as it is a *real job.*

Some of the factors that may be considered in gauging the reasonableness of an employee's refusal to accept a favored-work offer include:

- the timing of the offer;
- if the employee has moved, the reasons for moving;
- the diligence of the employee in trying to return to work;
- whether the employee has actually returned to work with some other employer; and
- whether the effort, risk, sacrifice or expense is such that a reasonable person would not accept the offer.

What Happens When There is a Dispute, and an Employer Obtains a Worker's Medical Records in an Attempt to Deny Benefits?

If an employer believes that a worker is not entitled to workers' compensation benefits, it may dispute a claim. As part of investigating and arguing its case, the employer may seek to obtain the worker's relevant medical records related to the injury through a request or subpoena to the workers' compensation insurance adjuster.

Obtaining a worker's medical records is not, in and of itself, improper, but an employer in possession of such records must handle them with great care. Any time an employee's medical records are at issue in a workers' compensation dispute, an employer must consider the serious implications of improperly disclosing the records

under various statutes and regulations. For example, the Health Insurance Portability and Accountability Act, or "HIPAA," is a federal statute that provides data privacy and security provisions for safeguarding medical information. However, in order for HIPAA to apply, an employer must be a "covered entity," such as, broadly speaking, a health plan, a health care clearinghouse, or a health care provider. Even if an employer is a covered entity, HIPAA would not apply to the disclosure of health information that it possesses only in its capacity as an employer.

Even if HIPAA is not applicable, other statutes impose obligations on employers with respect to their possession of an employee's medical records. The Americans with Disabilities Act, for example, requires an employer to treat any health information obtained from a disability-related inquiry or medical examination as a confidential medical record.

The bottom-line is that, to the extent an employer possesses an employee's medical records, it must take great care in handling them or risk being penalized.

Conclusion

The purpose of workers' compensation is straightforward: to compensate workers injured on the job. But its application in the real-world is often complex. Navigating through issues such as the favored-work doctrine must be done carefully, and in consultation with experienced counsel. If you have any questions about issues related to workers' compensation, we're here to help. Please contact Brian Goodenough to discuss your rights and obligations as an employer.