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THE INTERPLAY BETWEEN THE PENNSYLVANIA WORKERS'
COMPENSATION ACT, THE UNEMPLOYMENT COMPENSATION
LAW, THE FMLA, THE ADA, TITLE VII, AND COBRA

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I. INTRODUCTION

The job of human resource director is a challenging one that requires a wide range of skill sets. It insists that at any given moment, the director assume the role of social worker, accountant, physician, psychologist, benefits coordinator and attorney.

Complicating matters is the fact that the statutory and regulatory rules with which the director must be familiar, are oftentimes highly technical and occasionally in conflict with one another, particularly when they converge upon the experience of a single employee.

The primary goal of this discussion is to facilitate the efficient and effective administration of claims made under the Pennsylvania Workers' Compensation Act.

In order to achieve that goal, the discussion will review the interplay between four statutory provisions and the administration of Pennsylvania workers'

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compensation claims – the Pennsylvania Unemployment Compensation Law, the Americans with Disability Act, the Family Medical Leave Act and COBRA.

II. RELEVANT POLICY CONSIDERATIONS

The basic policy considerations underlying the Pennsylvania Workers' Compensation Act, the Pennsylvania Unemployment Compensation Law, the Family Medical Leave Act, the Americans with Disabilities Act, Title VII of the Civil Rights Act and COBRA can be summarized as follows:

- (a) The Pennsylvania Workers' Compensation Act – The basic purpose of the Workers' Compensation Act is to provide the employee with wage loss replacement benefits and medical coverage resulting from a work-related injury.
- (b) The Pennsylvania Unemployment Compensation Law – The basic purpose of the Unemployment Compensation Law is to provide wage loss replacement benefits to the employee who is capable of working, but who has experienced wage loss as a result of an involuntary termination of employment in the absence of willful misconduct.
- (c) The Family Medical Leave Act – The basic purpose of the Family Medical Leave Act is to prevent the employee from having to choose between his or her job with the employer and his health needs or the health/child needs of his or her family.
- (d) The Americans with Disabilities Act – The basic purpose of the ADA is to prevent discrimination against the employee who suffers from a physical or mental disability, but who is otherwise qualified to perform the essential functions of his or her job.
- (e) Title VII of the Civil Rights Act of 1964 – The basic purpose of Title VII is to prohibit discrimination by covered employers on the basis of race, color, religion, sex, national origin, pregnancy, age and disability.³

³ Title VII has been supplemented by the Pregnancy Discrimination Act of 1978, the Age Discrimination in Employment Act and the Americans with Disabilities Act. In addition, the Equal Employment Opportunity Commission (EEOC) most recently declared that employment discrimination on the basis of gender identity or transgender status is prohibited under Title VII. In addressing the role of the EEOC, the U.S. Department of Labor has explained that “[f]or applicants to and employees of most private employers, state and local governments, educational institutions, employment agencies and labor organizations, the Equal Employment Opportunity Commission is an independent federal agency that promotes equal opportunity in employment through administrative and judicial enforcement of the federal civil rights laws and through education and technical assistance.”

- (f) The Consolidated Omnibus Budget Reconciliation Act of 1986⁴ commonly referred to as “COBRA” seeks to provide a health insurance safety net to covered employees and family members at the employee’s expense when group coverage would otherwise be lost due to certain employment separation events.

III. STATUTORY ELEMENTS

A. THE PENNSYLVANIA WORKERS’ COMPENSATION ACT, 77 P.S. §§ 1 ET. SEQ.

General Rule - A claim for benefits will be awarded under the Workers’ Compensation Act where: (a) an employee; (b) suffers a physical or emotional injury; (c) arising in the course of employment and (d) related to employment⁵.

B. THE UNEMPLOYMENT COMPENSATION LAW, 43 P.S. §§ 751-914

General Rule - A claim for benefits under the Unemployment Compensation Law will be granted where (1) there is an involuntary discharge of an employee (2) who is capable of continuing to perform work and (3) who has not engaged in willful misconduct. Charles v. Unemployment Compensation Board of Review, 122 Pa. Cmwlth. 439, 552 A.2d 727 (1989).

C. THE FAMILY MEDICAL LEAVE ACT 5 U.S.C.A. §§ 6381-6387

General Rule - The Family Medical Leave Act (“FMLA”), which applies to private employers who employ fifty or more employees, for twenty or more calendar work weeks in the current or preceding calendar year; and state and local government employers, regardless of the number of employees, requires that the qualified individual employee be afforded **twelve weeks** of unpaid leave **during a twelve month period** in order to allow the employee to attend to his own “serious health condition” or the serious health condition of a spouse, child or parent or the birth/adoption/placement of a child, while guaranteeing a continuation of group health benefits.⁶

⁴ The provision is officially known as “The Consolidated Omnibus Budget Reconciliation Act of 1985.” Since it was signed into law on April 7, 1986 the title of the statute often references the 1986 date.

⁵ The Act will be liberally construed in order to effectuate its humanitarian purpose. See Lehigh County v. Workmen’s Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995).

⁶ As discussed below, in order to qualify for FMLA protection, the employee must have worked for the employer for a total of twelve months, though not consecutively, and at least 1,250 hours during the previous twelve-month period at a location in the United States, or in any territory or possession of the United States, where at least fifty employees are employed by the employer within seventy-five miles.

D. THE AMERICANS WITH DISABILITIES ACT 42 U.S.C.A. §§ 12101-22213

General Rule - The Americans With Disabilities Act, (“ADA”)⁷, which applies to private employers who employ fifteen or more employees, and to state and local government employers, regardless of the number of employees, prohibits discrimination against persons with “disabilities,” who are otherwise qualified to perform the essential functions of the job, with respect to all aspects of employment including application, hiring, wages, benefits, discipline, promotion, and work environment.⁸

On September 25, 2008, President George W. Bush signed into law the ADA Amendments Act of 2008 (“ADAAA”), discussed in greater detail below.

E. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C §2000

General Rule - Title VII of the Civil Rights Act prohibits discrimination by covered employers on the basis of race, color, religion, sex, national origin, or his or her association with another individual of a particular race, color, religion, sex or national origin or on the basis of his or her interracial association with another. In addition, Title VII has been supplemented with legislation prohibiting discrimination on the basis of pregnancy, age, and disability, or on the basis of gender identity or transgender status.

E. CONSOLIDATED OMNIBUS BUDGET RECONCILIATION ACT OF 1986 (COBRA), PUB. L. 99-272, 100 STAT. 82

General Rule - The Consolidated Omnibus Budget Reconciliation Act of 1986, (“COBRA”) requires that the employer afford continued access to health care insurance to employees and their covered family members, **at the employee’s expense**, where the employee experiences a “qualifying event” that results in a loss of coverage such as a voluntarily resignation, an involuntary termination in the absence of “gross misconduct,” or a reduction in work hours.

⁷ The ADA has been described as “the most expansive and significant civil rights legislation enacted by Congress since the passage of the Civil Rights Act of 1964” See “Taming of the Three-Headed Monster: Disabled Workers and the ADA, FMLA and Workers’ Compensation” Christopher E. Parker, Freeman, Mathis & Gary, LLP. The Equal Employment Opportunity Commission (EEOC) has primary authority for enforcing the employment provisions of the ADA.

⁸ Title I of the ADA prohibits employers of 15 or more workers, employment agencies, and labor organizations of 15 or more workers from discriminating against qualified individuals with disabilities. Title II of the ADA prohibits state and local governments from discriminating against qualified individuals with disabilities in programs, activities, and services.

IV. INTERPLAY WITH THE WORKERS' COMPENSATION ACT

As noted, the Pennsylvania Workers' Compensation Act is a humanitarian statute designed to provide expedited wage loss replacement and medical coverage to employees injured in the course of and as a result of their employment.

Once a compensable work injury occurs, issues arise regarding the nature and extent of the injury, the extent of wage loss or "disability" resulting from the injury and the reasonableness and necessity of medical treatment attributable to the injury.

Since a compensable work injury will often involve extended absenteeism from work, the need for wage-loss replacement and the need for job modification in order to facilitate a return-to-work, the Workers' Compensation Act, the Unemployment Compensation Law, the FMLA⁹, the ADA, Title VII and COBRA, can all converge upon the administrator responsible for the claim.

Below, we have addressed those instances where there can be interplay between the Pennsylvania Workers' Compensation Act and these other distinct, but often related statutory regimes.

A. THE UNEMPLOYMENT COMPENSATION LAW

An injured worker, entitled to receive disability benefits under the Workers' Compensation Act, **may simultaneously** recover wage loss benefits under the Unemployment Compensation Law where the work injury prevents the employee from performing his or her pre-injury job, but does not prevent him or her from performing other modified work available in the labor market. See Kowal v. Commonwealth, Unemployment Compensation Board of Review, 77 Pa. Cmwlth. 378, 465 A.2d 1322 (1983), *appeal after remand*, 99 Pa. Cmwlth. 234, 512 A.2d 812 (1986).

The Unemployment and Workers' Compensation regimes often address the individual's employment status simultaneously, where, for example, following the occurrence of a compensable work injury, the employer discharges the employee for alleged disciplinary reasons. In those instances the two provisions will address **the basis for the discharge** while applying similar standards.

Under the Unemployment Law, the question normally to be resolved, assuming the employee is otherwise eligible for UC benefits, is whether the discharge resulted from the employee's "willful misconduct;" that is, a "willful disregard for the employer's policy and rules" See Brady v. Unemployment Compensation Board of Review, 118 Pa. Cmwlth. 68, 544 A.2d 1085 (1988); McKeesport Hospital v. Unemployment Board of Review, 155 Pa. Cmwlth. 267, 625 A.2d 112 (1993).

⁹ For an excellent analysis of the interplay of Workers' Compensation and the ADA and the FMLA, see "The Employer's 'Bermuda Triangle': An Analysis of the Intersection Between Workers' Compensation, ADA and FMLA," Gregory G. Pinski and Angela L. Rud, 76 North Dakota Law Review, (2000).

When an employment discharge occurs in the context of a workers' compensation claim, the WCJ is asked to determine whether, through no fault of the employee, he or she has suffered wage loss following the occurrence of an otherwise compensable work injury. See Pieper v. Ametek-Thermox Instruments Div., 526 Pa. 25, 584 A.2d 301 (1990); Vista Int'l Hotel v. Workers' Compensation Appeal Board (Daniels), 560 Pa. 12, 742 A.2d 649 (1999). More specifically, the WCJ is asked to decide whether the post-work injury discharge was prompted by **the employee's bad faith misconduct**. See Stevens v. Workers' Compensation Appeal Board (Consolidated Coal Co.), 563 Pa. 297, 760 A.2d 369 (2000) (injured employee, who was unable to return to work for employer, returns to work for new employer but is thereafter discharged due to inability to perform new job in acceptable fashion, despite effort to do so, awarded reinstatement of disability benefits).

Claimants' have urged in the past that a UC ruling - declaring that the employee did not engage in "willful misconduct" - thereby permitting the employee to recover UC benefits - should collaterally estop the employer from arguing against an award of workers' compensation wage loss benefits on the basis of his or her "fault."

Citing the different standards of proof and the more informal character of UC litigation, the Commonwealth Court has ruled that a UC determination that the employee did not engage in "willful misconduct" **will not bind a WCJ** charged with determining the compensability of any ensuing wage loss under the Workers' Compensation Act. Bortz v. Workmen's Compensation Appeal Board, 656 A.2d 554 (Pa. Cmwlth. 1995) *affirmed* 546 Pa. 77, 683 A.2d 259 (1996); Griswold v. Workmen's Compensation Appeal Board, (Thompson Maple Products), 658 A.2d 449 (Pa. Cmwlth. 1995).¹⁰

Even though a favorable ruling by a UC referee has no binding effect upon a WCJ, the employer should, if it is appropriate to do so, defend a UC claim where a workers' compensation claim is imminent, since a UC ruling favoring the employer may draw WCJ sympathy.

It is noteworthy, that prior to August 31, 1993, the injured worker could receive UC and workers' compensation benefits without having to be concerned with any form of credit or off-set.

That changed, however with the enactment of "Act 44," remedial legislation designed to reduce the cost of Pennsylvania work injuries¹¹.

In pursuit of that goal, the Legislature drafted a new provision of the Act - Section 204 - which, for the first time, afforded employers credit for Unemployment

¹⁰ Generally, UC determinations have been given little deference in other legal forums. See Rue v. K-Mart Corp., 552 Pa. 13, 713 A.2d 82 (1998) (UC finding that employee did not steal bag of potato chips not binding in civil defamation action).

¹¹ The primary focus of Act 44 was "medical cost containment." Three years later, the Legislature focused its remedial efforts upon disability benefits with the enactment of Act 57.

Compensation Benefits received by an injured worker, receiving workers' compensation wage loss benefits.

The provision, which was further amended by "Act 57 of 1996," now provides, in pertinent part, as follows:

"(a)...[f] the employe (sic) receives Unemployment Compensation benefits, such amount or amounts so received shall be credited as against the amount of the award made under the provisions of Sections 108 and 306, except for benefits payable under Section 306(c) or 307.

(b) For the exclusive purpose of determining eligibility for compensation under the... 'Unemployment Compensation Law,' weekly compensation paid to an employe under this act shall be deemed to be a credit week as that term is defined in the 'Unemployment Compensation Law.'"¹²

Section 123.6(a) of the Act 57 Regulations instructs that "workers' compensation benefits otherwise payable shall be off-set by the **net amount** an employe (sic) receives in UC benefits subsequent to the work-related injury..." (emphasis supplied).

Although for many years the general practice was to calculate the offset using the employee's gross UC benefit rate, the Commonwealth Court ruled in Philadelphia Gas Works v. Workers' Compensation Appeal Board (Amodei), 964 A.2d 963 (Pa. Cmwlth. 2009) that when applying the off-sets set forth in Section 204(a) of the Act, the employer must use the "**net**" recovery of Unemployment Compensation, Social Security (Old Age) benefits, severance or pension benefits received by the injured employee.¹³

B. THE FAMILY MEDICAL LEAVE ACT

The FMLA was signed into law by President Bill Clinton on August 5, 1993 while the FMLA final regulatory rulemaking became effective April 6, 1995.¹⁴

¹² In Keystone Coal Mining Corp. v. Workmen's Compensation Appeal Board (Wolfe), 673 A.2d 418 (Pa. Cmwlth. 1996) and in Lykins v. Workmen's Compensation Appeal Board (New Castle Foundry), 552 Pa. 1, 713 A.2d 77 (1998), the Commonwealth Court and the Supreme Court ruled respectively that the unemployment credit provision cannot be applied to injuries occurring before August 31, 1993, the effective date of Act 44.

¹³ In doing so, the court noted that when presented with the issue in Ferrero it was not asked to apply or consider the language set forth in Section 123.6(a) of the Act 57 Regulations.

¹⁴ Most recently the U.S. Department of Labor issued a Notice of Proposed Rulemaking on February 15, 2012. The Proposed Rulemaking, proposes regulations addressing military leave provisions, establishing leave eligibility requirements for airline crewmembers and flight attendants and changes concerning calculation of leave.

The law, as noted above, “was promulgated with the intent of preventing employees from having to choose between the jobs they need and the families who need them.¹⁵”

As noted above, FMLA applies to all private sector employers who employ fifty or more employees, and all state and local employees, regardless of the number of individuals employed by the governmental unit.

In order to be eligible for FMLA protection, the employee must: (1) work for a covered employer; (2) work for that employer for a total of twelve months; (3) work at least 1,250 hours during the preceding twelve months; and (4) work at a location in the United States or United States Territory where at least fifty employees are employed within seventy-five miles of one another.

A covered employee is entitled to **twelve weeks of unpaid** leave during a **twelve month period** for: (1) an inability to work due to a “serious health condition;” (2) the birth or care of a new child of the employee; (3) the adoption of a new child; or (4) to care for an immediate family member such as a spouse, child, or parent suffering from a “serious health condition.”

In administering employee leave, **employers are permitted to choose one of four methods for determining the twelve-month period during which the twelve weeks of an employee’s leave entitlement occurs:** (1) the “**rolling**” method which calculates the employee’s leave year backward from the first date the employee uses any FMLA leave; (2) the “**calendar**” method, which calculates leave in each calendar year; (3) the “**fixed year**” method, which calculates leave on the basis of any fiscal year or a one year period specified by state law or a one year period commencing on the employee’s anniversary date and (4) the “**forward**” method, which calculates leave from the first date the employee uses any FMLA leave into the future.¹⁶

It should be noted that leave is calculated **using the employer’s method for calculating work time**, meaning that where the employer keeps employee time in tenths of hours, the employer should grant leave in tenths of hours.

On January 28, 2008 President George W. Bush signed into law the National Defense Authorization Act for Fiscal Year 2008 (“NDAA”).

The NDAA provides additional FMLA protection for military families as follows: (1) employers are now required to provide up to twenty-six weeks of unpaid leave to employees – son/ daughter, spouse, parent, next-of-kin - who are caring for a member of the Armed Forces wounded in the line of duty; and (2) twelve weeks of unpaid leave is available to an employee for any “qualifying exigency” arising out of out of the fact that the spouse, son, daughter, or parent of the employee is on active duty or has been

¹⁵ “The Family and Medical Leave Act,” Jill M. Lashay, Esquire, Dealing with Current Employment Issues, Pennsylvania Bar Institute, (2005).

¹⁶ 29 CFR §825.200 (b)(1-4).

notified of an impending call or order to active duty in the Armed Forces in support of a contingency operation.

1. **Basic Application of the FMLA:**

(a) The protection afforded by the FMLA is generally triggered by a “**serious health condition,**” or “an illness, injury, impairment, or physical or mental condition that involves either

1. **Inpatient care,** i.e. an overnight stay in a hospital, hospice or residential medical-care facility, including any period of incapacity or subsequent treatment in connection with the inpatient care, or

2. **Continuing treatment** by a health care provider that includes a period of incapacity lasting more than three consecutive, full calendar days and any subsequent treatment or period of incapacity that also involves: (a) treatment two or more times within thirty days of the first date of incapacity; (b) treatment by a provider on at least one occasion which results in a regimen of continuing treatment under the provider’s supervision; (c) the first treatment, which must involve an in-person visit to the provider, must occur within seven days of the first day of incapacity.

In addition, (a) any period of incapacity related to pregnancy; (b) any period of incapacity or treatment for a chronic serious health condition; (c) a period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective or (d) any absences to receive multiple treatments for restorative surgery or for a condition that would likely result in a period of incapacity of more than three days if not treated.

Examples ¹⁷ of continuing treatment include **pregnancy, pre-natal care, severe stroke, terminal cancer, chemotherapy treatments, asthma and diabetes.**¹⁸

(b) A “serious health condition” under the FMLA is not necessarily the equivalent of a “disability” under either the ADA or the Workers’ Compensation Act;

(c) When an employee requests leave for a “serious health condition” the employer will not violate the ADA by requiring the employee to produce the “confirming certification form” prescribed by the FMLA;

(d) The employer may require second and third medical opinions assessing the nature of the condition, at its expense – the third opinion will be deemed final and binding and will be performed by an agreed upon health care professional and may

¹⁷ See “Everything You Want to Know About the FMLA *And More*” Debbie Rodman Sandler, 12th Annual Employment Law Institute, (PBI 2006) at 3-4.

¹⁸ Id.

require periodic recertification - no more often than every 30 days - of the serious health condition;¹⁹

(e) Where the employee fails to provide a complete and sufficient certification, the employer may contact the employee's health care provider for clarification of the certification through a health care provider, a human resource professional, a leave coordinator or a management official - but not the employee's direct supervisor²⁰;

(f) If the employee chooses not to provide the employer with authorization allowing the employer to clarify the certification with the health care provider and does not otherwise clarify the certification the employer may deny the taking of the FMLA leave if the certification remains unclear;²¹

(g) While the employee seeking leave should provide a **thirty-day advance notice** of the need to take FMLA when the leave is foreseeable, where the leave is not foreseeable, the employee must provide notice as soon as practicable;

(h) The employee has no obligation to specifically use the reference "FMLA" when seeking leave. Rather, indicating why leave is required may be sufficient under certain circumstances to put the employer on notice of the employee's need for FMLA "leave," e.g. discussing the nature of the medical condition;²²

(i) The employee's need for more than the twelve-week leave period afforded by the FMLA will be construed in certain instances as a request for a "reasonable accommodation" under the ADA, and will not necessarily be deemed an "undue hardship" for ADA purposes;

(j) The relevant federal regulations permit FMLA "leave" to run on the basis of absences attributable to the disabling effects of a compensable work injury²³ **provided the employee is properly notified in advance that such absences will be counted against FMLA "leave"**²⁴;

(k) While the Workers' Compensation Act does not require that the injured employee return to work for the employer in his or her pre-injury capacity or its equivalent, the FMLA generally **does** require such an assignment **unless** the employer

¹⁹ See 29 C.F.R. § 825.307(a)(2).

²⁰ See 29 C.F.R. § 825.307(a).

²¹ Id.

²² See "An Employer's Notice Obligations Under the Family Medical Leave Act," Pamela G. Cochenour, Esquire and Divya Wallace, Esquire, Pietragallo Special Employment Law Edition, Summer, 2008.

²³ See "The Employer's 'Bermuda Triangle': An Analysis of the Intersection Between Workers' Compensation, ADA and FMLA," Gregory G. Pinski and Angela L. Rud, 76 North Dakota Law Review, (2000), citing 29 C.F.R. § 825.208.

²⁴ Notice is provided in three ways: (a) posting a notice; (b) providing FMLA information in a written handbook or similar document; and (c) giving the employee notice of his or her specific obligations when the FMLA leave period begins. See 29 C.F.R. §§ 825.300, 825.301.

can demonstrate that the employee would not have remained employed in his or her pre-injury job as of the date of reinstatement due to the elimination of the job or that the employee is unable to perform the essential functions of the pre-injury job or that the employee is a highly compensated “key employee” whose reinstatement would cause the employer substantial and grievous economic injury;²⁵

(l) The employee’s use of FMLA “leave” cannot result in the loss of any benefit that the employee had earned or was entitled to before taking the leave²⁶ and cannot be counted against the employee under a “no fault” attendance policy²⁷;

(m) While the employee is out of work on FMLA “leave,” the employer is required to continue to maintain the employee’s health insurance coverage on the same terms as if the employee were still an active employee. For example, if the employer covers 100% of the employee’s health insurance premium, it must continue to do so during FMLA leave. If the employer covers only 50% of the employee’s health insurance premium, it must continue to pay the premium at that percentage during the employee’s leave.

2. Practical Considerations for FMLA Administration

In their article, “The Employer’s ‘Bermuda Triangle’: An Analysis of the Intersection Between Workers’ Compensation, ADA and FMLA,” Gregory G. Pinski and Angela L. Rud offer a series of practical suggestions for effectively administering “employee leave” situations under the FMLA, while being mindful of the obligations set forth in the Workers’ Compensation Act and ADA:

(a) The employer should always request FMLA certification from an employee at the commencement of an unforeseen leave or immediately following a leave request;

(b) The employer should always maintain separate confidential medical examination files from regular personnel files;

(c) Since FMLA “leave” does not immediately intersect with the ADA concepts of “reasonable accommodation,” and “undue hardship,” an employer **cannot reduce** the twelve-week FMLA entitlement regardless of what impact it might have upon its business or operations;

(d) The FMLA does not require the employer to provide “reasonable accommodations” for a serious health condition. See Baker v. Hunter Douglas, Inc., 270 F. App’x 159, 2008 WL 744734 (3rd Circuit 2008);

²⁵ See 29 C.F.R. §825.312. In order to take advantage of the “key employee” provision, the employer must notify the employee of her or his “key employee” status at the time the leave is requested or as soon as practicable.

²⁶ See “Everything You Want to Know About the FMLA *And More*” Debbie Rodman Sandler, 12th Annual Employment Law Institute, (PBI 2006) at 4.

²⁷ *Id.*

(e) After the prescribed twelve-week period expires, however, ADA principles may be triggered, meaning that the employee may be entitled to **additional leave**, depending upon whether the additional time off work would be viewed as a “reasonable accommodation” and whether the additional time off would impose an undue hardship on the employer’s business;

(f) Any policy of the employer requiring the employee to achieve a level of fitness sufficient to permit a return to work must be uniformly applied, must be job-related and must be consistent with business necessity in order to avoid ADA liability.

3. Non-Compensable Work-Related Conditions

The FMLA may be implicated in connection with a **work-related condition that is not** compensable under the Act.

For example, where the employee suffers an emotional injury that requires treatment, but that does not arise out of a subjective reaction to an abnormal working condition, and is therefore not a compensable “mental-mental” work injury. See Payes v. Workers’ Compensation Appeal Board (Commonwealth of Pennsylvania/State Police), 5 A.3d 855 (Pa. Cmwlth 2010)(state trooper whose patrol vehicle struck and killed a confused pedestrian on an interstate highway not entitled to benefits under the Act since not exposed to abnormal working conditions); McLaurin v. Workers’ Compensation Appeal Board (SEPTA), 980 A.2d 186 (Pa. Cmwlth 2009)(bus driver confronted by passenger brandishing handgun develops post-traumatic stress disorder, but not entitled to benefits under Act since not exposed to abnormal working conditions); See Baker v. Hunter Douglas, Inc., 270 F.App’x 159, 2008 WL 744734 (3rd Circuit 2008). (employee suffering from nervous breakdown due to overwhelming work load requests and receives FMLA leave plus non-workers’ compensation short-term disability benefits); See also Lloyd v. Washington & Jefferson College, 288 F.App’x 786, 2008 WL 2357734 (3rd Circuit 2008)(associate professor requests and receives FMLA leave for stress condition caused by interaction with his department chair).

C. THE AMERICANS WITH DISABILITIES ACT

Signed into law on July 26, 1990, the ADA is ambitious legislation that seeks to make American society more accessible to individuals with disabilities.²⁸

²⁸ Whether the ADA has made the work place more accessible to individuals suffering from physical and emotional disabilities is subject to debate. In their paper “Consequences of Employment Protection? The Case of the Americans with Disabilities Act” published in the *Journal of Political Economy*, 2001, Daron Acemoglu and Joshua D. Angrist argue that because of increased costs to employers, the ADA has had a negative effect on the employment of disabled men of all ages and disabled women under the age of forty. They have also reported that the ADA has had no effect on the wages of disabled workers – those remain approximately 40 percent below the wages of non-disabled individuals. The authors also report that from 1992 through 1997 the Equal Opportunity Employment Commission received more than 90,000 discrimination complaints. Of this total, 29 percent of the charges filed were for failure to provide

The Act is divided into five titles, "Employment," "Public Services," "Public Accommodations," "Telecommunications," and "Miscellaneous."

The protection afforded by the ADA applies not only to individuals who are "disabled"²⁹, but also to those **perceived** as being disabled.

Indeed, a person will receive ADA protection if he or she meets at least one of the following tests: (1) **he or she has a physical or mental impairment that "substantially limits"³⁰ one or more of his or her major life activities** – an "actual" disability; (2) he or she has a "record of" such impairment; or (3) he or she is **regarded as** having such an impairment, e.g. where an employer takes action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor.³¹

In addition, individuals, not directly afflicted with, or perceived as being afflicted with, a physical or mental impairment, can receive ADA protection, where for example: (1) the person has an effective association with an individual known to have a disability, such as a parent or (2) the person may be subject to coercion or retaliation for assisting people with disabilities seeking to assert their rights under the ADA.

1. The ADA Amendments Act of 2008

On September 25, 2008, President George W. Bush, signed the ADA Amendments Act of 2008 ("ADAAA") substantially expanding the coverage afforded by the ADA.

reasonable accommodations, 10 percent for hiring violations and nearly 63 percent for wrongful termination. During that time period employers paid over \$174 million in EEOC settlements under the ADA.

²⁹As discussed in detail below, the United States Supreme Court narrowed the definition of "disability" in Sutton v. United Airlines, 527 U.S. 471 (1999) and Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) by allowing consideration of mitigating or ameliorative measures, and by insisting that the major life activity be limited "significantly" or "to a large degree."

³⁰ As noted below the ADAAA has instructed that the term "substantially limits" be construed broadly in favor of expansive coverage.

³¹ See Eshelman v. Agere Systems, Inc., 554 F.3d 426 (3rd Cir. 2009)(Employee returns to work on a part-time basis following an FMLA leave during she received treatment for breast cancer. She informs her supervisors that her chemotherapy treatment has resulted in a cognitive dysfunction. As a consequence of a difficult economic environment the employer lays off 18,000 employees worldwide. When in response to her supervisor's suggestion that she move to another facility, the employee refuses, citing the memory problems she was experiencing. Immediately thereafter her lay-off score is adjusted thereby subjecting her to a lay-off. In affirming an award under the ADA, the Third Circuit agrees that the employer **regarded** the employee as hindered in her ability to think.

The ADAAA, which became effective on January 1, 2009,³² **seeks to broaden the definition of “disability”** under the ADA, in response to holdings in several Supreme Court decisions and to certain Regulations issued by the EEOC. The final regulations promulgated in order to reflect the changes made to the ADA by the ADAAA, were published in the Federal Register on March 25, 2011.

While the ADAAA retains the basic definition of “disability” set forth above, **the new law reflects the intent of Congress to decisively broaden coverage of the ADA**³³ in response to the narrow definition of “disability” set forth by the U.S. Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002)³⁴ and Sutton v. United Airlines, Inc., 527 U.S. 471 (1999):

(a) The ADAAA **expands the definition of “major life activities”** by including two non-exhaustive lists.

The first list includes a variety of **activities of daily living**,³⁵ including “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”³⁶

The second list includes **major bodily functions** e.g., “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”

(b) The ADAAA instructs that the term “substantially limits” should be construed broadly in favor of expansive coverage – the analysis may include, if relevant, the “condition,” the “manner” and the “duration” of under which a major life activity can be performed in determining whether the impairment at issue is a disability;

(c) The ADAAA Regulations identify specific types of impairments that should easily be concluded to be disabilities and examples of major life activities (including major bodily functions) that the impairments substantially limit. **The impairments include: deafness, blindness, intellectual disability (formerly known as mental retardation), partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia;**

³² The ADAAA does not apply retroactively to discriminatory acts that occurred before January 1, 2009

³³ For an excellent summary of the ADAAA see “Congress Redefines the Scope of Disability Rights under the ADA”, Marie M. Joes, Esquire and James D. Miller, Esquire, Meyer, Darragh, Buckler, Bebnick & Eck, P.L.L.C., Pittsburgh, PA, Counterpoint, Pennsylvania Defense Institute (January, 2009).

³⁴ Id.

³⁵ Id.

³⁶ The EEOC has recognized “walking” as a major life activity, but has never construed the phrase to include “reading,” “bending” or “communicating.”

(d) The ADAAA clarifies that an impairment that is episodic or in remission is a “disability” if it would substantially limit a major life activity when active, e. g. **epilepsy, hypertension, asthma, diabetes, major depressive disorder, bipolar disorder, schizophrenia**;

(e) The ADAAA makes clear that the **positive effects of mitigating measures,³⁷ other than “ordinary eyeglasses or contact lenses”** shall not be considered in assessing whether an individual suffers from a “disability” for ADA purposes. By drafting the ADAAA in such a manner, Congress specifically rejected the Supreme Court’s reasoning in Sutton v. United Airlines, 527 U.S. 471 (1991) while instructing the courts to analyze conditions “without regard to the ameliorative effects of mitigating measures, such as medication, medical supplies or equipment, prosthetics, assistive technology, reasonable accommodations or auxiliary aids, or behavioral or adaptive neurological modifications.” **Other determinations – including the need for reasonable accommodation and whether an individual poses a significant risk of harm to self or others – can take into account both the positive and negative effects of a mitigating measure, e.g. a person with epilepsy may no longer need permission for unscheduled breaks as a reasonable accommodation after switching to a different medication that completely controls seizures**;

(f) The ADAAA provides that an individual subjected to an action prohibited by the ADA such as a failure to hire because of an actual or perceived impairment, will meet the “regarded as” definition of disability, unless the impairment is transitory and minor;

(g) The ADAAA provides that individuals covered only under the “regarded as” prong are not entitled to reasonable accommodations.

(h) The ADAAA and the regulations specifically state that changes to the ADA do not alter the standards for determining eligibility for benefits under State workers’ compensation laws or under Federal and State disability benefit programs.

2. **What is Not a Disability Under the ADA?**

The advent of the ADAAA begs the question, what types of conditions or impairments are not considered “disabilities” under the ADA?

Ordinary personality traits such as irritability, poor judgment or chronic lateness are not “disabilities” under the ADA.

The enumerated list of conditions not covered by ADA probably does not afford a great deal of guidance for the Human Resource director faced with the more common physical or emotional complaints presented by their employment staffs:

³⁷ Mitigating measures such as medication, medical equipment, prosthetic limbs, low vision devices, hearing aids, mobility devices, oxygen therapy equipment, physical therapy, psychotherapy, learned behavioral or adaptive neurological modifications.

- a. Pregnancy;
 - b. Illegal Use of Drugs; Resulting Psychoactive Substance Abuse Disorders;³⁸
 - c. Alcoholism³⁹;
 - d. Homosexuality, Bisexuality
 - e. Transvestism, Transsexualism;
 - f. Pedophilia, Exhibitionism, Voyeurism, Gender Identification Disorders;
 - g. Compulsive Gambling, Kleptomania;
 - h. Pyromania⁴⁰
3. **Comparing “Disability” Under the ADA and the Act**

Since both the ADA and the Workers’ Compensation Act seek to identify and, in various ways, ameliorate the consequences of “disability,” the reader should be mindful of how the concept is defined and addressed under each statutory scheme.

First, it is important to consider that under the Pennsylvania Workers’ Compensation Act the word “disability” is a term of art that does not address simply the physical and/or emotional ability of the injured worker to engage in gainful employment. Rather, the term contemplates two elements – “work injury” and “wage loss.” In other words, in order for an employee to be “disabled” under the Act, he or she must suffer a work injury that results in a corresponding wage loss, i.e. **“injury + wage loss = disability.”** Dillon v. Workmen’s Compensation Appeal Board (Greenwich Collieries), 536 Pa. 490, 640 A.2d 386 (1994); Howze v. Workers’ Compensation Appeal Board (General Electric Co.), 714 A.2d 1140 (Pa Cmwlth. 1998). Accordingly, where the employee suffers a work injury and only a partial wage loss, he or she will be deemed to be “partially disabled” and where the employee suffers a work injury and a corresponding wage loss that is total, he or she will be deemed to be “totally disabled.”

Under the ADA, the concept of “disability” does not include an economic component, **but refers to actual or perceived physical or emotional impairment**, without immediate regard for any corresponding wage loss.

³⁸ An individual who has completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs or who is participating in such a program and is no longer engaging in the illegal use of drugs shall not otherwise exclude the employee as a qualified individual with a disability.

³⁹ See 42 U.S.C. §12114.

⁴⁰ See 42 U.S.C. §12211.

In Lloyd v. Washington & Jefferson College, *supra*, a college professor, after having been granted FLMA coverage for the effects of work stress and agoraphobia, was found not to have presented a “disability” under the ADA because despite his emotional condition he remained capable of working and teaching on campus three days per week, as well as serving as a councilman, engaging in family and social outings and spending weekend hours working on IT projects and course development. In dismissing the professor’s ADA lawsuit by summary judgment, the Third Circuit agreed that his alleged inability to be on campus more than three days per week was not sufficient to establish that he was substantially limited in a major life activity.⁴¹

4. Convergence of the ADA and the Act

The following are some general rules to remember when the ADA and the Workers’ Compensation Act converge:

(a) Not everyone with an occupational injury has a “disability” as defined by the ADA, i.e. an occupational injury may not be severe enough to “substantially limit a major life activity”;

(b) An employer may ask a prospective employee about a prior workers’ compensation claim only after providing a conditional offer of employment;

(c) An employer may ask a prospective employee to undergo a physical examination to obtain information about the existence or nature of a prior occupational condition, but **only after providing a conditional offer of employment so long as the employer requires all entering employees in the same job category to have a medical examination**;

(d) Before making a conditional offer of employment the employer may not obtain information about an applicant’s prior workers’ compensation history from former employers, state workers’ compensation agencies or services that provide such information;

(e) The ADA requires **confidentiality** of the injured worker’s occupational injury and workers’ compensation claim;

(f) The employer may not refuse a return to work of an employee suffering from an occupational disability simply because it believes that the employee poses some increased risk of re-injury or will increase its workers’ compensation costs, **unless** the employer can demonstrate that the employee poses a “direct threat,” or, a “**significant risk of substantial harm that cannot be lowered or eliminated by a reasonable accommodation**”;

⁴¹ The reader should note that the case was decided before the enactment of the ADAAA.

(g) **The employer cannot condition a return to work on the occupationally injured employee's ability to do so on a full-duty basis, if the disability prevents him or her from performing only marginal functions of the position, or if a reasonable accommodation will allow him to him or her to perform the essential functions of the job;**

(h) An employer may not refuse to permit an injured employee to return to work simply because the workers' compensation system has declared the worker to be "totally disabled" or to be suffering from a "permanent disability";

(i) The ADA does not require the employer to make a reasonable accommodation for the injured worker if the worker does not suffer from a "disability" as defined by the ADA;

(j) An employer may not fire an injured worker who is temporarily unable to work because of a disability-related occupational injury where a reasonable accommodation can be made and will not pose an undue hardship⁴² for the employer;

(k) As a reasonable accommodation, the employer must reallocate job duties for the injured worker, provided those duties involve marginal functions of the job that the employee is incapable of performing;

(l) The employer cannot unilaterally re-assign an injured worker to a new position unless it has first determined that the worker cannot perform the essential functions of the pre-injury job;

(m) **The employer is under no obligation to create a new position or bump another employee where there is no vacancy for an injured employee who can no longer perform the essential functions of his or her pre-injury job;**

(n) But the employer must re-assign the employee to a new position that is comparable to the pre-injury position if there is a vacancy for which the employee is qualified⁴³, or if there is an available lower graded position, absent any undue hardship to the employer;

(o) The employer is permitted to modify a position - a modification that would not qualify as required reasonable accommodation - in order to reduce workers' compensation costs - **meaning that the ADA does not prohibit the employer from creating a light-duty position for the injured employee;**

⁴² An "undue hardship" is one that causes the employer significant difficulty or expense - one that would be unduly costly, disruptive or one that would fundamentally alter the nature or operation of the business. See "Employers' Obligations to Applicants and Employees Pursuant to Title I of the ADA" Jeffrey L. Braff, Esquire, 12th Annual Employment Law Institute (PBI 2006).

⁴³ See discussion below addressing unsettled question of whether the employer is obligated to award the vacant position to the disabled employee over more qualified applicants.

(p) **The ADA does not require the creation of a light-duty job for a non-occupationally injured employee, but if the employer reserves light-duty positions for occupationally injured employees, it must also make such positions available for non-occupationally injured employees, if a position is vacant;**

(q) **If the employer has temporary light-duty work for the occupationally injured worker, it need not provide the worker with a permanent light-duty job; and**

(r) The workers' compensation "exclusive remedy provision" does not preclude the employee from pursuing an ADA claim against the employer⁴⁴.

5. ADA Component to the Act?

Section 306(b)(2) of the Act contains language that one could argue borrows from the ADA notion of "reasonable accommodation" by instructing, in pertinent part, that "[i]f the employer has a specific job vacancy the employe (sic) is capable of performing, the employer shall offer such job to the employe (sic)."

It is also important to consider that under the longstanding Pennsylvania common law tradition, employers of injured workers are not only responsible for the payment of wage loss benefits and medical coverage, **but are also responsible for re-introducing the worker into the labor market**, by locating and referring suitable open and available employment. See Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction), 516 Pa. 240, 532 A.2d 374 (1987).

And yet it appears that an employer could face ADA liability following the occurrence of a compensable work injury, by refusing to bring an injured employee back to work in an available job, comparable to the pre-injury job, while retaining the services of a vocational specialist to perform either a Kachinski job search or labor market analysis. See Cleveland v. Policy Management Systems Corporation, 119 S. Ct. 1597 (1999)(United States Supreme Court rules that individual's receipt of Social Security Disability benefits does not estop him or her from prosecuting an ADA claim i.e. an individual who has received Social Security Disability benefits is not necessarily precluded from arguing that he or she is a "qualified individual with a disability" under the ADA, suggesting that a claimant receiving workers' compensation benefits could, under certain circumstances, prosecute an ADA claim).⁴⁵ See also EEOC "Guidance on

⁴⁴ Where the injured employee returns to work for another employer in a modified capacity, only to be discharged by the new employer in violation of the ADA, the employer liable for the reinstatement of total disability benefits will **not be permitted** to assert a subrogation lien against any ADA award the injured worker might obtain from the discharging employer. See Brubacher Excavating, Inc. v. Workers' Compensation Appeal Board (Bridges), 774 A.2d 1274 (Pa. Cmwlth. 2001).

⁴⁵ See "The Employer's 'Bermuda Triangle': An Analysis of the Intersection Between Workers' Compensation, ADA and FMLA," Gregory G. Pinski and Angela L. Rud, 76 North Dakota Law Review, (2000), citing Haschmann v. Time Warner Entertainment Co. 151 F.3d 591 (7th Cir. 1998) (the court refuses to adopt a per se rule precluding a plaintiff from asserting an ADA claim while receiving disability payments) and McNemar v. Disney Store, Inc., 91 F.3d 610 (3rd Cir. 1996) (an

the Effect of Disability Representations in Benefits applications on ADA Coverage” in 1997, instructing that representations made in applications for Social Security, workers’ compensation and other disability benefits should not automatically bar an ADA claim.⁴⁶

6. THE LAW OF “REASONABLE ACCOMODATION”⁴⁷

The duty to make “reasonable accommodations” to qualified individuals with disabilities is considered one of the most important features of the ADA. In order to facilitate this fundamental process, the ADA may require the **restructuring of jobs by reallocating or reassigning marginal job functions, modifying work schedules, altering of the lay-out of work stations, and/or modifying work equipment.**⁴⁸

In considering the issue, it is important to understand that “reasonable accommodation” contemplates the removal of **workplace barriers**, meaning that **non-workplace barriers** generally do not fall within the employer’s reasonable accommodation obligation. Workplace barriers may be **physical**, such as inaccessible facilities or equipment, or “**procedural**,” e.g. rules concerning when or where work is performed, when breaks are taken, when leave is given, or how tasks are accomplished. The ADA, the EEOC and the courts have identified the following accommodations that an employer may be required to provide: **job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquiring or modifying equipment; changing exams, training materials, or policies and providing qualified readers or interpreters.** See 42 U.S.C. 12111(9); 29 C.F.R. § 1630.2(o)(2).

It is also important to understand that a “reasonable accommodation” can involve a “**preference**” for an employee with a disability so she or he can “obtain the **same** workplace opportunities that those without disabilities automatically enjoy.” U.S. Airways, Ins. v. Barnett, 535 U.S. 391, 122 S. Ct. 1516 (2002) (“by definition any special ‘accommodation’ requires the employer to treat an employee with a disability differently, i.e. preferentially”). In Holly v. Clairson Industries, LLC, 492 F.3d 1247 (11th Cir. 2007), the court observed that “the very purpose of reasonable accommodation laws is to require employers to treat disabled individuals differently in some circumstances – namely, when different treatment would allow a disabled individual to perform the essential functions of his position by accommodating his disability without posing an undue hardship on the employer.”

There are three general categories of reasonable accommodation:

individual’s representation to the Social Security Administration that he was disabled and unable to work barred his subsequent ADA claim.)

⁴⁶ Id.

⁴⁷ The authors are grateful to David K. Fram, Esquire of the National Employment Law Institute for allowing the utilization of select texts from his paper “*Resolving ADA-Workplace Questions*” (NELI 2008).

⁴⁸ Id.

(a) Changes to the **job application process** so that a qualified applicant with a disability can be considered for the job;

(b) Modifications to the **work environment** – including how or when or where a job is performed – so that a qualified individual with a disability can perform the job; and

(c) Changes so that an employee with a disability can enjoy **equal benefits and privileges** of employment.

The EEOC has taken the position that an employer may need to provide a reasonable accommodation even if the individual does not require an accommodation to perform the essential functions of the particular job assignment. For example, the EEOC argued in one case that even though the employee was able to perform her essential functions as a software engineer, the employer had to consider allowing her to work at home because her doctor felt this would be “advisable” in light of complications she was experiencing following cancer surgery. See EEOC’s Brief in Rauen v. U.S. Tobacco, No. 01-3973 (Brief filed in Seventh Circuit, 8/9/02).

A. Unpaid Leave as a Reasonable Accommodation

As noted above, unpaid leave may be a reasonable accommodation in certain instances. See Appendix to 29 C.F.R. §160.2(o); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship. No. 915.002 (10/17/02) at Question 16. For example, where an individual is recovering from an illness, or taking some other action in connection with his or her disability, such as training a guide dog.

Although there is general agreement that unpaid leave **can be** a reasonable accommodation, there has been some disagreement as to whether the employee’s job must be held open on an indefinite basis. See EEOC Fact Sheet: “The FMLA, the ADA, and Title VII of the Civil Rights Act of 1964” at p. 7 (Question 14), and EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 18.

Most courts have held that an employer **need not provide indefinite leave** as a reasonable accommodation. See Krensavage v. Bayer Corp., 2008 U.S. App. LEXIS 1290 (3d Cir. 2008) (unpublished)(“open-ended disability leave” is not a reasonable accommodation where there is no “expected duration” for the leave.); Fogelman v. Greater Hazleton Health Alliance, 2004 U.S. App. LEXIS 26861 (3d Cir. 2004) (unpublished)(although leave is an accommodation when it would enable the individual to perform essential functions “within a reasonable amount of time,” leave “for an indefinite and open-ended period of time” does “not constitute a reasonable accommodation.”)

B. Job Restructuring as a Reasonable Accommodation

“Job restructuring” means modifying the employee’s job in order to **reallocate or redistribute nonessential job functions**, or altering when and/or how a function of the job is performed. 42 U.S.C. §12111(9)(B); 29 C.F.R. §1630.2(o)(2)(ii), Appendix.

Job restructuring can also involve **changing the way essential functions have traditionally been performed**. For example, in EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561 (8th Cir. 2007), the court held that the employer may have been able to accommodate the plaintiff, suffering from cerebral palsy, by allowing him to use certain equipment such as a wheelchair, scooter, and hand scanner while working as a greeter or cashier.

C. Transitional Duty as a Reasonable Accommodation

Since an employer is **never required to reallocate essential functions**, it is **not required to create** a new job, such as a transitional or light duty job that relieves the employee from having to perform his or her essential job functions. See Haines v. Bethlehem Lukens Plate Steel, 2001 U.S. App. LEXIS 24678 (3d Cir. 2001) (unpublished)(**court notes that “an employer is not required to create a light duty position for the disabled employee” while holding that “assignment to an existing permanent light duty position is a reasonable accommodation”**).

If, however, the employer has existing light duty jobs – as many employers do – it may be required to **re-assign** the disabled employee to one of those jobs if re-assignment is required as a reasonable accommodation. For example, in Howell v. Michelin Tire Corp., 860 F. Supp. 1488 (M.D. Ala. 1994), the court stated that re-assignment to an existing vacant light-duty job is a reasonable accommodation for someone who cannot perform his original job anymore because of a disability. Similarly, the EEOC has taken the position that “if an employer already had a vacant light duty position for which an injured worker is qualified, it might be a reasonable accommodation to re-assign the worker to that position.” EEOC Technical Assistance Manual, Ch. 9.4.

One question that is commonly raised is whether an employer is permitted to create a light duty job for only a temporary period of time. The EEOC has stated that **“an employer is free to determine that a light duty position will be temporary rather than permanent.”** EEOC Enforcement Guidance: Workers’ Compensation and the ADA, in Graves v. Finch Pruyn & Co., 457 F.3d 181 (2d Cir. 2006).

In Shiring v. Runyon, 90 F.3d 827 (3d Cir. 1996), an injured mail carrier could not physically deliver the mail. The U. S. Postal Service created a temporary job for him that required him to sort the mail, but not deliver it. Later, when it became clear that the employee would be unable to return to a delivery position, the plaintiff claimed, among other things, that the employer was obligated to allow him to continue performing the light-duty assignment. The court disagreed, explaining that the employer had no obligation to create a permanent job simply because it had agreed to create the light-duty job in order “to give [the plaintiff] something to do on a temporary basis.” See also Mengine v. Runyon, 114 F.3d 415 (3d Cir. 1997)(U.S. Postal Service “not required to

transform its temporary light duty jobs into permanent jobs” in order to accommodate the employee.)

D. Reserving Light-Duty Jobs for Occupational Injuries

Another difficult – and controversial – question is whether an employer can reserve light-duty jobs for only on-the-job-injuries. An argument can be made that such a policy does not violate the ADA because it does not discriminate **based upon disability**, but discriminates based upon **where** the employee was injured.

The EEOC has stated that an employer **may create light duty positions solely for employees who are injured on the job.** EEOC Enforcement Guidance: Workers’ Compensation and the ADA, No. 915.002 (9/3/96), at p. 20.

The EEOC has also taken the position, however, that an employer **cannot** reserve **existing light duty jobs for on-the-job injuries**, but must consider re-assigning **any** disabled employee, including those suffering from non-occupational injuries, to such an existing job if it is vacant and if it is required by the employee as a reasonable accommodation. EEOC Enforcement Guidance: Workers’ Compensation and the ADA, No. 915.002 (9/3/96), at p. 22. **This Guidance is available on the internet at www.eeoc.gov.**

More recently, the EEOC stated in an informal guidance letter, that “[w]hether a policy of creating light duty positions for employees who are injured on the job while not creating the same for employees with disabilities that are not caused by work-related injuries would have an adverse impact on employees with disabilities must be determined on a case-by-case basis.⁴⁹

Indeed, employers should keep in mind that disability-rights advocates are likely to challenge these policies using a “disparate impact” argument i.e. the policy has a disparate impact against certain types of disabilities that are not typically workplace injuries, such as cancer and AIDS. In addition, the practice of reserving light-duty work for occupational injuries only might be challenged under Title VII of the Civil Rights Act of 1964 since such a program might discriminate against pregnant women.

E. Changing an Employee’s Supervisor as a Reasonable Accommodation

The EEOC has stated an **employer is not required to change an employee’s supervisor as a reasonable accommodation.** EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 33.

⁴⁹ See January 28, 2000 Informal Guidance letter issued by Christopher J. Kuczynski, Assistant Legal Counsel.

In Steinmetz v. Potter (USPS), 2005 EEOPUB LEXIS 5999 (EEOC 2005), the EEOC held that “an employer does not have to provide an employee with a new supervisor as a reasonable accommodation.” The courts seem to agree. In Ozlek v. Potter, 2007 U.S. App. LEXIS 29483 (3d Cir. 2007) (unpublished), the court ruled that the employee was not entitled to transfer to new supervisor as a reasonable accommodation.

F. Work-at-Home as a Reasonable Accommodation

The EEOC and most courts take the position that **the actual physical location of the job performance is a policy that may have to be modified as a reasonable accommodation**. In Woodruff v. Peters, 482 F.3d 521 (D.C. Cir. 2007), for example the court ruled that work-at-home could be a possible reasonable accommodation for an employee who supervised a team that was allegedly “self-directed,” since the agency’s handbook anticipated telecommuting for up to five days per week, and the employee had been working at home for part of each week for several months.

In EEOC v. Spectacor Management Group, Civ. Act. No. 95-2688 (E.D. Pa., Settled: 6/95), the EEOC maintained that the employer was obligated to provide the opportunity to work at home as a reasonable accommodation. In that case, the employee allegedly needed to work at home in order to receive medical treatment for his AIDS condition. See also EEOC’s Brief in Rauen v. U.S. Tobacco, No. 01-3973 (Brief filed in Seventh Circuit 8/9/02)(EEOC urges that “home office” may be a required accommodation for employee whose doctor suggested that it would be “advisable” because of complications from her cancer surgery, even though the employee could perform the job’s essential functions in the office.)

Finally, the EEOC has stated in its “EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002” (10/17/02) at Question 34, that an employer “must modify its policy concerning where work is performed” to allow an employee to work at home if this accommodation is effective and would not cause an undue hardship.

G. Modified Work Schedule as a Reasonable Accommodation

An employer, in certain circumstances, may be required to modify a disabled employee’s work schedule as a reasonable accommodation. 42 U.S.C. 12111(9); 29 C.F.R. §1630.2(o)(2)(ii).

There seems to be general agreement that a work schedule can include a number of modifications, such as altering arrival/departure times, providing periodic breaks during the day or changing when certain functions are performed. The key question – in **all** cases – is whether there is a nexus between the disability and the requested schedule; that is, whether the modified schedule is truly needed **because** of the disability. In Conneen v. MBNA America Bank, N.A., 334 F.3d 318 (3d Cir. 2003), the employer argued that arriving at work at 8:00 a.m. was an essential function of the job of a Marketing Production Manager, since managers must set a good example for other employees. The employer argued that the employee was not qualified where she

could not report to work until 9:00 a.m. because of her depression. The court held that “setting a good example” was not sufficient to render the 8:00 am schedule “essential,” thereby permitting the modified schedule as a reasonable accommodation.

H. Job Re-Assignment as a Reasonable Accommodation

The courts have consistently held that an employer must, in certain circumstances actually **re-assign** the impaired employee as a reasonable accommodation, based on the clear language of the statute. 42 U.S.C. §12111(9)(B). This is one of the provisions that distinguish the ADA from the Rehabilitation Act (prior to the 1992 amendments to the Rehabilitation Act, which made it consistent with the ADA). Under the pre-amendment Rehabilitation Act, some courts held that reasonable accommodation did not include re-assignment.

In Haines v. Bethlehem Lukens Plate Steel, 2001 U.S. App. LEXIS 24678 (3d Cir. 2001) (unpublished), the court noted that re-assignment to an existing position is a reasonable accommodation. In that case, the plaintiff alleged that a vacant, permanent light duty position existed with the employer. In Shapiro v. Township of Lakewood, 292 F.3d 356 (3d Cir. 2002), the court held that the employer could not refuse a re-assignment request under the ADA simply because the request did not adhere to the employer’s policy requiring employees to formally apply for specific openings.

The Third Circuit has ruled that when an employee brings a “**failure-to-transfer**” claim against the employer, he or she bears the burden of establishing: (1) there was a vacant, funded position; (2) the position was at or below the level of the employee’s former job and (3) the employee was qualified to perform the essential duties of the vacant job with reasonable accommodations. Mengine v. Runyon, 114 F.3d 415, 417 (3d Cir. 1997); Donahue v. Consolidated Rail Corp., 224 F.3d 226, 230 (3d Cir. 2000).⁵⁰

An interesting question that has yet to be resolved is whether the disabled employee seeking a re-assignment must compete with other qualified non-disabled individuals for the sought-after vacant position.⁵¹

Some courts have ruled that the ADA does not require the employer to turn away a more qualified candidate in order to accommodate a disabled employee. Huber v. Wal-Mart, 486 F.3d 480 (8th Cir. 2007). Some courts have ruled to the contrary – that the ADA requires the employer to award a vacant position to the disabled employee

⁵⁰ The authors wish to thank Tiffanie C. Benfer, Esquire for the use of her analysis and discussion of various reassignment issues under the ADA, in her excellent article, “Does a Disabled Employee Seeking a Reassignment Have to Compete with the Rest of the Applicant Pool? Maybe!” Tiffanie C. Benfer, Esquire, Hill Wallack, LLP, Quarterly Newsletter, Volume 19, Number 1.

⁵¹ Id. The United States Supreme Court has ruled that a reassignment is unreasonable if it violates the employer’s established seniority system. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 122 S. Ct. 1516 (2002).

even if the employee is less qualified for the position than other applicants. See Aka v. Washington Hospital, 156 F.3rd 1284 (10th Cir. 1998).

I. Salary/Benefits of Reassigned Employee

There appears to be general agreement that the employer has no obligation to provide the reassigned employee his or her original salary, or to maintain his or her original benefits, if the position to which the employee has been reassigned pays a lower salary. The EEOC has indicated that in cases of reassignment to lower-level positions, an employer is not required to maintain the reassigned individual at the salary of the higher graded position if it does not so maintain reassigned employees who do not have disabilities. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 30. Courts have reached this same result. For example, as noted earlier, in Jenkins v. Cleco Power LLC, 487 F.3d 309 (5th Cir. 2007), the court held that a reassigned disabled employee has no right “to receive the same compensation as he received previously.” Similarly, in Cassidy v. Detroit Edison Co., 138 F.3d 629 (6th Cir. 1998), the court specifically noted that if a comparable position is not available, the employer may reassign the employee to “a lower grade and paid position.” If, however, the employer agrees to pay employees without disabilities their higher salary or original benefits package following reassignments to lower-level positions (for example, in connection with a plant closing), it should do the same for employees with disabilities (or risk a disparate treatment lawsuit).

7. THE MECHANICS OF “REASONABLE ACCOMMODATIONS”

A. The Employee’s Obligation to Request the Reasonable Accommodation.

The generally accepted rule is that a disabled individual must request an accommodation.

Indeed, the EEOC has stated, that, in general, “it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed.” Appendix to 29 C.F.R. §1630.9; EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at “General Principles” and Question.⁵² In Williams v. James (OPM), 2004 EEOPUB LEXIS 999 (EEOC 2004), the EEOC stated that “an individual with a disability should request a reasonable accommodation when she knows that there is a barrier that is preventing her from

⁵² See also 7/29/98 Informal Guidance letter from Christopher J. Kuczynski, Assistant Legal Counsel (“In order to receive a reasonable accommodation, an employee with a disability must request one from the employer. The employee should explain why a particular accommodation is needed.”)

performing the job.” The EEOC did not find it an acceptable excuse that the employee did not disclose her disability (HIV) and need for accommodation (a modified schedule) because she “was afraid of being judged.”

The EEOC’s internal procedures on reasonable accommodation provide, however, that the employee may request an accommodation “from his/her supervisor; another supervisor or manager in his/her immediate chain of command; the Office Director; or the Disability Program Manager.” Internal EEOC “Procedures for Providing Reasonable Accommodation for Individuals with Disabilities” (2/2001) at II.

B. The Content of the Employee’s Request for Reasonable Accommodation

The general rule is that **the employee need not utter magic words** in order to perfect a valid request for reasonable accommodation under the ADA.

In the past, the EEOC has maintained that, **“if an employee requests time off for a reason or possibly related to a disability e.g. ‘I need six weeks off to get treatment for a back problem’ the employer should consider this a request for ADA reasonable accommodation as well as FMLA leave.”** See EEOC Fact Sheet: “The FMLA, the ADA, and Title VII of the Civil Rights Act of 1964” at p. 8 (question 16). **This Fact Sheet is available on the internet at www.eeoc.gov.**

The courts have similarly endorsed the proposition that the employee need not articulate certain “magic” language such as “reasonable accommodation” in order to perfect a valid request. For example, in EEOC v. Sears, 417 F.3d 789 (7th Cir. 2005), the court held that the **interactive process is triggered** even when “notice is ambiguous as to the precise nature of the disability or desired accommodation.” The court explained that “it is sufficient to notify the employer that the employee may have a disability that requires accommodation.” At that point, the employer can ask for clarification, but “cannot shield itself from liability by choosing not to follow up on an employee’s requests for assistance, or by intentionally remaining in the dark.” In this case, the court observed that the employee’s notification to supervisors that she wanted to use a shorter route through a stockroom because the otherwise long walk was difficult for her was enough to put the employer on notice that she had leg problems and needed permission to sue the shortcut. See also Armstrong v. Burdette Tomlin Memorial Hospital, 438 F.3d 240 (3d Cir. 2006)(although the employee must request an accommodation, the request need not be specific.)

Similarly in McGinnis v. Wonder Chemical Co., 5 AD Cases 291 (E.D. Pa. 1995), the court rejected the employer’s argument that the plaintiff was not qualified for his Truck Maintenance Supervisor job - requiring heavy lifting, bending, and twisting. In that case, the employee claimed that he could perform the essential functions with reasonable accommodations. The court implicitly agreed that the employer **was** on notice of the need for reasonable accommodation because the employee told his supervisor that his pain prevented him from working. Interestingly, in this case, the court noted that the employer was **also** on notice of the employee’s need for FMLA

leave. Therefore, employers should carefully monitor **FMLA leave requests** to determine whether the individual also is requesting an ADA reasonable accommodation.

The EEOC has stated that requests for accommodation do not need to be in writing.

Although the employer may ask the individual “to fill out a form or submit the request in written form,” the employer cannot ignore an oral request. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA, No. 915.002 (10/17/02), at Question 3. The EEOC’s internal procedures on reasonable accommodation require, however, that the employee to submit a written request confirming any oral request for accommodation. See Internal EEOC “Procedures for Providing Reasonable Accommodation for Individuals with Disabilities” (2/2001) at III (“employees seeking a reasonable accommodation **must follow up an oral request either by completing the attached ‘Confirmation of Request’ form or otherwise confirming their request in writing (including by e-mail) to the Disability Program Manager.... While the written confirmation should be made as soon as possible following the request, it is not a requirement for the request itself. EEOC will begin processing the request as soon as it is made, whether or not the confirmation has been provided.**”) (bold in original). Courts would likely agree with EEOC’s position. For example, as noted earlier, in Parkinson v. Anne Arundel Medical Center, 2003 U.S. App. LEXIS 22442 (4th Cir. 2003) (unpublished) the court noted that requests for accommodation need not necessarily be in writing.

In addition, at least one Court of Appeals has ruled that an employee may need to follow the procedures in the applicable collective bargaining agreement for communicating the need for reasonable accommodation. See Lockard v. General Motors Corp., 2002 U.S. App. LEXIS 25787 (6th Cir. 2002) (unpublished)(employee did not properly request a reasonable accommodation because he did not use the procedures required by the collective bargaining agreement.)

C. Employer’s Duty to Engage in Interactive Process When Accommodation is Requested

Once an accommodation has been requested, the employer is obligated to initiate an **interactive process** with the individual.

In Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000), vacated on other grounds, 535 U.S. 391, 122 S. Ct. 1516 (2002), the Supreme Court explained that **the “interactive process” requires the employer to “analyze job functions to establish the essential and nonessential job tasks,” to “identify the barriers to job performance” by consulting with the employee to learn “the precise limitations” and to learn “the types of accommodations which would be most effective.”** In Taylor v. Phoneixville School District, 184 F.3d 296 (3rd Cir. 1999) the Third Circuit observed that the interactive process “as its name implies, requires the employer to take some initiative” and that “the interactive process would have little meaning if it was interpreted to allow the

employer, in the face of a request for accommodation, simply to sit back passively, offer nothing, and then, in post-termination litigation, try to knock down every specific accommodation as too burdensome. That's not the proactive process intended: it does not help avoid litigation by bringing the parties to a negotiated settlement." The Taylor court noted that employers can demonstrate good faith during the interactive process by "taking steps like the following: **meet with the employee who requests the accommodation, request information about the condition and what limitations the employee has, ask the employee what he or she specifically wants, show some sign of having considered employee's request, and offer an discuss available alternatives when the request is too burdensome.**"

Still, the court concluded that an employer who acts in bad faith during the interactive process will be liable under the ADA only "if the jury can reasonably conclude that the employee would have been able to perform the job with accommodations." See also Donahue v. Consolidated Rail Corporation, 224 F.3d 226 (3d Cir. 2000); Mengine v. Runyon, 114 F.3d 415 (3d Cir. 1997)(the court rules that there is no independent legal violation by failing to engage in the interactive process, but that "if an employer fails to engage in the interactive process, it may not discover a way in which the employee's disability could have been reasonably accommodated, thereby risking violation" of the law.)

D. Documenting Disability When Reasonable Accommodation is Requested

If an employee requests a reasonable accommodation, the employer may ask him or her for information regarding the disability.

For example, the employer is entitled to know that the individual has a **covered disability** and that she or he requires an accommodation **because of the disability**.

In its "ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations" (10/10/95), the EEOC has stated that if the disabled employee requests a reasonable accommodation in the context of disability and/or the need for accommodation that is not obvious, **the employer may ask for reasonable documentation describing the employee's disability and functional limitations**. This Guidance is available on the internet at www.eeoc.gov. In its "Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002" (10/17/02) at Question 6, the EEOC reiterated that an employer cannot ask for unrelated information, "in most situations, an employer cannot request a person's complete medical records because they are likely to contain information unrelated to the disability at issue and the need for accommodation."

For example, in cases where a disability is not obvious, an employer "may ask the employee for documentation describing the impairment; the nature, severity, and duration of the impairment; the activity or activities that the impairment limits and the extent to which the impairment limits the employee's ability to perform the activity or activities." The EEOC has also stated that an individual "can be asked to

sign a limited release allowing the employer to submit a list of specific questions” to the individual’s “health care or vocational professional.”

In addition, **the EEOC has written that an employer may require the individual to go to the health professional of the employer’s choice if the individual provides insufficient information.**” In such a case, however, the EEOC has cautioned that the employer “should explain why the documentation is insufficient,” “allow the individual to provide the missing information,” and “pay all costs associated with the visits(s)” to the employer-chosen health professional. Guidance at p. 13-16.

E. Employee’s Failure to Cooperate in Providing Medical Documentation and/or Identifying Reasonable Accommodation

Failing to cooperate in the interactive process can be fatal to an individual’s ADA claim for reasonable accommodation.

Cooperation can include a number of things, such as being willing to try an accommodation, being willing to discuss alternatives, and providing needed documentation. The EEOC has stated that during the interactive process, the individual “does not have to be able to specify the precise accommodation” needed, but “s/he does need to describe the problems posed by the workplace barrier.” In Whelan v. Teledyne Metal Working Products, 2007 U.S. App. LEXIS 6268 (3d Cir. 2007) (unpublished), the court held that the employee was responsible for the breakdown in the interactive process that occurred by insisting upon a single accommodation that was “unreasonable as a matter of law.”

In addition, it appears that an employer may require cooperation in determining whether an accommodation continues to be needed. For example, in Conneen v. MBNA America Bank, N.A., 334 F.3d 318 (3d Cir. 2003), the employer had given the employee a temporarily modified schedule, allowing her to come to work one hour late because of morning sedation caused by her anti-depression medication. Some time later, a new supervisor requested that the employee return to her regular schedule - the employee agreed that she could work the regular hours. When the employee continued to be late, the employee blamed her tardiness on heavy traffic, her parents, and her dog’s “gastric distress.” After she was terminated, the employee claimed that the employer should have continued the modified schedule. The court disagreed, however, noting that the employee never requested a continuation of her modified schedule, and that an employer “cannot be held liable for failing to read [the employee’s] tea leaves.” The court observed that the employee “had an obligation to truthfully communicate any need for an accommodation, or to have her doctor do so on her behalf if she was too embarrassed to respond to MBNA’s many inquires into any reason she may have had for continuing to be late.”

F. Employer’s Right to Choose the Accommodation

An employer is obligated to provide an effective accommodation – **not necessarily** the particular accommodation that the employee is seeking or desires. See Appendix to 29 C.F.R. § 1630.9.

Indeed, the EEOC has consistently stated that although an employer must give an “effective” accommodation, it need not be the “best” accommodation.⁵³ Although it should give consideration to the employer’s preferred accommodation, the employer is free to choose any effective accommodation that is less expensive or easier to provide.

While the employee is free to refuse an accommodation offered by the employer, See Appendix to 29 C.F.R. § 1630.9(d), the employer has certainly met its ADA obligations by **offering** an effective accommodation even if the employee chooses not to accept it. In addition, the EEOC and courts have explained that although an employee cannot be forced to accept a reasonable accommodation, if she or cannot perform the job without the accommodation, he or she will not be considered “qualified” under the ADA. 29 C.F.R. §1630.9(d); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 11.⁵⁴

G. Reasonable Accommodations for Temporary Workers

In the case of temporary workers, several issues arise concerning reasonable accommodation. One common question is whether the temporary agency or the client company – the so-called “borrowing employer” – has the obligation to provide accommodations. According to the EEOC, during the application process, the staffing firm or the “lending employer” is the applicant’s prospective employer “because it has not yet identified the client for which the applicant will work.” For that reason, the staffing firm has the obligation to provide accommodations for the application process. EEOC Enforcement Guidance on the Application of the ADA to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms (12/22/00), at C96). **See Guidance on the internet at www.eeoc.gov.** Once a worker has been referred to a client, **both** the lending employer and borrowing employer may be obligated to accommodate **if both qualify as joint employers**.

For workers’ compensation liability purposes, the identity of the injured worker’s “employer” is determined on the basis of “indicia of control” over the workers’ job duties, meaning that depending upon the facts of the particular case, the injured worker may be the employee of the lending employer or the employee of the borrowing employer – but not the employee of both entities. See JFC Temps, Inc. v. Workers’ Compensation Appeal Board (Lindsay and G&B Packing), 545 Pa. 149, 680 A.2d 862 (1996); Red Line Express Co., Inc., v. Workers’ Compensation Appeal Board (Price), 588 A.2d 90 (Pa. Commw. 1991); Accountemps v. Workers’ Compensation Appeal Board

⁵³ See May 15, 1995 Informal Guidance letter from Elizabeth M. Thornton, Deputy Legal Counsel.

⁵⁴ See March 10, 1994 Informal Guidance letter from Philip B. Calkins, Acting Director of Communications and Legislative Affairs (“[i]f an employee refuses an effective reasonable accommodation, but cannot perform a job’s essential functions without it, s/he will no longer be considered qualified.”)

(Myers), 120 Pa. Cmwlth. 489, 548 A.2d 703 (1988); Pennsylvania Manufacturer's Association Insurance Co. v. Workmen's Compensation Appeal Board (Sheffer), 52 Pa. Cmwlth. 588, 590, 418 A.2d 780, 781 (1980) ("When an employee is furnished by one entity to another, the situation is one of 'borrowed employee.' ") See Black v. Labor Ready, Inc. et. al., ___ Pa. Super. ___, ___ A.2d ___ (4/26/10)(borrowing employer estopped from asserting exclusive remedy defense in civil action brought by temporary employee who suffered amputation injury while working in borrowing employer's factory, following borrowing employer's denial of its alleged employer status during workers' compensation litigation).

8. THE LAW OF "UNDUE HARDSHIP"

The ADA and the EEOC's regulations set forth a number of factors that are to be considered in determining whether an accommodation imposes an "undue hardship" on the employer:

- (a) The nature and net cost of the accommodation;
- (b) The financial resources of the facility/facilities, the number of employees at the facility/facilities, the effect on expenses and resources, or other impact on the operation of the facility/facilities;
- (c) The overall financial resources of the entity, the size of the business with respect to the number of employees; the number, type, and location of its facilities; and
- (d) The type of operations of the entity, including the composition, structure, and functions of the workforce, and the geographic separateness and administrative or fiscal relationship of the facility/facilities in question to the covered entity.

D. TITLE VII OF THE CIVIL RIGHTS ACT

The provisions of Title VII apply to employers who employ 15 or more employees for 20 or more weeks in the current or preceding calendar year.

The EEOC and State fair employment practices agencies (FEPAs) enforce Title VII, and may investigate, mediate and file lawsuits on behalf of employees.

An aggrieved individual must file a complaint of the discrimination with the EEOC within 180 days of learning of the discrimination or the individual may forfeit the right to file a lawsuit.

The individual also has the right under Title VII to file a private lawsuit against the alleged discriminatory employer even if the EEOC chooses not to do so.

In an action brought by a complaining party under Sections 706 or 717 of the Civil Rights Act against an employer who engaged in unlawful intentional discrimination may recover compensatory and punitive damages.

Damages may not be awarded where the employer demonstrates good faith efforts to identify and make reasonable accommodations that would provide the individual with equal employment opportunity and would not cause an undue hardship on the operation of the employer's business.

E. **COBRA - CONSOLIDATED OMNIBUS BUDGET RECONCILIATION ACT OF 1986**

The Consolidated Omnibus Budget Reconciliation Act of 1986, commonly referred to as "COBRA" was enacted through amendments to the Employee Retirement Income Security Act⁵⁵ and was signed into law by President Reagan on April 7, 1986.

As noted above, the statute guarantees the covered employee and the employee's family members the right to continued coverage through the employer's group health plan, at the employee's expense, where coverage would otherwise be lost due to certain "qualifying events," e.g. the employee who voluntarily resigns his or her employment or is terminated by his or her employer for any reason other than "**gross misconduct.**"

The statute permits the employee's spouse or children to maintain the group coverage they enjoy regardless of the employee's COBRA election decision, assuming, of course, that the spouse or children were insured under the employer's group plan the day before the "qualifying event." If an employee forgoes COBRA, any of his qualified family members may elect to continue their health insurance benefits under the former employer's plan for up to thirty-six months.

Originally, Title X of the legislation amended the Internal Revenue Code and Public Health Service Act to deny income tax deductions to employers for contributions to group health plans where the employer failed to meet continuing coverage requirements.

The statute now imposes an excise tax on those employers whose health plan fails to provide continuing coverage to qualified employees.

Because the employee - not the employer - must bear the cost of the benefit, COBRA rights are rarely invoked.⁵⁶

⁵⁵ For more information regarding COBRA visit the U.S. Department of Labor's website at www.dol.gov/ebsa/faqs_consumer_cobra

⁵⁶ In 2006 for example only 10% of those eligible to invoke COBRA coverage actually did so. That is because COBRA participation typically comes at a high price. If the employee chooses to continue his or group health plan under COBRA, he or she can be charged one hundred percent of the premiums plus a two percent administrative fee. According to the nonprofit group Families USA, group health coverage for COBRA participants consumes 84% of the average monthly unemployment compensation benefit, rendering participation impossible in many instances. The **American Recovery and Reinvestment Act of 2009** provides qualified COBRA participants with a 65% federal subsidy covering group health insurance premiums for up to fifteen months. An employee can take advantage of this legislation provided he or she becomes

1. Plan Coverage

A worker is eligible for COBRA health insurance coverage where he or she is employed by the following qualified employers: (a) a private sector entity that employs twenty or more employees on more than fifty percent of its typical business days during the previous calendar year enrolled in a group plan; (b) a state or local government; (c) an entity that classifies him or her an independent contractor, or (d) a non-profit organization with twenty or more employees enrolled in a group health plan.

The law grants an exemption from COBRA continuation rules for workers employed by the federal government, certain church-related organizations and private firms employing fewer than twenty individuals.

2. Qualified Beneficiaries

A "qualified beneficiary" is an individual who was covered by a group health plan on the day before a "qualifying event" occurred that caused him or her to lose coverage.

If the employee's employer has more than twenty employees, but does not offer group health coverage, or offers coverage only to certain groups of employees and the employee is not a member of one of those groups, the employee is not a qualified beneficiary and will not be eligible for COBRA coverage.

In addition, if the employee's employer **goes out of business**, thereby ending the group health plan, the employees will not be a qualified beneficiary eligible for COBRA coverage since there is no health plan to "continue" in that instance.

The employee will no longer be eligible for COBRA coverage ends where: (a) he or she exhausts his or her eighteen or twenty-six month COBRA coverage period; (b) he or she does not pay his or her premium; (c) his or her employer chooses to discontinue its group plan; (d) the employer goes out of business; or (e) the employee obtains coverage through another employer group health plan that does not contain any exclusion or limitation regarding pre-existing conditions.

3. Qualifying Events

The key feature of COBRA is the requirement that the employer's group health insurance plan allows the employee and the employee's immediate family members who had been covered by the health care plan, to maintain their coverage where coverage would otherwise be lost due to certain "qualifying events."

eligible for COBRA from September 1, 2008 through June 2, 2010 and provided the employee was involuntarily terminated or experienced a reduction in work hours that led to loss of health insurance benefits. An employee will not be eligible for assistance if his annual income is above \$125,000.00 (single) or \$250,000.00 (joint tax return). Subsidies are reduced for those with modified adjusted gross incomes of up to \$145,000.00 (single) or \$290,000.00 (joint tax return).

Simply stated, a “qualifying event” is an event that causes an individual to lose his or her group health coverage.

The statute references the following “qualifying events”: (a) the death of the covered employee; (b) termination of the covered employee for any reason other than “gross misconduct,” including resignation, lay-off, strike, lockout, medical leave;(c) reduction in hours worked by the covered employee; (d) the covered employee becomes entitled to Medicare; (e) divorce or legal separation of the spouse from the covered employee that terminates the ex-spouse's eligibility for benefits or (f) loss of dependent child status under the plan rules. .

The particular “qualifying event” will yield various forms of continuing coverage:

COBRA COVERAGE

<u>QUALIFYING EVENT</u>	<u>ELIGIBLE BENEFICIARIES</u>	<u>MAXIMUM COVERAGE TIME</u>
Voluntary Termination	<ul style="list-style-type: none"> •Employee •Spouse •Dependent Child 	18 months
Involuntary Termination	<ul style="list-style-type: none"> •Employee •Spouse •Dependent Child 	18 months
Reduced Hours	<ul style="list-style-type: none"> •Employee •Spouse •Dependent Child 	18 months
Total Disability	<ul style="list-style-type: none"> •Employee 	29 months
Employee Entitled To Medicare	<ul style="list-style-type: none"> •Spouse •Dependent Child 	36 months
Divorce Or Legal Separation from Employee	<ul style="list-style-type: none"> •Spouse •Dependent Child 	36 months
Death Of Employee	<ul style="list-style-type: none"> •Spouse •Dependent Child 	36 months
Loss Of Dependent-Child Status	<ul style="list-style-type: none"> •Dependent Child 	36 months

4. Eligible Health Plans

Health plans subject to COBRA include the following: (a) medical plans; (b) dental, vision and prescription drug plans; (c) drug and alcohol treatment programs; (d) fully insured and self-insured group health plans, including HMOs; (e) Employee Assistance Plans, (“EAP”) that provide medical care such as counseling or psychological treatment; (f) on-site health care, including discounted or free medical services; (g) Section 125 flexible spending accounts, also known as cafeteria plans, under certain circumstances.

The following programs **not** subject to COBRA: (a) wellness programs; (b) some church plans; (c) federal government health plans; (d) disability-income policies; (e) Accidental Death and Dismemberment policies; (e) life, disability and long-term care insurance plans, and medical savings accounts (MSAs); and (f) Employee Assistant Plans that do not provide medical care.

5. Health Plan Selection

Employers may, but are not required to, grant the separated employee the option to drop benefits such as dental and vision care while receiving COBRA coverage.

If the employer offers separate health insurance plans such as dental, medical and vision, the separated employee and his or her qualified family members may choose to continue any combination under COBRA. If, however, multiple health benefits are offered through one plan, the separated employee must elect the entire plan or forego the coverage in its entirety.

If the employer changes its health insurance plan for its current employees, the separated employee is entitled to purchase coverage under the new plan.

If the employer switches plans, the separated employee will not be permitted to maintain the old plan, but will be forced to move to the new plan along with the rest of the group.

6. Electing COBRA Coverage

The COBRA rights provided under the plan must be described in the plan’s summary plan description (“SPD”) – a written document that describes the benefits of the plan, the rights of the participants and beneficiaries under the plan and how the plan works.

Before a group health plan must offer a continuation of coverage, it must be notified of the qualifying event.

The employer, **must within thirty days**, notify the plan if the qualifying event is: (a) termination or reduction of hours in the employment of the covered employee; (b)

death of the covered employee; (c) covered employee becomes entitled to Medicare or (d) bankruptcy of employer.

The employee or one of the covered employee's qualified beneficiaries must, **within sixty days**, notify the plan if the qualifying event is: (a) a divorce; (b) legal separation; or (c) a child's loss of dependent status under the plan. .

When the plan receives notice of a qualifying event, the plan must, **within fourteen days**, give the qualified beneficiaries an "**election notice**" describing their rights to continuation coverage and how to make an election.

The qualified beneficiary thereafter has **sixty days** to decide whether to elect COBRA continuation coverage and **forty-five days** after electing coverage to pay the initial premium.

7. Effective Dates of Coverage

The separated employee's COBRA coverage will be effective on a retroactive basis to the date the employee lost his benefits, provided he or she has paid his or her premium.

If the employee enrolls in COBRA on the last day he or she is eligible to do so, the coverage period will commence retroactively to the date he or she lost his or her benefits, provided he or she has paid his or her premium.

If the employee elects to purchase COBRA coverage, he or she may cancel coverage at any time.

8. Interaction with Workers' Compensation Claim

"Qualifying events" occur quite often in the context of a workers' compensation claim.

If the employee becomes totally disabled as a consequence of a work injury, he or she may, pursuant to a collective bargaining agreement or in accordance with employer policy, lose his or her group plan benefit after a period of time, thereby triggering the employee's COBRA rights.

Where, however, the employer administers the work-related disability under FMLA - by counting the absences against the employee's entitlement to unpaid leave - the leave will not be construed as a "qualifying event" but will entitle the employee to continued health coverage in the absence of a COBRA election.

A COBRA qualifying event may occur, however, where the employer's obligation to maintain health benefits under FMLA ceases, e.g. the employee notifies the employer of his or her intent not to return to work following the exhaustion of

FMLA leave, or, where the leave continues in the form of an ADA reasonable accommodation.

It is well-understood that workers' compensation claims are often prompted by an involuntary separation. For example, the employee may file a new workers' compensation claim or re-institute an old claim in order to preserve medical coverage for the work-related condition or assure a continuation of weekly wage loss benefits following an economic lay-off from a light-duty position, or as a measure of retribution following a disciplinary discharge.

Employment separation, in the form of a voluntary resignation, may result in the context of a Compromise and Release settlement where the employer or insurance company insists upon such a condition of settlement.

In each instance the separated employee will be eligible for COBRA coverage provided there is a qualified group plan offered by the employer and provided that the separation was not prompted by the employee's "gross misconduct."

The availability of COBRA coverage in such instances will not significantly impact the employer though such qualifying events will require the employer to issue a COBRA notification.

So, it is important that the employer's workers' compensation claims office communicate with the employer's benefits office in order to make certain that when a qualifying event occurs in the context of a workers' compensation claim or settlement the proper COBRA notification is circulated.

V. CONCLUSION

While the language of the particular statute and the case law construing the statute, or any accompanying regulation, must always be applied judiciously, the human resource director, as well as any other individual assigned the task of administering a workers' compensation claim, should always be mindful that application of the law will rarely afford a good result in the absence of common sense and compassion for the employee.