



## THE WAIVER RISK

By Scott O'Mara

The CalPERS, County retirement and the City retirement systems all have a secondary re-evaluation procedure for Workers that retire early because of an industrial disability retirement.

This allows the retirement system to compel the Worker (that have a job-related injury, and was forced to leave their employment because of the complications due to the injury and their inability to perform the substantial duties of a job) to undergo a re-evaluation allowing the governmental entity to force a re-evaluation.

There is a practice that some Employer's use to manipulate the Workers and remove the Worker's ability to return back to work. This is done by getting the Worker to sign a settlement document in the Workers' Compensation cases that state that, "the Worker was waiving their right to return back to employment". That if the Worker was to attempt to return back to work either forcibly, by the retirement system, or on their own unilateral decision that the worker has agreed to waive their rights to be rehired.

The Workers' Compensation settlement documents which set forth this waiver create a significant complication for the Worker.

The caveat to the Worker is the understanding that the Compromise and Release (C&R) although it only speaks to the Workers' Compensation system it can override and dictate removing the Workers' right for returning and reinstatement with the Employer.

Without this specific language of a waiver in the C&R of re-employment where the Worker agreed that the lump-sum settlement is also a waiver of any right to reinstatement or be rehired, and the Worker agrees not to seek reinstatement with the Employer or agrees to not reapply for employment with the Employer, without that language, if a determination was made by either CalPERS, the governmental agencies that fall within the County Retirement Act of 1937 and/or the majority of the retirement systems the Worker if found eligible, physically or mentally and they were able to return back to work based upon the Employer having an available position they could then do same, if no waiver.

There is an interesting case that I litigated many years ago and in that situation, the Worker or Sergeant in Highway Patrol sought to return back to work with the Department. The Department and State Compensation Insurance Fund told him he did not have right for reinstatement regardless of his medical condition improving and was supported by the documentation provided by the doctors. The Employer denied the employment.

That was litigated and it was determined that the Employer did not have the right to deny re-employment. The determination as to returning back to work as this was to be made by CalPERS. CalPERS made the Decision, and the employer was forced to allow Sergeant Starnes to return back to work because he had not done a waiver.

Sergeant Willie Starnes in his Worker Comp. case with his employer did not waive his right to return back to work. Instead, Sergeant Willie Starnes entered in to a Stipulation which gave him five (5) years from the date of injury to Reopen the case for New and Further Disability, and lifetime medical care, leaving open the option of his ability to return back to work.

The other tool for resolution of a case without litigation is a Compromise and Release (C&R) and many Employers' because of the frustration the Workers' are running into because of the failure of the Utilization Review (UR) and Industrial Medical Review (IMR) offer a Compromise and Release (C&R). The Compromise and Release (C&R) is a lump-sum payment where the Worker agrees to give up their right to receive any future medical care and waiver of Reopening rights for New and Further Disability. In addition to the waiver of medical care and right to Reopen for New and Further Disability, the verbiage that is now being utilized by some Employers' in a Compromise and Release (C&R) is the waiver of the ability to be able to be employed again by either reinstatement and/or rehire.

The caveat is that the Worker needs to speak to their Attorney. Many times, I have seen this particular documentation occur where the Worker has waived their rights to reinstatement because the Worker has **not** had representation. The Worker does not understand the multi-prong approach that can be utilized if their condition changes and **allows the Employer to remove the disability retirement, and allows the Employer to not oblige to re-employ the Worker by this waiver that has been set forth in the settlement document.**

It has been previously litigated unsuccessfully by other law firms that the waiver verbiage used was a violation of the Labor Code 132(a), and was discriminatory to the Worker. The Worker in the waiver had not anticipated that their condition would improve nor had the Worker anticipated that the Employers' retirement system would seek to remove the retirement income, if in fact, the medical evidence supported the return to work.

In the cases that are utilized to justify the waiver it was found that the resignation, was voluntary. The resignation, waiver even though it was stepped outside of the Workers' Compensation arena had binding affect on the retirement system, and the injured worker. Even though the retirement system had not been brought into the case, other than, after the waiver had occurred the Worker was stopped from the ability to obtain reinstatement because the Worker had signed a waiver of rights to his/her reinstatement.

The language used in the settlement documents should be limited solely to the Workers' Compensation system. If the settlement document steps outside of those parameters, the Worker and Counsel should examine the risk to the Worker as well as examine the Compromise and Release (C&R) and its substantial impact way beyond the Workers' Compensation arena.

The Employers' usage and manipulation of this is very troubling. Particularly, when the Worker does not have counsel to represent their best interests and the Employer understands the legal significance of this waiver while the worker does not understand a waiver precludes the option of returning back to work.

We do not recommend the Compromise and Release (C&R) in the vast majority of the cases, even though there are some mounting problems because of the denial, timely medical care with Utilization Review and Independent Medical Review. The waiver that is placed on the Compromise and Release (C&R) is set up in a position where the Worker gives up their right for medical care, and if the Employer manipulates the retirement system or the retirement system steps in, and if the Worker loses the ability for the disability retirement they are not be in a position to obtain reinstatement because of the waiver.

If the reinstatement system is still used because of no waiver, the Employers may not seek to curtail or deny the Workers right to return back to work due concerns that the employer has the injured Worker may become a higher risk of re-injury. The worker has right to return to work if there was no waiver made and the medical evidence supports the ability to return to work. (*Willie Starnes case*)

This right to return back to work if there is no waiver was set forth in the *Phillips v County of Fresno* case. In that matter, the County Retirement Board determined there was no residual impairment precluding him from returning back to work. But yet, the Employer delayed the Workers returning back to work and delayed making payments to him. The court ultimately opined in a court of Appellate Decision in 1990, that the County was obliged to allow him to return back to work within at least thirty (30) days of the denial. Once the Worker sought the ability to return to work and that the County's continued delay and the County's not paying him money during this period of time there was an obligation that the County had. Therefore, the County was Ordered to meet this obligation by paying from February 1984 to January 1987, which included his salary, vacation credits, annual leave credits, and retirement contributions. The Opinion was based upon the reinstatement rights that were retroactive with back pay and benefits. Again, the *Phillips* case is supportive as to why the member should not engage in a waiver that may impact their employment and/or income at later stage, if in fact the disability retirement is found to be not medically necessary or the workers condition improves allowing him/her to return to work.



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