Employer Best Practices for LA Comp. No.2

HOW TO PROPERLY OFFER A JOB TO YOUR INJURED EMPLOYEE AND AVOID SUBSTANTIAL PENALTIES FOR GETTING IT WRONG

In Louisiana, once an injured employee's treating physician determines he can work, the employee becomes entitled to a form of indemnity benefit different than he was receiving when he was completely out of work. When an employee is completely unable to work (according to his treating physician), he is entitled to Temporary Total Disability ("TTD") benefits. The amount of TTD paid is equal to two thirds of his pre-accident Average Weekly Wage ("AWW"), subject a minimum and maximum amount. However, when an employee is able to work with restrictions (as determined by his treating physician), the form of indemnity benefits to which they are entitled changes to Supplemental Earnings Benefits ("SEBs").

SEBs allow you as the employer to take a credit against the employees' wage loss by establishing a wage-earning capacity within his work restrictions. Basically, once the employee has been released to work, you establish a post-accident wage earning capacity. Then, you subtract that post-accident wage earning capacity from his pre-accident wages and multiply the new amount times two thirds.[1] This will give you the SEB amount.

As a consequence, establishing a post-accident wage earning capacity is <u>critical</u> as it can vastly reduce your exposure for SEBs.

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[1] While technically performed as a monthly calculation, it is perhaps easier to view if we remove one additional calculation from the example. If your employee had a pre-accident, Average Weekly Wage of $1,100.00, the employee's compensation rate would be $733.34 (rounded up). When unable to work, the employee would be paid that amount as their TTD rate. It is also what they would be paid as their SEB rate, unless we have established a post-accident, wage earning capacity. Continuing this example, if a proper bona fide job offer is extended to the employee by you, and that job establishes a wage earning capacity of $800.00, then the "loss of earning capacity" is $300.00 ($1,100.00 - $800.00), and their SEB rate, expressed as a weekly number, would only be $200.00 (two thirds of $300.00).

However, it is important to note that if you take a credit for a post-accident wage earning capacity, and the post-accident wage earning capacity you have established is in any way flawed, you have effectively underpaid the injured employee. Such an underpayment will almost assuredly result in the filing of a lawsuit by the employee and the assessment of a $2,000.00 penalty and attorneys' fees. Further, the court will also not accept the wage-earning capacity offset, and you will have to pay the employee the difference.[2]

Now you can see why properly establishing a post-accident, wage earning capacity is critical. Hopefully, you can also now see the financial benefits of establishing a high post-accident wage earning capacity. Since it is likely that you, as the employer, would be able to establish a wage earning capacity greater than that which we would expect from vocational rehabilitation (who will identify other jobs within the employee's restrictions, educational limitations, and reasonable geographical area), it is often in your best financial interest to offer the employee a job through the use of what we refer to as a "bona fide job offer."

Admittedly, in a perfect world, once an injured employee has been released to work in a limited capacity, you would simply be able to call him and instruct him to come back to work. If you do this, and the employee actually returns to work, then there would be no problem as you would have established his post-accident, wage-earning capacity upon his return to work. A "bona fide job offer" has **very** specific requirements, and failing to satisfy even one requirement could put you at risk for substantial workers' compensation penalties.

Nevertheless, because SEB calculations rely on wage earning "capacity" (not actual wage earnings), you may still be able to take a credit even if the employee does not return to work. In other words, if you establish the existence of a job within your company that fits within the employee's work restrictions and precisely follows the rules below, you can take the credit for the wages the employee would have earned in that position even if that employee refuses to accept it. However, you bear the burden of proving at trial that the job offer was valid, and any flaw in the offer will

[2] While you may be inclined to think that your flawed effort at established a post-accident, wage-earning capacity was reasonable so as to avoid the penalty, the courts have long held that the requirements are so well established that anything less than perfect compliance is unreasonable.

be used to find the bona fide job offer was improper. You will then be at risk for penalties and attorney's fees, and the court will not recognize the wage-earning capacity you contend that offer established.

In summary,

- If you offer the employee a job that meets **every single one** of the requirements for a bona fide job offer, you can take a credit against the employee's SEB entitlement based upon the wage-earning capacity established in that offer; or
- If the bona fide job offer is flawed and you take a credit for those wages, you will pay a penalty, attorney fees, and the court will not recognize the wage-earning capacity you contend was established. You will then have to pay the employee the difference.

Failure to follow all these requirements will have the same effect as following none of the requirements.

WHAT IS REQUIRED?

The Workers' Compensation Act itself does not provide the level of specificity we would like on this issue. However, over the years case law has interpreted the law and given rise to numerous requirements that must be met in order to show a job offer was properly extended to an employee.

While there is no absolute list of requirements, our review of the continually changing case law allows us to offer these as the minimum requirements of a bona fide job offer. And, before you think that a phone call is an easier method, **never** present a job offer to an injured employee with restrictions by phone. It will become a matter of proof at trial. For example, you will testify that the conversation took place, and the employee will claim that it did not. As it would be our burden of proof at trial, we would lose. In a situation like this one, it is either written, or it did not happen. Under no circumstances will the court ever find that to be a proper bona fide job offer and as a basis to reduce the employee's entitlement to SEBs.

A version of our recommended letter is attached, and you are free to use it and place it under your company's letterhead.

Mailed by certified mail

The letter **must** be sent by U.S. Postal Service via certified mail. As the US Post Office is an arm of the federal government, the courts will accept a certified mail receipt as evidence the letter was received. The same recognition is not extended to FedEx, UPS, etc., and the court may not accept them as sufficient evidence of receipt. Play it safe and send it by U.S. Postal Service certified mail.

Compliance with doctor's restrictions

The job you extend must be within the restrictions imposed by the employee's treating physician. While you may sincerely believe the employee is capable of more, the job offered extended must not violate any of the limitations placed upon the employee by his treating physician. Always begin your search for an appropriate job from a copy of the physician's restrictions. Ideally, you should identity a job that has a written, formal job description within the employee's physical requirements. But, if you must modify an existing position or create a new position in order to accommodate the employee's restrictions, the physical requirements must be in writing. Always attach a copy of the job description, whatever it may be, to the offer letter. Assuring the employee that you will locate a job for him will effectively nullify the offer.

Please note the job description must be clear enough for the employee (or his doctor) to determine whether the job complies with the employee's physical limitations. Simply claiming that you will identify a job upon the employee's return to work will never be accepted by the court, and it is an invitation to pay the employee a penalty.

A description of the work schedule and hourly wages to be paid

The offer letter must contain the (1) anticipated number days to be worked, (2) the employee's hourly schedule, and (3) the wage rate that the employee would be paid. If the employee does not accept the offer and we need to argue we are allowed to take a credit for the wage-earning capacity established, we would only allowed to take a credit for the gross wages the employee would have earned in a single week as described in the job offer extended. For example, if you offer the

employee a forty-hour per week position at $10.00 per hour, and the employee does not return to work, we can use this $400.00 wage-earning capacity to reduce your SEB exposure.

If the gross wage-earning capacity cannot be determined from the letter itself, you cannot take the credit if the claimant does not accept the offer.

Include a copy of the physician's work restrictions

To support later to the court that you provided the employee "everything" in your offer, you want to attach a copy of the doctor's work restrictions. It is not uncommon for an employee to claim greater restrictions than those imposed by his doctor or that the employee to be unaware of the restrictions. Having everything attached to the offer letter will also allow the court to compare whether the job you have extended is within the restrictions imposed by the treating physician.

Time limit for acceptance

Your offer letter should also include a time limit by which the employee should accept the job. It should be stated that his failure to either accept the position by that date or contact you to obtain a written extension, will be considered a voluntary abandonment/resignation of his employment. As a safety precaution, you should also designate one specific individual at your company who the employee must contact to either accept the position or ask for an extension. You do not want to run into a situation in which you have nothing official regarding the employee's request for an extension and you apply a credit thinking the employee has abandoned their position only to find out later that another individual agreed to grant him an extension. Make sure to allow sufficient time for the employee to both receive and review the offer letter. We recommend you give the employee no less than ten days from the date of mailing.

Doctor's approval of the job

Whether you are required to obtain the treating physician's pre-approval of the job is an issue still being decided in the courts. While there is a Louisiana Supreme Court case that states the physician's approval is not mandatory, as the statute does specifically not require it, some courts do require pre-approval for the offer to be

considered effective. As a result, out of an abundance of caution, we recommend that you obtain pre-approval from the physician and attach a copy of that approval to the job offer. In the absence of this preapproval, the court will subject your offer to a higher degree of scrutiny or may disregard it out of hand.

A "squeal provision"

The "squeal provision" is a way we have identified to solve numerous reoccurring issues. It is quite common for an employee to claim he was asked to perform job duties beyond his restrictions and then simply fail to return to work because of the perceived risk of reinjuring himself. He may argue he told some individual about his concerns, and that they were never addressed. The employee will rely on this to argue the job offer was invalid. The court may then find the job offer was improper, and you may no longer be allowed to take the credit for the job established. Identifying one individual who the employee must contact to report complaints will weaken the employee's argument if the designated employee was not aware of any complaints offered.

This "squeal provision" should instruct the employee to bring his complaints to the designated individual, and that designated individual only. The offer should identify the designated individual by name and provide his/her contact information. Multiple means of contact should be provided to limit the employee's ability to argue he could not reach the designated individual. You should inform the employee that any complaints will be kept confidential. This, again, limits the employee's ability to later argue he did not want to complain due to fear of retaliation. You should also take the opportunity to inform the employee's supervisor that he is to be working under specific restrictions and provide the supervisor with a copy of the limitations and time during which the limitations will apply. This will prevent the employee's supervisor from unwittingly instructing the employee to perform activities beyond his restrictions. Finally, take any complaints brought to your attention seriously and documents your handling of these complaints in writing.

Monitor later restrictions imposed

Anytime the employee's medical restrictions change, you must prepare and provide the employee with a new bona fide job offer letter. Your letter will only be

effective during the time in which it complies with the employee's physical limitations. As a result, you should stay in contact with your adjuster, as the adjuster will have the most up-to-date information regarding the employee's work restrictions assigned by their doctor.

Remind the employee of conduct policies

It is not uncommon for an injured employee to believe that they cannot be fired while under restrictions, as this is the policy in some states. In Louisiana, an injured employee working under restrictions is still subject to your company's policies regarding conduct, tardiness, etc. You should take the opportunity in your letter to remind the employee.

CONCLUSION

While we cannot guarantee that following these requirements will give you a fool-proof bona fide job offer letter, these recommendations will allow you to avoid common pitfalls used by the courts to deny the employer the benefit of a bona fide job offer. We can assure you that anything less will likely see your offer be deemed insufficient by the court.

We will update these Best Practices as new concerns are raised by the courts. Also, if you have unfortunately encountered any additional restrictions imposed by the courts in a case in which you were involved, please feel free to let us know. The goal of this product is to provide the most current description of requirements being imposed by the courts.

As always, feel free to reach out to us if you have any Louisiana workers' compensation questions or if you have topics that you would like us to cover in future issues.

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