

# Work Comp Insights

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## Disciplining or Terminating Employees With Open Workers' Compensation Claims

Can an employer discipline or terminate an employee who has an open workers' compensation claim? This is a common question that many employers ask. The answer depends on which state the company is located in, why the employee is being disciplined or terminated and the nature of the workers' compensation claim. Let's look at an example.

Say an employee is insubordinate to their supervisor, and this issue has occurred more than once. While the employee has been reprimanded, they continue to disobey company policies or procedures. However, the employee has an open workers' compensation claim from an occupational injury. As a result, the employer may question whether they can continue to discipline or terminate the employee due to poor behavior.

Review this article to learn more about when an employer can discipline or terminate employees with open workers' compensation claims.

### What Is an Open Workers' Compensation Claim?

In general, an open workers' compensation claim can mean that an occupational injury or illness is currently being treated, benefits are still being paid, rehabilitation is in process or the

employee has not yet reached maximum medical improvement.

Workers' compensation claims can stay open for several years, depending on how severe the injury or illness was and what the treatment for that ailment entails.

If an employee's claim is still open, this generally means that the claim is still active in the workers' compensation system.

### When Can an Employer Discipline or Terminate?

While employers cannot retaliate against their employees for filing workers' compensation claims, this does not mean that they are unable to discipline or terminate an employee who has an open claim. There are various reasons as to why an employer could discipline or terminate an employee. For example, an employer could potentially be permitted to discipline or terminate an employee with an open workers' compensation claim in these circumstances:

- After obtaining permanent restrictions, the employee can no longer complete the job tasks that were initially assigned to them.
- Company-wide layoffs are necessary.
- Leading up to their injury or illness, the employee had poor work performance, and this issue was properly documented.

However, it's important to remember that employers must have detailed documentation and be consistent in their practices with all employees. In addition, employers must ensure that they are not violating any other laws when disciplining or terminating an employee. After all, just because there is no issue with workers' compensation laws, does not mean



there won't be any compliance concerns related to disability regulations or other fair employment standards.

### Documentation Is Key

In most states, it's illegal to discipline or terminate an employee because the employee filed a workers' compensation claim. This is considered retaliation, and employees are protected from this practice under workers' compensation laws. By terminating an employee for filing a workers' compensation claim, an employer could open themselves up to serious litigation issues. Employers can end up paying significant compensatory and punitive damages for retaliation claims.

But what happens when an employee's behavior or attitude creates work performance issues? For example, an employee may fail to complete assigned work within the required time, be insubordinate to a supervisor or show up late to work—thus showcasing a poor work performance. As soon as these issues occur, the employer should start documenting them. This provides a foundation for the employer, helping them justify disciplinary action or termination—even if the employee has an open workers' compensation claim.

However, suppose an employer only starts documenting issues after an employee makes a workers' compensation claim, even though the behavior had already been occurring before the claim happened. In that case, it could seem as though the behavior became a problem only because of the workers' compensation claim.

If an employee's performance issues began after an injury or illness and during the open workers' compensation claim, it should be noted in the employee's personnel file with detailed notes. From there, the employer should complete a full investigation into what occurred. This way, the employer will have sufficient documentation in the event that the employee files a lawsuit against them for being disciplined or terminated during the course of an open claim.

Employers should also be consistent in their disciplinary and termination practices. If there's no consistency, discrimination or wrongful termination claims could arise against the employer. It's important that—when an employer is considering whether to discipline or terminate an employee—they follow these measures:

- Document the employee's misconduct.
- Thoroughly investigate the misconduct.
- Obtain witness statements (if applicable).
- Record any disciplinary actions that the employee received, or provide reasons as to why no discipline was required.
- Record the reason for the employee's termination (including any documentation regarding a probationary period).

Documenting the situation with very detailed notes could help an employer defend themselves against any wrongful termination or discrimination claims that may occur.

### Is it Retaliation?

Employer actions that could potentially be deemed unlawful retaliation when made against an employee with an open workers' compensation claim include:

- Changing the employee's job tasks, even though the employee is still able to perform them
- Changing the employee's work schedule
- Demoting the employee
- Reducing the employee's hours

If an employer is deemed to have wrongfully retaliated against an employee, they can be liable for various penalties, such as fines or—in severe cases—jail time.

### What Happens to the Workers' Compensation Claim if the Employee Is Terminated?

If an employee who has an open workers' compensation claim is terminated, the claim will continue to stay open. The employer will still be responsible for the coverage of the employee's occupational injury or illness—unless the insurance carrier, a state agency or a court determines otherwise.

It is usually in an employer's best interest to keep an employee who has an open claim working. Doing so allows the employer to directly communicate with the employee, closely monitor the employee's medical treatment progress and have more input as to what the employee is doing in recovery.

Employees who have been terminated, on the other hand, tend to be very hard to reach—which makes the employer's task of following up with them that much more complicated. What's more, an employer does not have the same kind of direct access to a terminated employee as they would have to an employee who continues working. This access can be helpful for monitoring the employee's healing process and holding the employee accountable for following proper medical restrictions. If an employee is terminated and then hired by another company, it will become extremely difficult to make sure the employee follows their restrictions.

In any case, employers need to weigh the pros and cons of termination versus keeping an employee working. For instance, not terminating an insubordinate employee simply because they have an open workers' compensation claim may end up being costlier than any potential retaliation claim that the employer could otherwise face for the termination itself. Each situation is different, but employers should always keep in mind that consistency is key when determining what kind of circumstances or employee actions may warrant termination.

Contact us today with any questions about workers' compensation insurance.

