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UNIONS

# Workers' comp issues in the unionized workplace: Traps for the unwary

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At present, only 6.6 percent of Tennessee's workforce is represented by a union, totaling 156,000 wage and salaried workers. A substantial percentage of those workers are concentrated in what could be termed "strategic" industries, such as construction, transportation, utilities, and communications. Nevertheless, the application of federal labor law to workers' compensation law is not an issue that arises with any great frequency. Perhaps it is for that reason that little research and analysis is devoted to the subject. However, when workers' compensation issues do arise in the context of an employment relationship involving a union, the implications can be complicated, potentially involving a variety of legal concepts, each of which will be discussed in more detail below.

## *Federal preemption*

The principal federal statutes involving labor relations are the National Labor Relations Act (NLRA), which was later amended by the Labor Management Relations Act (LMRA). Any discussion of the relationship between labor law and workers' compensation needs to begin with a discussion of federal preemption. The concept of federal preemption provides that in the interest of a uniform national labor policy, federal law "trumps" any state law that arguably regulates labor relations or conflicts with federal labor law. Since the basic scheme of state workers' compensation law simply provides a mechanism for disability and medical benefits which is obviously not regulated by federal labor law, state workers' compensation law is not preempted, except in certain situations that will be discussed further below.

It is for this reason that Tennessee law determines questions such as compensability and related issues, even when the employment relationship involves a union. For example, in *Goodman v. HBD Industries*, 208 S.W.3d 373 (Tenn. 2006), the court declined to exclude from the average weekly wage calculation a 28-week period during which the employee

was voluntarily on strike, resulting in a lower maximum weekly benefit. Although the employee's status as an employee while on strike is determined by federal law, the amount of workers' compensation benefits to which he is entitled was determined by state law.

Other issues have arisen in the context of a unionized employment relationship where the issues are determined solely with reference to Tennessee law. For instance, in *Rector v. Bridgestone (U.S.A.), Inc.*, 26 TAM 32-6 (Tenn. Workers' Comp. Panel 2001), the court awarded benefits for a mental injury to an employee who was subjected to persistent and severe harassment by other employees for crossing a picket line during a strike. Similarly, in *Jones v. Hartford Accident & Indemnity Co.*, 811 S.W.2d 516 (Tenn. 1991), the employee, who served as chairperson of the union grievance committee, was awarded benefits for severe anxiety neurosis following a stormy meeting with management and union representatives. The court found that the episode constituted a sufficiently acute and sudden incident of emotional stress and therefore arose out of the employment. Interestingly, in this case, the court also held that the injury occurred in the course of employment, as the meeting was held at the request of the employer and for the "mutual benefit" of the employer and employee.

Some states have gone so far as to authorize "collectively bargained workers' compensation programs" in the unionized setting, sometimes called "workers' comp carve-outs." These are agreements negotiated between a labor union (or unions) and the employer (or group of employers), which modify the conventional system of workers' compensation benefit delivery and provide for mediation and binding arbitration of workers' compensation claims. These agreements do not change the substantive provisions of state workers' compensation law relative to issues such as notice, time limitations on filing suit, or available defenses, but are designed to improve how benefits claims are processed. In addition to providing dispute resolution procedures such as mediation and arbitration, these agreements provide for a negotiated list of approved medical providers, independent medical examiners, modified duty plans, and vocational rehabilitation programs.

Another area that is not preempted by federal labor law is retaliatory discharge for filing a workers' compensation claim. If the claim for retaliatory discharge does not require an interpretation of the contract between the union and the employer, federal law does not preempt the claim and it can be filed in state court. *Lingle v. Norge Division of Magic Chef Inc.*, 486 U.S. 399 (1988).

## Negotiation of the collective bargaining agreement

Once a union has been selected by a majority of employees (called the "bargaining unit"), the union has the exclusive authority (and corresponding obligation) to represent all employees in the unit. The employer cannot negotiate individually with employees, and all employees must deal with the employer through the union. The contract (or "collective bargaining agreement") that is negotiated between the union and the company defines the terms and conditions of the employment relationship, and in legal terms, individual employees are simply "third party beneficiaries" of that agreement.

The NLRA, as amended by the LMRA, requires the union and the employer to negotiate with each other "in good faith." Federal labor law also divides the subjects of bargaining into certain categories:

- those over which the parties must bargain if raised in negotiations (mandatory subjects);
- those over which the parties may bargain if they so choose (permissive subjects); and
- those which may not be proposed and/or over which the parties cannot negotiate (illegal subjects).

Mandatory subjects of bargaining include "wages, hours, and other terms and conditions of employment." The NLRA does not provide any more specific definition of mandatory subjects, although the National Labor Relations Board (NLRB) considers anything that vitally affects the employment relationship to be a mandatory subject of bargaining. The parties are not legally required to reach agreement on mandatory subjects of bargaining — they are simply required to negotiate in good faith over any mandatory subject if it is proposed. If an employer unilaterally implements a policy that is considered a mandatory subject without negotiating with the union, it has committed an unfair labor practice for the failure to negotiate in good faith.

What does all this mean in the workers' compensation context? Two points, basically. The NLRB has ruled that drug and alcohol testing of employees who

suffer work-related injuries requiring medical treatment is a mandatory subject of bargaining. *Johnson-Bateman Co.*, 295 NLRB 180 (1989). Consequently, a unionized employer desiring to implement a certified drug-free workplace in Tennessee must negotiate with the union over the scope of the policy. (The holding only applies to employees; drug testing of applicants is not a mandatory subject of bargaining as applicants are not in the bargaining unit.) It should also be noted that the Tennessee Drug-Free Workplace Act provides that it is not to be applied inconsistently with the NLRA; the employer's policy must reference the collective bargaining agreement; and the employer must comply with its collective bargaining responsibilities if the plan is being rescinded.

In addition to the drug testing implications, the courts have also ruled that safety policies are mandatory subjects of bargaining. *NLRB v. Gulf Power Co.,* 384 F.2d 822 (5th Cir. 1967). Accordingly, the employer is required to negotiate contract provisions relative to safety committees. The Tennessee Workers' Compensation Law provides that in those situations where the employer is required to implement a safety committee, it may apply to the department for a certification that its existing committee established under a collective bargaining agreement satisfies the requirements of the statute. Drug testing and safety committees provide two examples where federal labor law preempts state law, and Tennessee law is designed not to conflict with the federal law.

## Application of the collective bargaining agreement to workers' comp issues

As stated above, the collective bargaining agreement negotiated between a union and the employer sets the parameters of the employment relationship. In addition to converting the employment relationship from "employment at will" to one requiring "just cause" for termination, most collective bargaining agreements contain broad provisions ensuring an employee's ability to maintain his status as an employee with rights to recall during extended periods of leave or layoff. These provisions have been applied with some regularity in workers' compensation cases. For example, in *Edwards v. Saturn Corp.*, 33 TAM 45-3 (Tenn. Workers' Comp. Panel 2008), the court found that the employee made a meaningful return to work and was therefore limited to the 1.5 multiplier, because he remained an employee of the employer while on layoff, according to the terms of the collective bargaining agreement. Likewise, in *Blankenship v. American Ordnance Systems LLS,* 164 S.W.3d 350 (Tenn. 2005), the court held that the injured employee was still considered an employee under the collective bargaining agreement at the time of a strength test in which the employee was injured, even though she was on layoff. And in *Wheeler v. Whirlpool Corp.*, 35 TAM 12-3 (Tenn. Workers' Comp. Panel 2010), the court held that the injured worker continued to be an employee with recall rights after accepting a voluntary layoff pursuant to a collective bargaining agreement.

A variation on this issue is due to be addressed by the Tennessee Supreme Court in the coming months. In *Jenkins v. Yellow Transportation Inc.*, Jenkins filed a request for reconsideration of an initial award after being laid off in a reduction in force. Pursuant to the collective bargaining agreement between Jenkins' union and the employer, Jenkins is still considered an employee with recall rights. The case is further complicated by the fact that even if Jenkins were recalled, he would be earning less than his pre-injury wage, based on a wage reduction negotiated between the union and the employer, and ratified by a vote of the union membership. The trial court awarded reconsideration benefits and the case is currently pending before the Workers' Compensation Appeals Panel, although no date for oral argument has been set.

## Application of workers' comp and related issues to the collective bargaining agreement

When disputes arise regarding the application or interpretation of the collective bargaining agreement, arbitrators are called upon to determine the rights and liabilities of the employee, the union, and the employer. However, the agreement does not exist in a vacuum, and arbitrators may be faced with statutory or common law issues that overlay the contractual dispute between the parties. Most arbitrators consider their role as requiring them to interpret the collective bargaining agreement in light of and consistent with what is called "external law."

One of the most common issues in this situation is the extent to which the Americans with Disabilities Act (ADA) impacts workers' compensation issues under a collective bargaining agreement, specifically with regard to seniority issues. In *U.S. Airways Inc. v.*

*Barnett*, 535 U.S. 291 (2002), the employee had injured his back while working in a cargo-handling position at U.S. Airways. Invoking his seniority rights, Barnett transferred to a less physically demanding position in the mailroom. Subsequently, Barnett's new position became open to a seniority-based employee bidding under U.S. Airways' seniority system and, ultimately, Barnett lost his job. He filed suit under the ADA, alleging that his right to reasonable accommodation had priority over the seniority system. The U.S. Supreme Court did not agree, holding that collectively bargained seniority trumps the need for reasonable accommodation. The court stated: "A typical seniority system provides important employee benefits by creating, and fulfilling employee expectations of fair, uniform treatment — *e.g.,* job security and an opportunity for steady and predictable advancement based on objective standards — that might be undermined if an employer were required to show more than the system's existence."

As a result of this decision, arbitrators have not been reluctant to apply the ADA with some authority when workers' compensation issues arise under the terms of a collective bargaining agreement. In the arbitration of *Franklin Electric Co. and IUE-CWA, Local 84-802* (2003), the collective bargaining agreement incorporated the reasonable accommodation requirements of the ADA. After her work-related injury, the employee requested various reasonable accommodations that the employer refused to implement, and she was laid off. The accommodations consisted of providing a co-employee to assist the injured employee when lifting objects that exceeded her limitations, or to provide a crane for that purpose. The arbitrator denied the employee's grievance, noting that the duty to reasonably accommodate does not require the employer to excuse an employee from performing essential job functions, such as the lifting requirements in this case.

In the arbitration of *ExxonMobil and PACE Local 4-522*, 116 LA 1263 (2002), the collective bargaining agreement provided that in the event an employee became incapable of performing his job due to an occupational injury, the company would provide available work that the employee is capable of performing. After a back injury, the employee was terminated after the company concluded that there was no work available that the employee could perform. The union argued that the employer could have subcontracted some of the duties that the employee was unable to perform. The arbitrator denied the grievance, noting that those duties were essential functions of the job and the decision to subcontract work was solely within the discretion of management.

In the arbitration of *Parkersburg Bedding and UNITE/Mid-Atlantic Regional Joint Board*, 118 LA 1788 (2003), the collective bargaining agreement prohibited discrimination under the ADA. Due to the physical limitations created by her work-related injury, the employee was unable to satisfy the lifting requirement of the janitor position she was offered. The arbitrator concluded that the employer was justified in refusing to place the employee in that job.

## Conclusion

Workers' compensation issues in the unionized workplace not only involve the usual implications of other federal laws such as the ADA and the Family and Medical Leave Act, but also implicate federal labor laws and the law of arbitration. Labor law and arbitration are not subjects that arise with any great frequency among workers' compensation practitioners. However, when they do, they present a myriad of issues that must be addressed, and it is hoped that this article provides some measure of useful information in that regard.

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