What to do when considering termination of an injured employee and be in compliance with the ADA, the FMLA and workers’ compensation laws

Most roofing contractors have faced the decision whether to terminate an injured employee who has been unable to work for some period of time. Often, this decision is made in haste without an understanding of the legal issues that come into play. Unbeknownst to most roofing contractors, terminating an individual who is missing work because of a work-related injury involves a legal analysis of the individual’s rights under the American with Disabilities Act (ADA), Family Medical Leave Act (FMLA) and the applicable state’s workers’ compensation laws.

The first step in this analysis is to determine which of these laws apply in any given situation. ADA only applies to companies that employ at least 15 people. ADA prohibits employers from discriminating against a qualified individual with a disability because of that individual’s disability with regard to various aspects of employment. To establish a prima facie case of discrimination under ADA, a plaintiff must show that he or she is disabled, is a qualified individual and was subjected to unlawful discrimination because of his or her disability. As it concerns the first element of a claimant’s prima facie case, the term “disability” is defined in the ADA as including a physical or mental impairment that substantially limits one or more of the major life activities of the individual; a record of such impairment; or being regarded as having such an impairment. An individual is “qualified” when he or she can perform the essential functions of the job, with or without reasonable accommodation. The concern roofing contractors face when terminating an injured individual is whether the injury leaves the employee “disabled”
as that term is defined under ADA.

FMLA only applies to companies that employ at least 50 individuals. FMLA gives qualifying employees the right to take up to 12 weeks of unpaid leave per year for any one of three family or medical purposes: to care for the employee’s newborn child (or a child adopted by or placed for adoption with the employee); to care for a child, spouse or parent with a serious health condition; or to obtain treatment for and recover from the employee’s own serious health condition if it affects his or her ability to do the job. An individual qualifies for protection under FMLA if, as of the date FMLA leave begins, the employee worked for a company for at least 12 months (which need not be consecutive) and, during the 12 months immediately preceding the date the leave begins, the employee worked at least 1,250 hours. A “serious health condition” is defined under the FMLA as an illness, injury or impairment, or physical or mental condition that involves either inpatient care in a hospital, hospice or residential medical care facility or continuing treatment by a health care provider. The concerns roofing contractors covered by the FMLA face when terminating an injured individual is whether individuals qualify for FMLA relief and whether injuries qualify as serious health conditions entitling the qualifying employee up to 12 weeks of unpaid leave per year.

Workers’ compensation laws differ from state to state. Generally, companies that employ three or more individuals will have some obligation to provide workers’ compensation benefits. Workers’ compensation laws require employers to agree to pay for any work-related injury without any finding that the employer was actually at fault for the injury. In return, employees agree to limit the amount of compensation they would receive as part of a workers’ compensation award (which, in most cases, is significantly less than a damage award given by a
judge or jury). In some states, workers’ compensation laws act to prohibit employers from terminating employees for having filed a workers’ compensation claim. Roofing contractors must be sure to consult with legal counsel to avoid being the subject of a retaliation claim.

Terminating an employee whose work-related injury qualifies as a “disability,” “serious health condition” or both is a minefield for roofing contractors. Any misstep can invite a lawsuit for back pay, attorneys’ fees and liquidated damages. When faced with a work-related injury, roofing contractors would be wise to evaluate the injury to determine whether ADA, FMLA or workers’ compensation laws apply. Once it is determined which laws apply, the next step is to understand and comply with the applicable laws. Sometimes, the obligation under each law creates a conflict. In this scenario, roofing contractors should follow the course of action that provides the greatest rights for the injured employee while also consulting legal counsel.

Consider the example of a worker who falls from the roof and injures his back. Back injuries heal within a few months. In this instance, the employee would be entitled to workers’ compensation benefits, but the injury would not rise to the level of a “disability” under ADA (temporary disabilities are not afforded protection under ADA). What if the employee suffered an injury causing permanent damage that affected the employee’s ability to walk? Under the ADA, given these facts, the employee may be “disabled.”

The roofing contractor covered by FMLA must determine whether the back injury qualifies as a “serious health condition.” In the original example, it is likely the injury does qualify as a “serious health condition” but not a “disability.” Therefore, the roofing contractor must be sure to meet his or her obligations under the FMLA while not having a concern for any obligations under ADA.

— more —
Sometimes, a work-related injury can qualify as a “disability” under ADA and a “serious health condition” under FMLA. In this instance, a roofing contractor will have obligations under ADA and FMLA.

Once a roofing contractor has an understanding of which laws apply to the work-related injury, he or she is in a better position to proceed with the termination. In most instances, for roofing contractors who employ at least 50 people, the injury will qualify as a “serious health condition” entitling the employee up to 12 weeks of unpaid leave. If the employee exhausts all 12 weeks of unpaid leave provided under FMLA, the roofing contractor has met its obligations under FMLA. Can the roofing contractor proceed with termination if the employee is unable to return to work? First, the roofing contractor must conclude whether the injury also qualifies as a “disability” under ADA. If so, the roofing contractor may be required to provide additional unpaid leave to the employee as a reasonable accommodation to the employee. If granting additional unpaid leave causes undue hardship on the roofing contractor and no other reasonable accommodations are available to the employee that would allow him or her to perform the essential functions of the job, then the roofing contractor could proceed with the termination knowing he or she met obligations under FMLA and ADA. The same result follows when the injury does not qualify as a “disability” under ADA.

It is recommended roofing contractors who find themselves considering the termination of an individual missing work because of a work-related injury first discuss proceeding with the termination with legal counsel. Consulting legal counsel is particularly important if the termination falls close in time to when the employee filed a workers’ compensation claim or exercised rights under the ADA, FMLA or both. The concern is that the timing will create an

– more –
appearance that the roofing contractor is illegally retaliating against the employee for exercising his or her legal rights.

###