What are the legal risks involved in managing employee injury/ illness?

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An introduction to managing employee injury/ illness

Employees who are ill or injured must be carefully managed, including during recruitment, while employed and if their employment terminates.

During recruitment, the results of a medical examination may require an employer to make reasonable adjustments to enable the prospective employee to perform the inherent requirements of the job. While employed, an illness or injury may trigger various issues, including workers compensation (if a work-related illness or injury), discrimination issues, obligations and protections under the *Fair Work Act 2009* (Cth) (FW Act), privacy around sensitive health information and contractual rights such as the ability to direct an employee to attend a medical examination.

Performance management of employees who are ***ill*** or injured can be a particularly difficult and sensitive issue in both legal and practical terms — especially if the performance management leads to termination of employment.

This guidance note sets out the issues that employers commonly face when managing injured or ill employees.

Discriminating or taking adverse action against ill or injured workers

Equal opportunity legislation protects employees from discrimination because of a temporary or permanent physical, intellectual and psychiatric disability. See anti-discrimination laws for more information.

Section 351 of the FW Act also prohibits a person from taking adverse action against another person because of certain characteristics of that person, including a physical or mental disability.

Features of an ill or injured employee's behaviour may be inextricably linked to and form part of an employee's disability: *Purvis v State of New South Wales (Dept of Education and Training)* (2003) 217 CLR 92. This means that it may, for example, be unlawful to discriminate against an employee for disability-related absences.

Discrimination may be lawful if:

- the employee is unable to perform the inherent requirements of the position because of the illness/injury; and
- there are no special facilities or modifications to the job or place of work which would enable performance, or those changes would impose 'unjustifiable hardship' for the employer.

Discrimination may also be lawful if the employee poses a risk to the safety of the employee or other persons in the workplace.

Adverse action taken against an employee with a disability is permitted if that action is not unlawful under the applicable anti-discrimination law: s 351(2), FW Act.

An employer must assess the inherent requirements of the employee's role. This requires the employer to identify the essential elements of the position. Remote, peripheral or irrelevant tasks are not relevant for this purpose unless taken together they have a significant impact on the role.

It is an essential element that a role is able to be performed safely, eg, a job may not be able to be performed safely if an employee has infectious disease (such as COVID-19, SARS) or where an employee is HIV positive: *X v Commonwealth of Australia* [1999] HCA 63. For some roles, risks of infection may be addressed enabling duties to be performed at a remote location - such as the employee's home. See Anti-discrimination laws and Dealing with the impact of widespread disease on the workplace.

If an employee cannot perform the inherent requirements because of the disability, then an employer must consider if there are any reasonable adjustments that can be made that may assist the employee in performing those requirements. When considering whether adjustments are reasonable, the employer should weigh up the benefit and detriment to the employee, how much the adjustment will cost the employer (ie, is it an unjustifiable hardship?), whether the adjustment is of limited duration (ie, there is no obligation to provide a new role) and if there are any adverse work health and safety impacts. Unjustifiable hardship is a high bar, particularly if the employer is large and well resourced. See Anti-discrimination laws.

Employers should consider other overlapping legal obligations, including adverse action claims under general protections provisions (Pt 3.1, FW Act), rights of pregnant employees (see Safe work during pregnancy and Return to work) and the right to request flexible working arrangements because of a disability (s 65, FW Act)

References: *Disability Discrimination Act 1992 (Cth), Pt 3 Div 3.1, Anti-Discrimination Act 1977 (NSW), Pt 4 Div 1, Equal Opportunity Act 2010 (Vic), Pt 4 Div 2, Anti-Discrimination Act 1991 (Qld), Pt 5 Div 2, Equal Opportunity Act 1984 (SA), Pt IVA Div 2, Equal Opportunity Act 1984 (WA), Pt 4 Div 2, Anti-Discrimination Act 1998 (Tas), Pt 4 Div 3, Anti-Discrimination Act 1992 (NT), Pt 3 Div 3.1, Discrimination Act 1991 (ACT), Pt 3.1 and s 772, Fair Work Act 2009 (Cth*)

What if the employee requests flexible working arrangements to accommodate an illness or injury?

A national system employee with a disability may request a change to his or her working arrangements if the employee has a disability and satisfies certain criteria (s 65, FW Act). See Flexible working arrangements.

All modern awards now include a model term that facilitates flexible working arrangements and provisions may also be included in other industrial instruments (s 55, FW Act and Family Friendly Working Arrangements [2018] FWCFB 5753).

While an employer can refuse a request for a flexible working arrangement on reasonable business grounds, that refusal may lead to a disability discrimination claim if the request is for a reasonable adjustment which enables the employee to perform the inherent requirements of his or her job. Employers are likely to be best served by acceding to requests where that would assist the employer in complying with anti-discrimination legislation.

When refusing a request for a flexible working arrangement, employers should also be mindful that an employee may use the written reasons in support of a claim against the employer arising from the refusal. For eg, a general protections claim, an unfair dismissal claim or an anti-discrimination claim. An employee may also be able access dispute resolution provisions under an award or enterprise agreement and, where the flexible working request obligations have been contravened, may have a claim for a breach of that award or enterprise agreement.

If an employee is on workers' compensation and has some capacity for work, flexible working arrangements which constitute modified or light duties may also satisfy the requirement to provide suitable employment.

See Flexible working arrangements; General protections; Unfair dismissal; Dispute resolution under an enterprise agreement; Anti-discrimination laws

Practice Tip: When responding to a flexible working request employers may use the templates available on the FWO website. However, an employer should be aware that these templates are likely to be employee-focused and an employer may wish to make some amendments.

Entitlement to personal/carer's leave if an employee is ill/injured

Paid personal/carer's leave may be taken when the employee is unfit for work due the employee's illness or injury.

The National Employment Standards under the FW Act provide that employees (other than casuals) are entitled to 10 days' paid personal/carer's leave for each year of service with their employer, which accrues progressively throughout the year and from year to year. Personal/carer's leave may also be available under an applicable award, an enterprise agreement, a contract of employment and/or an employer's policy. See Personal/carer's leave for more information.

If an employee fails to comply with notice and evidence requirements, an employer may be able to refuse the request to take paid persona/carer's leave. See Personal/carer's leave for more information.

In some circumstances, the failure to provide evidence that the employee was unfit for work due to illness or absence may justify disciplinary treatment and may be a valid reason for dismissal. For eg, where the employee has had ongoing intermittent absences and failed on each occasion to provide required evidence on request (unless this is a symptom of a disability) and/or where there is persuasive evidence that the employee was fit for work during the absence(s) so that there was a fraudulent taking of paid leave. Before disciplining the employee, the employer should afford procedural fairness, including seeking an explanation and considering the employee's response before taking next steps. See also *General protections*; *Unfair dismissal* for more information.

An employee who is ill or injured may be able to access other forms of accrued leave entitlements (including *annual leave* or *long service leave*) if they have exhausted their paid personal/carer's leave entitlements. Otherwise, if no paid personal/carer's leave is available, the employer may provide unpaid leave to avoid breaching the prohibition on dismissing employees on temporary absences while ill or injured: ss 352 and 772, FW Act.

Getting more information about an employee's illness or injury

A right to request more information

The employer's right to request the employee to provide evidence will depend upon the circumstances of each case, and the terms of any applicable award, agreement, contract or applicable legislation.

Under the FW Act, evidence supporting personal/carer's leave must "satisfy a reasonable person" that the leave was taken "because the employee is not fit for work because of a personal illness, or personal injury": s 107, FW Act. If a medical certificate or statutory declaration has been provided by the employee that states the employee is unfit for work for a specified period because of illness or injury then the ability to pursue it further is limited even if the employer does not believe it. At most, an employer could contact the doctor to confirm that the doctor provided the certificate and that it is accurate.

Rights to request medical evidence may be set out in an award, agreement, contract or policy and may be broader than the "reasonable person" requirement in s 107 of the FW Act.

Even where there is no express contractual right to request medical evidence, there may be an implied contractual right for an employer to direct the employee to provide them with medical evidence that will enable them to manage their businesses, including to determine whether any adjustments might need to be made in its business to accommodate the employee's return to work and to enable the employer to fulfil its work health and safety obligations in relation to the employee and other persons in the workplace: *Australian and International Pilots Association v Qantas Airways Ltd* [2014] FCA 32.

It has also been suggested that an employer can insist on an employee attending a medical examination as an incident of its implied right under contract to issue lawful and reasonable directions: see the Full Bench of the FWC's decision in *Grant v BHP*. In that case, however, an appeal was made to the Federal Court where Justice Collier ruled that it was unnecessary to imply a term allowing the employer to direct attendance at a medical assessment because the employer had a statutory right to do so under the Coal Mining Safety and Health Act 1999 (Qld). On appeal to the Full Federal Court, Justice Collier's finding on the statutory issue was upheld. Accordingly, the Full Court declined to consider whether there is a general implied term in employment contracts enabling an employer to direct an employee to undergo medical evaluation, though it did say that the issue gave rise to legal complexities.

References: *Grant v BHP Coal Pty Ltd [2014] FWCFB 3027*
Grant v BHP Coal Pty Ltd (No 2) [2015] FCA 1374
Grant v BHP Coal Pty Ltd [2017] FCAFC 42

Practice Tip: Employers negotiating enterprise agreements may wish to include a provision relating to supplying evidence to establish an entitlement to paid personal/carer's leave. This can provide a greater level of clarity and certainty than the rather vague concept of what would satisfy a 'reasonable person' as set out in *s 107(3)*.
References: *s 107(3), Fair Work Act 2009 (Cth)*

A direction to undergo a medical assessment must be reasonable

Whatever the source of the entitlement to direct an employee to undergo a medical evaluation, the direction must be reasonable.

In *Cole v PQ Australia Pty Ltd*, the Fair Work Commission provided guidance about the matters that an employer should consider in assessing whether there are reasonable grounds to require an employee to attend a medical assessment:

- Is there a genuine indication of the need for the examination such as prolonged absences from work or absences without explanation or evidence of an illness which related to the employee's capacity to perform the inherent requirements of the job?
- Has the employee provided adequate medical information which explained absences and demonstrated fitness to perform duties?
- Is the industry or workplace particularly dangerous or risky?
- Are there legitimate concerns that the employee's illness will impact on others in the workplace?
- Is the medical assessment truly aimed at determining, independently, whether the employee is fit for work?

References: *Cole v PQ Australia Pty Ltd [2016] FWC 1166*

It may be reasonable for an employer to direct the employee to provide further medical evidence in the following situations:

- To **challenge a medical certificate** (or other evidence) provided by an employee in support of an application for leave, and either require a further medical certificate or further evidence that the employee is (or was) unfit to attend work due to illness or injury.

  The fact that a medical certificate is backdated does not necessarily make it open to challenge: *Maritime Union of Australia v DP World Sydney Limited.*

  This challenge may be reasonable if there is evidence that the employee is or may have been fit for work (eg, a Facebook or social media post indicating that the employee was not ill and had fraudulently taken the leave) or where a doctor has indicated that the certificate is not accurate or is fraudulent. The employer should put these concerns to the employee when requesting further information.

  References: *Hammond v Australian Red Cross Blood Service [2011] FWA 1346*
  Anderson v Crown Melbourne Ltd [2008] FMCA 152
  Maritime Union of Australia v DP World Sydney Limited [2014] FWC 2682
  Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd [2015] FCAFC 157

  Where an employer is concerned that an employee is working in a manner inconsistent with medical restrictions while claiming sick leave or benefits, covert surveillance conducted in an appropriate manner may be an acceptable means of investigating the employee's conduct. However, the employer must have reasonable grounds for its suspicions as the circumstances in which a decision is made to implement surveillance and the manner in which it is arranged and carried out, may give rise to findings of unfairness in the context of an unfair dismissal laws: *Kinnane v DP World Brisbane Pty Limited [2014] FWC 4541*. See also Unfair Dismissal and note that some jurisdictions have surveillance legislation that may regulate or prohibit covert surveillance in the workplace and in private areas.

  References: *Kinnane v DP World Brisbane Pty Limited [2014] FWC 4541*

- To **request reasonable additional information** about the employee's illness or injury where a medical certificate or other evidence is in vague or general terms.

  It may be appropriate in some circumstance to have more information about the nature of the illness/injury, how/why the illness/injury affects the employee's capacity to work, anticipated recovery time and when or how the employee might be able to perform partial duties.

  This request may be reasonable because the information will assist the employer in putting in place arrangements to meet ongoing business requirements during the employee's absence and may also identify any health and safety issues that are preventing the employee returning to work. When making this request, the employer should confirm the basis for the request.

  See for example, In *Australian and International Pilots Association v Qantas Airways Ltd*, where Qantas asked a pilot who had been on extended sick leave to provide a medical report indicating his diagnosis, prognosis, capacity to return to pre-injury duties and the anticipate time frame. Although the relevant enterprise agreement only required provision of 'a medical certificate or other evidence of unfitness for duty', the Full Court found that Qantas was entitled to request the additional information to assist it in determining whether any adjustments might need to be made in its business and rostering arrangements to accommodate the pilot's return to work. The need for planning to enable the pilot to resume work was also fundamental to the employer fulfilling its work health and safety obligations in relation to the pilot himself, as well as other people in the workplace, including potential passengers.

  References: *Australian and International Pilots Association v Qantas Airways Ltd [2014] FCA 32*

- To obtain a '**second opinion'** from a different medical practitioner when there are conflicting assessments.

However, where there is a long-standing relationship, a court may give greater weight to the employee's treating medical practitioner.

References: *Koka v Australian Nuclear Science and Technology Organisation [2010] FWA 2073*

Practice Tip: To be "reasonable" any request for a second opinion, further medical examination etc would almost invariably need to be at the employer's expense.

- To **attend a medical examination/consultation arranged by the employer** (and generally paid for by the employer) to assist with return to work issues, including with a medical practitioner of the employer's choice, or with a specialist physician, or with a 'return to work' consultant who assists employees to re-enter the workplace after a period of absence from work due to illness or injury.

  References: *Australian and International Pilots Association v Qantas Airways Ltd [2014] FCA 32*

Seek specific consent to access the medical information and report

Unless specifically agreed to in a contract employment, award or enterprise agreement, employers will need an employee's written consent for the employer to contact the medical practitioner directly and/or read the medical report. The employer should provide a copy of that consent to the medical practitioner.

The employer should set out in detail what should be assessed by the medical practitioner during the appointment, which will generally include considering whether the employee is fit enough to perform each of the inherent requirements of the job, what modifications would assist and the duration of any ongoing absence(s), the duration of any reduced capacity to perform the inherent requirements of the employee's role and any specific health and safety considerations which the employee should take account of in the workplace to address safety risks that may present if the employee works while ill or injured.

The employer must comply with privacy laws that apply to sensitive and health information, although once the information is collected it will be covered by the employee records' exemption: *Lee v Superior Wood* [2019] FWCFB 2946.

Workers compensation

If an employee has suffered a work-related illness or injury, the employee may be entitled to benefits under federal or state workers' compensation legislation.

Workers compensation legislation may limit the employer's capacity to dismiss an employee whilst the employee is paid workers' compensation and/or require that employment continues to be made available for a specified period following injury. Psychological illness or injury that is caused by reasonable management action of the employer is not generally compensable under workers compensation (and may also relied on in response to an application for an anti-bullying order).

Safe Work Australia provides information about workers compensation across jurisdictions in Australia, including publishing an annual report which summarises the different workers' compensation arrangements across Australia and New Zealand (see Safe Work Australia).

To obtain information about enforcement and regulations of workers compensation laws in the applicable jurisdiction an employer can contact the following authorities:

- SafeWork NSW

- Workplace Health and Safety Queensland
- WorkSafe Victoria
- WorkSafe ACT
- SafeWork SA
- NT WorkSafe
- Workcover WA
- WorkSafe Tasmania
- Comcare (for Australian government employees and self-insurers)

Further information is set out in Personal Injury NSW, Personal Injury Qld and Personal Injury Vic.

Performance managing ill or injured employees

An employee who is ill or injured can be performance managed, including for capability.

It is important that the performance program does not exacerbate the employee's illness or injury – this is a particularly significant where there is a stress-related or mental illness.

Adapting the process to accommodate individual needs

Performance management processes must be adapted to take account of the employee's illness or injury.

For example an employee's illness or injury may make it more difficult for the employee to attend face-to-face meetings with the employer, or may mean that they have limited access to email or computer facilities thus rendering it unreasonable for the employer to use email communication as part of the performance management program. The employer should consult with the employee to identify appropriate adaptations.

If the performance management process is not modified as necessary, that failure may:

- exacerbate the illness or injury;
- increase the likelihood of a long-term absence – particularly where it is a mental illness or is stress-related;
- cause a lack of procedural fairness (ie, which can render a dismissal unfair);
- contravene obligations to make reasonable accommodation under anti-discrimination laws; and/or
- be adverse action in breach of the general protections provisions in the FW Act (ie. the employee may allege the performance management is taking place because of the disability or the employee's use of paid personal/carer's leave entitlements)
- indicate that the management action is not reasonable (ie. exposing the employee to a workers' compensation claim if the disciplinary processes causes a stress-related illness which may lead to an investigation by a health and safety regulator).

See also Performance management for further information on conducting these processes.

Is the reason related to the illness/injury?

When the reason for the performance management is not related to the illness or injury, the employer must ensure that the performance or conduct issue is clearly identified and that the process is conducted separate to any other

processes related to the employee's illness or injury.

However, employers should not assume that that poor performance is unrelated to an employee's illness or injury and should try and find out if there is any particular reason why the employee is not performing.

For eg, a failure to be punctual could be caused by a disability such as a drug addiction or be morning sickness, both of which may be disabilities protected by anti-discrimination laws and which necessarily import other obligations which must be addressed during the process. If the reason is a disability then the employer will need to consider if the employee's duties or place of work can be modified to enable the employee to perform the inherent requirements of the employee's role.

If the performance issue relates to absenteeism, an employer should conduct additional due diligence before undertaking any performance management process. Those additional steps are set out in the Checklist – Due diligence prior to managing absenteeism issues.

Any performance management process must be conducted with substantive and procedural fairness, including by addressing the matters set out in the Checklist – Ensuring fairness when performance managing ill or injured workers.

The process of performance management of ill or injured employees is often a long and drawn out affair and may be side-tracked by related issues such as workers compensation claims, refusals to communicate, applications for anti-bullying orders, the lodging of grievances or complaint (under a policy, contract of employment or industrial instruments), the filing of a claim of adverse action during employment and the triggering of dispute resolution procedures under contracts of employment and industrial instruments. These issues may necessarily delay or temporarily halt the performance management process.

See: Anti-bullying laws (for more information about handling an application for an anti-bullying order), Dispute resolution under enterprise agreements, Grievance or complaint under general protections provisions, Duty to comply with lawful and reasonable directions (ie, where there is a refusal to communicate) and Employment policies and their effect on the employment relationship.

When can you dismiss an ill or injured employee?

A decision of last resort

The dismissal of a genuinely ill or injured employee should be the last resort for an employer as it will often lead to claims of unfair dismissal, unlawful termination, discrimination, adverse action under general protections legislation and potential breaches of obligations set out in workers-compensation legislation.

The dismissal of a sick employee also sends a signal to the employer's workforce and may adversely affect the reputation of the business in its future recruitment activities.

It is also worth remembering that where paid personal/carer's leave and other accrued paid leave has been exhausted, there will usually be little cost for an employer in taking the time to ensure that there is a procedurally fair process. A rushed approach will make it more difficult for an employer to defend a legal claim, which will lead to significant legal and time costs and may result in civil penalties, compensation orders and potentially reinstatement and back pay.

No dismissal during a 'temporary' absence from work

An employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations: *s 352*. The 'reverse onus' set out in *s 361* applies to alleged breaches of *s 352* in the same way as to alleged breaches of the other provisions of *Pt 3-1*.

An illness or injury will be prescribed by the regulations if the employee satisfies one of the following notice and evidence requirements (see *Regulation 3.01* of the Fair Work Regulations 2009 (Cth)), which requires the employee to:

- provide a medical certificate or statutory declaration about the illness or injury within 24 hours of the commencement of the absence or 'such longer period as is reasonable in the circumstances'; or
- comply with the terms of an award or enterprise agreement which requires them to notify the employer of their absence from work and to 'substantiate the reason for the absence'; or
- provide the employer with evidence in accordance with *s 107(3)(a)* for the taking of paid personal/carer's leave for a personal injury or illness within the meaning of *s 97(a)*.

To be a prescribed injury or illness its duration must not exceed 3 months in a single period, or the total absences of the employee within a 12 month period must be less than 3 months (see *Regulation 3.01(5)(a)* of the Fair Work Regulations 2009 (Cth)).

Additionally, the employee cannot be dismissed unless the employee has also exhausted all the employee's paid personal/carer's leave (see *Regulation 3.01(5)(b)* of the Fair Work Regulations 2009 (Cth)) – assuming the employee meets the requirements to take that remaining accrued leave.

Regulation 3.01(6) states that periods during which an employee is absent from work while receiving compensation under workers' compensation legislation do not count as paid personal/carer's leave. This means that if an ill or injured employee has exhausted their entitlements to compensation under the relevant workers' compensation legislation, but retains entitlements to paid personal/carer's leave, then the *s 352* prohibition will apply until such time as the employee has exhausted those entitlements and the absence meets the criteria set out in *reg 3.01(5)*.

Section *772(1)(a)* and *reg 6.04* make parallel provision to *s 352* and *reg 3.01* for employees of non-national system employers. See *Unlawful termination*.

Even where an illness or injury not covered *s 352* (ie, because it is not a prescribed kind of illness or injury under *reg 3.01*), an ill or injured employee may still have a claim under s 351 of the FW Act on the grounds that the employee was discriminated against because of the employee's disability: *McGarva v Enghouse Australia Pty Ltd* (2014) 286 FLR 434

Practice Tip: It is important that employers accurately record periods of employee absence, and the reasons for such absence. This is particularly the case where absences are intermittent in character. Accurate record-keeping will make it easier for the employer to avoid the prohibition in *s 352* (ie, enabling the employer to prove that the total unpaid absences of the employee within a 12-month period exceed 3 months).

Further Reading - you will need a LexisNexis© subscription

Workplace Law — Fair Work > Fair Work Act 2009 > Fair Work Act 2009 > Chapter 3 Rights and responsibilities of employees, employers, organizations etc > Part 3-1 General protections > Division 7 Ancillary rules > s 361 Reason for action to be presumed unless proved otherwise > Commentary to s 361 > [7-2850.1]–[7-2850.25]

Workplace Law — Fair Work > Fair Work Act 2009 > Fair Work Act 2009 > Chapter 3 Rights and responsibilities of employees, employers, organizations etc > Part 3-1 General protections > Division 5 Other protections > s 352 Temporary absence — illness or injury > Commentary to s 352 > [7-2330.1]–[7-2330.35]

Dismissal following a procedurally fair performance management process

If *s 352* of the FW Act does not apply (i.e. prohibition on dismissing for temporary absence), there has been a procedurally fair process and all requirements have been satisfied under anti-discrimination legislation and, where relevant, workers compensation legislation, then an employer can consider terminating an employee's employment.

The reason for dismissal in these circumstances is that the employee is not capable of performing the employee's job, unless it is an unrelated misconduct issue – which would not typically be the case for an ill or injured employee.

Alternatively, in some cases there may be a basis for terminating the employee because the employee's role has become redundant while the employee was absent. However, this pre-supposes the redundancy was genuine, requires notice and consultation (if covered by an industrial instrument) and will (depending on service) require the payment of redundancy pay in addition to other payments on termination of employment (see Redundancy for more information).

If the employee is dismissed, the employer must pay the employee his or her legal entitlements, including unused accrued leave entitlements, a payment in lieu of notice (if notice is not worked, in part or full) and any outstanding entitlements payable under bonus, incentive or commission schemes.

Considerations for a negotiated exit, including a deed of release

Depending on the circumstances, it may be appropriate to engage in without prejudice discussions with the aim of negotiating a settlement of all current and future claims relating to the matter in exchange for the ill or injured employee's execution of a release. The release would normally contain non-disclosure and non-disparagement terms.

If the settlement includes a payment greater than $5,000 that is expressed under the deed of release as being made in relation to the employee's illness or injury and the employee has received Medicare benefits in respect of that illness or injury, the employer may have obligations under the *Health and Other Services (Compensation) Act 1995* (Cth) (Act). That includes an obligation to notify the Department of Human Services of the amount of the settlement payment by a certain date by completing a M0022 - Medicare Compensation Recovery notice of judgment or settlement form, withholding the amount equal to the Medicare benefit from the settlement payment and informing the employee of his or her liability to pay that amount under the Act. This should be addressed as part of the negotiation and reflected as required in the terms of the release.

A release cannot carve-out an employer's workers compensation obligations.