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Mediating an Employment Dispute with a Workers' Compensation Claim

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Phillip Cha
Mediator at Cha Mediation Services

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Many employment disputes include a pending claim for workers' compensation benefits. While the two cases are on separate, independent tracks, employers often try to get a global resolution at the time of the mediation in the employment case.

This sounds simple, but the reality is that the workers' comp claim has many moving parts that require grease before the case is ready to settle. Accordingly, civil litigators can't sit back and assume that they can settle the workers' comp claim whenever they want. Rather, litigators must be proactive and diligent in setting up the workers' comp claim for a global settlement at mediation.

One of the most important considerations in reaching a global resolution of the civil dispute and workers' comp claim at the mediation is timing. The global settlement process should start early. At the outset of the litigation, defense counsel should reach out to the workers' comp claims representative or workers' comp defense counsel regarding the status of the workers' comp claim and timeline for a potential resolution.

One of the key factors in the timeline for a workers' comp settlement is when the treating physician and other medical examiners have completed their medical evaluations regarding the nature and extent of the worker's alleged injury. The bottom line is that if the medical evaluations haven't taken place, then the workers' comp case probably won't be ready for settlement.

Therefore, knowing when the medical evaluations will take place will give the litigator an idea of when the workers' comp claim will be ripe for settlement negotiations. By establishing a good working relationship with workers' comp defense counsel at the outset, litigators can be kept in the loop on major developments in the worker's comp claim that may impact settlement at mediation.

As the mediation approaches, counsel handling the civil case should check in again with workers' comp counsel regarding the status of workers' comp case, including the status of the medical reports, any upcoming medical examinations, liens and any other developments that may impact a global resolution. This would be a good time to ask if the parties have had any settlement discussions in the workers' comp case. If not, the litigator could suggest that workers' comp counsel get the ball rolling on settlement discussions with the other side.

Having adequate lead time for such discussions is critical in the workers' comp world, where heavy case loads may result in delayed response times when it comes to settlement communications. In some situations, it may be appropriate to invite workers' compensation to the mediation in order to resolve the workers' comp claim there.

If an employee is terminated after filing a workers' comp claim, he or she may also have a claim for retaliation under Labor Code Section 132a. The Superior Court and Workers' Comp Appeals Board technically have concurrent jurisdiction over such claims, but they are usually filed with the Workers' Compensation Appeals Board along with the workers' comp claim. However, Labor Code Section 132a claims are not covered by workers' compensation insurance, so they are on a separate but parallel track with the workers' comp injury case-in-chief.

This creates an interesting settlement dynamic where defense counsel handling the civil suit also typically represents the employer with respect to the 132a claim, but the employee has separate counsel – one for the civil suit and one for the workers' comp and 132a claims. In these situations, it is incumbent upon defense counsel to reach out directly to the employee's workers' compensation attorney to discuss settlement of the 132a claim.

Defense counsel should not expect opposing counsel in the civil case to be in a position to settle the 132a claim, as that claim is usually beyond the scope of opposing counsel's representation of the plaintiff in the civil case, and opposing counsel may not even have any knowledge of its existence.

Again, litigators should expect longer turnaround times when it comes to hearing back from workers' comp counsel, so don't wait until the last minute and expect an immediate response. At a minimum, defense counsel should give opposing counsel in the civil case a heads up that the plaintiff should have his or her workers' compensation attorney on telephone standby during the mediation so there are no surprises.

Also note that any settlement reached with respect to the 132a claim will require that a separate Compromise and Release Agreement be filed with the Workers' Compensation

Appeals Board to effect dismissal of that claim. If the civil litigator has forged a good working relationship with workers' compensation defense counsel, then the workers' comp counsel can assist in getting the 132a claim dismissed upon settlement.

To sum up, employers often prefer the finality and certainty of a global resolution of civil claims and workers' comp claims at mediation. However, it takes keen foresight and diligent follow-up to make it happen.

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Phillip Cha

Mediator at Cha Mediation Services

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