Roemer Wallens Gold & Mineaux LLP
Counsellors at Law

13 Columbia Circle
Albany, New York 12203
(518) 464-1300
www.rwgmalaw.com

MANAGEMENT RIGHTS

A Labor Relations newsletter for clients of ROEMER WALLENS GOLD & MINEAUX LLP designed to provide relevant information to public sector managers on matters relating to the labor relations environment in government.

Winter (January) 2017

Workers' Compensation: Could Horseplay Lead to a Compensable Event?

Workers' Compensation ("WC") benefits are afforded to those who incur an injury or illness arising out of, or in the scope of, their employment. So, one would think that if an employee engages in horseplay or "goofing off" while they are supposed to be working and hurts him or herself, WC benefits should not be awarded – well, you would be incorrect in such thinking.

In 2009, the New York Appellate Division, Fourth Department, concluded that

> horseplay or frivolous activities, although [perhaps] involving intentional acts, are natural diversions between co-employees during lulls in work activities; injuries sustained during [these lulls] are compensable.

Shumway v. Kelly, 60 A.D.3d 1457, 1548 (4th Dept. 2009).

In a 1985 case, an employee was trying out a handstand on the arms of a swivel chair. The employee fell and incurred injury. In granting this employee's WC claim, the WC Board opined that

> young men, whose jobs call for expenditures of physical energy, cannot be expected, during slack periods, to sit in idleness and gossip; that the employer must expect that they will engage in some form of activity and that the risk was a risk of employment.

Aucompaugh v. General Electric, 111 A.D.2d 1073, 1073 (3rd Dept. 1985).

Among the factors looked at when concluding whether the resulting horseplay injury is compensable is whether it can be said that the result was foreseeable – for example, has the action happened before? That is, is the "horseplay" an activity regularly (commonly) engaged in by the employees – even though the "Boss" may not have known about it (or worse yet, if the "Boss" is aware and allows such activity to continue).

Remember, there is no "defense of contributory negligence" (contributing to your own injury) in a WC claim. Best practices lead to the recommendation to address horseplay or "goofing off" certainly when one sees it or hears about it. Further, a "strike" preemptive would be a good idea. That is, discuss the prohibition of such activity with your workforce.

New OSHA Rules May Affect Post-Accident Drug Testing Policies

The Occupational Safety and Health Administration (OSHA) issued a new Final Rule regarding record-keeping, reporting policy and retaliation provisions of the agency's regulations. The new rule adds an electronic reporting requirement for workplace injuries/illnesses for certain industries. (Note that OSHA will specifically notify employers affected by this new requirement.) Additionally and importantly, the changes aim to increase employee reporting by explicitly requiring employers to have (and notify employees of) a "reasonable" reporting system for employees to report work-related injuries and illnesses that does not deter or discourage employees from reporting work-related injuries. The rule also requires that employers notify employees that they have a right to report these work-related injuries or illnesses and that the employer is prohibited from retaliating against an employee for doing so. (These requirements are satisfied by posting the already-required OSHA workplace poster) The rule also strengthens the anti-retaliation provisions of existing regulation and allows OSHA to issue citations against with monetary penalties, even without an employee complaint.

OSHA's commentary accompanying the final rule expresses a specific concern over three common employment policies which it believes can be used to unlawfully deter and/or retaliate against employees who report workplace injuries – disciplinary policies, post-accident drug testing policies, and employee incentive programs. Most notably, OSHA takes the position that blanket post-accident drug testing policies (in situations

where it is not required by state or federal law) may deter proper reporting. The agency's comment states that the rule only prohibits employers from taking adverse action against an employee *because the employee reported* an injury or illness. In order to strike the appropriate balance between avoiding deterrence of reporting and satisfying legitimate business-related concerns, the commentary suggests that for an employer to require post-incident drug testing, there must be a "reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness." The fact sheet issued by OSHA indicates the agency will evaluate the issue on a case-by-case basis in determining whether the policy is being used as a pretext for retaliation. (https://www.osha.gov/recordkeeping/finalrule/interp_recordkeeping_101816.html)

The anti-retaliation provisions went into effect on December 1, 2016. A federal lawsuit has been filed in the Eastern District of Texas challenging the anti-retaliation portions of the rule. A federal judge declined to issue an injunction which would have placed the implementation of these rules on hold pending the outcome of that lawsuit. Therefore, the rules remain in effect at this time.

Public Sector Applicability. OSHA regulations may be applicable in the public sector, local government level in "states that operate their own job safety and health process, called OSHA State Plan States." In such a state, as in NYS, the PESH must, within six (6) months of OSHA's final rule (about June 1, 2017), adopt a rule "similar" to that described above. As of this writing, PESH has yet to issue any regulations for comment or review – Stay Tuned.

Military Leave: Family Member vs. Significant Other

The Scenario: A current employee is requesting two days off from work for a "Mandatory Yellow Ribbon Ceremony for Army Reserves." Her significant other is in the reserves and is being deployed. He has designated her as his "family member" to attend this "mandatory" ceremony. The employee has only ten hours of vacation leave, so she could be approved for seven hours for one of the requested days off; however, she would be short four hours for the other day. The employee is requesting paid "military leave" for that time.

The Employee's FMLA Guide to Military Leave was created by the Wage and Hour Division of the United States Department of Labor and may shed some light on the issue. This guide helps employees that are related or married to military personnel to know whether or not they qualify for leave. The employee must meet the qualifications under FMLA for "qualifying exigency leave." The law provides that "if your spouse, parent, son or daughter is a military member who is deployed or has been notified of an impending deployment to a foreign country, and you work for a covered employer and are an eligible employee, you may be entitled to qualifying exigency leave."

In order to qualify for exigency leave the employee must be a spouse, parent or a son or daughter of the military member. In addition, the employee's spouse must be on covered active duty, or a call "for members of the reserve components of the Armed Forces (members of the National Guard and Reserves), duty during deployment of the member with the Armed Forces to a foreign country under a call or order to active duty in support of a contingency operation." Once the employee meets the aforementioned qualifications, it must be determined whether "a qualifying exigency" exists. A "qualifying exigency" may include the need "to attend military events and related activities. These could include official military ceremonies, military programs, family support programs, and/or informational briefings sponsored or promoted by the military or military service organizations that are related to the military member's covered active duty." An employer may require certain documentation in order to grant the leave.

All that being said, a significant other is not covered under the FMLA-established definitions for qualifying exigency military leave. Note, however, that for the purposes of attending a Yellow Ribbon Reintegration Program [YRRP] event, "Family" includes the Service Member's spouse, children, parents, grandparents and/or "significant others as noted on the YRRP webpage. Even though a "significant other" is covered to attend the event, that coverage does not extend to FMLA military leave. It appears that for attendance at the YRRP event, the YRRP uses a broader interpretation of "family" and includes significant others. If the employee has other leave available, that would be the appropriate leave for the employee to use. Nowhere in the FMLA, NYS Military Law, Human Rights Law, Civil Service Law, or USSERA is there language to extend FMLA coverage or leave to "significant others."

2017 IRS Rate

The 2017 "Standard Mileage Rate" is now $053.5/mile (a drop of .5¢ from the prior year).

Welcome

RWGM takes pride in welcoming a new Associate to our Firm – Joseph A. Coticchio is a member of our Labor and Employment Group – Welcome Joe!