PENNSYLVANIA BUREAU OF WORKERS' COMPENSATION
13TH ANNUAL CONFERENCE
JUNE 3, 2014
HERSHEY LODGE & CONFERENCE CENTER
HERSHEY, PENNSYLVANIA

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

BY: ANDREW E. GREENBERG, ESQUIRE
THE CHARTWELL LAW OFFICES, LLP[1]

and

MARY WALSH-DEMPSEY, ESQUIRE[2]

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.

---

[1] Andrew E. Greenberg is a founding member of The Chartwell Law Offices, LLP, a litigation firm that handles Pennsylvania and New Jersey matters out of its Philadelphia, Pittsburgh, Harrisburg, and Valley Forge offices. Mr. Greenberg is the co-author of *Pennsylvania Workers' Compensation Law & Practice* with Judge David B. Torrey of Allegheny County. He can be contacted by e-mail at agreenberg@chartwelllaw.com.

[2] Mary Walsh-Dempsey is Senior Litigation Counsel with Ufberg & Associates, a full-service law firm, located in Scranton, Pennsylvania, whose mission is to provide employers with creative, effective, and proactive solutions to workforce management challenges and their attendant legal issues. She formerly was a member of O'Malley & Langan, P.C. She is the author of numerous articles and co-founded the "Employment Discrimination Center", a subsidiary of her former firm that handles aspects of employment discrimination, litigation and the Fair Labor Standards Act. She can be contacted at mwdempsey@uberglaw.com.

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 six statutory provisions and the administration of Pennsylvania workers' compensation claims – the Pennsylvania Unemployment Compensation Law, the Americans with Disability Act, the Family Medical Leave Act, Title VII of the Civil Rights Act of 1964, COBRA and the Affordable Care Act.

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, COBRA and the Affordable Care Act 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

(f) The Consolidated Omnibus Budget Reconciliation Act of 1986[4] 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.

(g) The Patient Protection and Affordable Care Act – Commonly referred to as "Obama Care," the Patient Protection and Affordable Care Act seeks to expand health insurance coverage for previously uninsured Americans, prevent health care fraud and abuse and improve health care quality and overall wellness through mandatory individual coverage, employer coverage requirements, health insurance exchanges and expanded Medicaid coverage.

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 employment[5].

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 – For 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, a qualified individual employee must be afforded **twelve weeks** of unpaid leave **during a**

---

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."

[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).

twelve month period in order to allow him or her 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, with guaranteed continuation of group health benefits.[6]

D. THE AMERICANS WITH DISABILITIES ACT 42 U.S.C.A.§§ 12101-22213[7],

General Rule – For private employers who employ fifteen or more employees, and for all state and local government employers, regardless of the number of employees, the law prohibits discrimination against persons with "disabilities," who are otherwise qualified to perform 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 – Prohibits discrimination by covered employers on the basis of race, color, religion, sex, national origin, or 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. It has been supplemented by legislation prohibiting discrimination on the basis of pregnancy, age, and disability, gender identity and transgender status.

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

General Rule - Requires that employer afford continued access to health care insurance to employees and their covered family members, **at the employee's expense**,

---

[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.

[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 fifteen or more workers, employment agencies, and labor organizations of fifteen 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.

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.

F. THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

General Rule - Signed into law on March 23, 2010 by President Barack Obama, and declared constitutional by the United States Supreme Court on June 28, 2012, The Patient Protection and Affordable Care Act, also referred to as "The Affordable Care Act" or "Obama Care" has engendered substantial political rhetoric and maneuvering by the U.S. Congress, state legislatures, governors, lobbyists and political pundits.

President Obama has described the Affordable Care Act as "the most important piece of social legislation since the Social Security Act passed in the 1930's and the most important reform of our health care system since Medicare passed in the 1960s."[9]

The law creates a national framework for providing near universal coverage and outlines strategies to increase access to affordable, improved care while containing costs.

Upon full implementation, it is anticipated that the Affordable Care Act will extend health insurance coverage to ninety-four percent of the population while establishing a set of strategies to improve care and contain costs.

The central provisions of the law – guaranteed affordable and accessible coverage – became effective January 1, 2014

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 often arise regarding the nature and extent of injury, the extent of wage loss or "disability" resulting from injury and the reasonableness and necessity of incurred medical treatment.

Since a compensable work injury may result in extended absences from work, the need for wage-loss replacement and the need for job modification to facilitate a

[9] Part of this section is based upon an excellent paper, "The Affordable Care Act and Effects on the Workers' Compensation System: In General, Cost-Shifting, and the Implications of Employer-Sponsored Wellness Programs" presented by Judge David B. Torrey at the National Association of Workers' Compensation Judiciary, National Workers' Compensation Judicial College on August 20, 2013 in Orlando, Florida. The authors have also relied upon observations set forth in a paper written and presented by Dr. Dean Hashimoto during the same conference entitled "The Affordable Care Act and Its Effects on Workers' Compensation." The authors wish to thank Judge Torrey and Dr. Hashimoto for allowing us to share their observations and reasoned conclusions.

return-to-work, the Workers' Compensation Act, the Unemployment Compensation Law, the FMLA[10], the ADA, Title VII, COBRA, and perhaps the Affordable Care Act can all converge upon the administrator responsible for the particular 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 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 worker's employment status simultaneously, where, for example, following the occurrence of a compensable work injury, the employer discharges the worker 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" or 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).

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

[10] 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).

work for new employer but is thereafter discharged due to inability to perform new job in acceptable fashion, despite good faith effort to do so, awarded reinstatement of disability benefits).

Claimants' counsel 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 ruling 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. Department of Corrections v. Workers' Compensation Appeal Board (Wagner-Stover), 6 A.3d 603 (Pa. 2010); 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).[11]

Even though a favorable ruling by a UC referee has no binding effect on a WCJ, the employer will oftentimes, 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 injuries[12]. 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 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)…I[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.

[11] 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).

[12] The primary focus of Act 44 was "medical cost containment." Three years later, the Legislature focused its remedial efforts on wage loss benefits through the enactment of Act 57.

> (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.'"[13]

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 by assessing 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 the employer must use the "**net"** recovery of Unemployment Compensation, Social Security (Old Age) benefits, severance or pension benefits received by the injured employee in calculating the off set.

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]

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]"

In order to be eligible for FMLA protection, the employee must: (1) work for a covered employer; (2) work for that covered 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 a 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

---

[13] 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 could not be applied to injuries occurring before August 31, 1993, the effective date of Act 44.

[14] On February 15, 2012 the U.S. Department of Labor issued a Notice of Proposed Rulemaking proposing regulations addressing military leave provisions, establishing leave eligibility requirements for airline crewmembers and flight attendants and changes concerning calculation of leave.

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

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, for example, where the employer records employee work time in tenths of hours, it 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 notified of an impending call or order to active duty in the Armed Forces in support of a contingency operation.

1. <u>Basic Application of the FMLA:</u>

(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

[16] 29 CFR §825.200 (b)(1-4).

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, the concept of **continuing treatment** includes: (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: **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 require periodic recertification - no more often than every thirty 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 through **a health care provider, a human resource professional, a leave coordinator or a management official - but not through the employee's direct supervisor[20];**

(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 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 where the leave is foreseeable, where the leave is not foreseeable, the employee must provide notice as soon as practicable;

---

[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.
[19] See 29 C.F.R.§ 825.307(a)(2).
[20] See 29 C.F.R.§ 825.307(a).
[21] Id.

(h) The employee has no obligation to specifically use the reference "FMLA" when seeking leave. Rather, the act of explaining 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 FMLA will be construed in certain instances as a request for a "reasonable accommodation" under the ADA;

(j) The relevant federal regulations permit FMLA "leave" to run on the basis of absences attributable to the disabling effects of a compensable work injury[23] **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, FMLA generally **does** require such an assignment, **unless** the employer 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 leave[26] and cannot be counted against the employee under a "no fault" attendance policy[27];

(m) While the employee is out of work on FMLA leave, the employer is required 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

---

[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.

[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.

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 cer**tification 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);

(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 leave 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]

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 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

---

[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 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.

[29] As 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.

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**.**

The ADAAA, which became effective on January 1, 2009,[32] significantly **broadens the ADA definition of "disability"** in response to several holdings by the United States Supreme Court, and certain Regulations issued by the EEOC.

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 narrower definition of "disability" set forth by the 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,

---

[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 agreed that the employer **regarded** the employee as hindered in her ability to think.

[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, Bebneck & Eck, P.L.L.C., Pittsburgh, PA, Counterpoint, Pennsylvania Defense Institute (January, 2009).

[34] Id.

[35] Id.

standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."

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" in which a major life activity can be performed in determining whether the subject impairment is a disability;

(c) The ADAAA Regulations identify specific types of impairments that should easily be construed as disabilities that substantially limit major life activities: **deafness, blindness, intellectual disability, partially or completely missing of limbs, mobility impairments requiring use of 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;**

(d) **The ADAAA clarifies that an impairment that is episodic or in remission is a "disability" if it substantially limits 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,[36] 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

[36] 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.

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. <u>What is Not a Disability Under the ADA?</u>

The advent of the ADAAA begs the question, what conditions or impairments are not "disabilities" under the ADA?

First, it should be understood that ordinary personality traits such as irritability, poor judgment or chronic lateness are not "disabilities" under the ADA.

In addition, the following enumerated conditions are not covered by ADA:

a. Pregnancy;

b. Illegal Use of Drugs; Resulting Psychoactive Substance Abuse Disorders;[37]

c. Alcoholism[38];

d. Homosexuality, Bisexuality

e. Transvestism, Transsexualism;

f. Pedophilia, Exhibitionism, Voyeurism, Gender Identification Disorders;

g. Compulsive Gambling, Kleptomania;

h. Pyromania[39]

[37] 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.
[38] See 42 U.S.C. §12114.
[39] See 42 U.S.C. §12211.

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 word is defined and addressed under each statutory scheme.

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, 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 (Greenwhich 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" while the employee who suffers a work injury and a corresponding total wage loss will be deemed to "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.

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, and remained capable of 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.[40]

4. Convergence of the Act and the ADA

The following are some general rules to remember when the Workers' Compensation Act and the ADA converge on a particular claim or employee:

(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;

[40] The reader should note that the case was decided before the enactment of the ADAAA.

(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;**"

(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, though with the advent of the ADAAA, the concept of "disability " has been substantially broadened;

(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 hardship[41] for the employer;

[41] 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).

(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 qualified[42], **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**;

(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 employer[43].

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)."

---

[42] 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.

[43] 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).

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).[44] See also EEOC "Guidance on 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.[45]

6. THE LAW OF "REASONABLE ACCOMODATION"[46]

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**.[47]

---

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

[45] Id.

[46] 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).

[47] Id.

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 to be 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:

(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, 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 one in order 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 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.

As noted above, while 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

"Job restructuring" typically means modifying the employee's job in order to **reallocate or redistribute non-essential 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.

But, 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

Since an employer is **not 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**.[48]

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

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.

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." In Ozlek v. Potter, 2007 U.S. App. LEXIS 29483 (3d Cir. 2007) (unpublished), the court similarly ruled that the employee was not entitled to a transfer to a new supervisor as a reasonable accommodation.

F. Work-at-Home

The EEOC and most courts take the position that **the actual physical location of the job performance is a work component 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.

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

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

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

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). [49]

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.[50]

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.3rd 480 (8th Cir. 2007). Some courts have ruled to the contrary – that the ADA **does** require the employer to award a vacant position to the disabled employee 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.,

---

[49] 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.

[50] 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).

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 than 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.[51] 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 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. Content of 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,

[51] See also 7/29/98 Informal Guidance letter form 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.")

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 pursue 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 need not be made 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). The 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

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 to 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. Investigating 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 "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 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. [52] 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

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

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.[53]

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 (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., 995 A.2d 875 (Pa. Super. 2010)(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:

---

[53] 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.

(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 OF 1964

As noted above, Title VII is a federal law that prohibits employment discrimination on the basis of an individual's race, color, religion, sex, national origin in the context of: (1) hiring and firing; (2) compensation, assignment, or classification of employees; (3) transfer, promotion, layoff, or recall; (4) job advertisements; (5) recruitment; (6) testing; (7) use of company facilities; (8) training and apprenticeship programs; (9) fringe benefits; (10) pay, retirement plans, and disability leave; or (11) other terms and conditions of employment.

In addition, Title VII prohibits: (1) harassment on the basis of race, color, religion, sex, or national origin; (2) retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices; (3) employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, or ethnic group, or individuals with disabilities, or based on myths or assumptions about an individual's genetic information; (4) denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race, religion, national origin, or an individual with a disability and (5) discrimination based upon participation in schools or places of worship associated with a particular racial, ethnic, or religious group.

The law not only prohibits intentional discrimination, but also disparate treatment or practices that have the effect of discriminating against individuals on the basis of race, color, national origin, religion, or sex.

The law applies to private employers, state and local governments, and educational institutions that employ fifteen or more individuals. It also applies to private and public employment agencies, labor organizations, and joint labor management committees that control apprenticeship and training.

1. Race Related and Color Discrimination

Discrimination on the basis of an immutable characteristic associated with race, such as skin color, hair texture, or certain facial features is a violation of Title VII. This is true even though not all members of the race share the same characteristic. Title VII also prohibits discrimination on the basis of a condition which predominantly affects one race unless the discriminatory practice is job related and consistent with business necessity. For example, since sickle cell anemia predominantly occurs in African-Americans, a policy that excludes individuals with sickle cell anemia is discriminatory unless the policy is job related and consistent with business necessity. Similarly, a "no-beard" employment policy may discriminate against African-American men who have a predisposition to pseudofolliculitis barbae - severe shaving bumps -unless the policy is job-related and consistent with business necessity.

Even though race and color clearly overlap, they are not synonymous. Accordingly, color discrimination can occur between persons of different races or ethnicities, or between persons of the same race or ethnicity. Although Title VII does not specifically define "color," the courts and the EEOC interpret "color" to have its commonly understood meaning – pigmentation, complexion, or skin shade or tone. In other words, color discrimination occurs when a person is discriminated against based on the lightness, darkness, or other color characteristic of the person. Title VII prohibits race/color discrimination against all persons, including Caucasians.

Employers should adopt "best practices" to reduce the likelihood of discrimination and to address impediments to equal employment opportunity.

2. National Origin Discrimination

It is illegal under Title VII to discriminate against an individual on the basis of birthplace, ancestry, culture, or linguistic characteristics common to a specific ethnic group.

Accordingly, a rule requiring that employees speak only English on the job may violate Title VII unless the employer can demonstrate that the requirement is necessary for conducting business. If the employer believes such a rule is necessary, employees must be informed when English is required and the consequences for violating the rule.

The Immigration Reform and Control Act (IRCA) of 1986 requires employers to assure that employees hired are legally authorized to work in the United States. An employer who requests employment verification only for individuals of a particular national origin, or individuals who appear to be or sound foreign, may violate both Title VII and IRCA. Rather, verification must be obtained from all applicants and employees. Employers who impose citizenship requirements or give preferences to U.S. citizens in hiring or employment opportunities may also violate IRCA.

3. Religious Discrimination

Title VII protects all aspects of religious observance and practice as well as belief and defines religion very broadly for purposes of determining what the law covers. For purposes of Title VII, religion includes traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism, as well as religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others. An employee's belief or practice can be "religious" under Title VII even if the employee is affiliated with a religious group that does not espouse or recognize that individual's belief or practice, or if few – or no – other people adhere to it. Title VII's protections also extend to those who are discriminated against (or those who require an accommodation) because they profess no religious beliefs.

Religious beliefs include theistic beliefs (i.e. those that include a belief in God) as well as non-theistic moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. Although courts generally resolve doubts about particular beliefs in favor of finding that they are religious, beliefs are not protected merely because they are strongly held. Rather, religion typically concerns "ultimate ideas" about "life, purpose, and death." Social, political, or economic philosophies, as well as mere personal preferences, are not "religious" beliefs protected by Title VII.

Religious observances or practices include, for example, attending worship services, praying, wearing religious garb or symbols, displaying religious objects, adhering to certain dietary rules, proselytizing or other forms of religious expression, or refraining from certain activities. Whether a practice is religious depends on the employee's motivation. The same practice might be engaged in by one person for religious reasons and by another person for purely secular reasons (*e.g.,* dietary restrictions, tattoos, etc.).

Discrimination based on religion within the meaning of Title VII could include, for example: not hiring an otherwise qualified applicant because he is a self-described evangelical Christian; a Jewish supervisor denying a promotion to a qualified non-Jewish employee because the supervisor wishes to give a preference based on religion to a fellow Jewish employee; or, terminating an employee because he told the employer that he recently converted to the Baha'i Faith.

An employer is required to reasonably accommodate the religious belief of an employee or prospective employee, unless doing so would impose an undue hardship. Requests for accommodation of a "religious" belief or practice could include, for example: a Catholic employee requesting a schedule change so that he can attend church services on Good Friday; a Muslim employee requesting an exception to the company's dress and grooming code allowing her to wear her headscarf, or a Hindu employee requesting an exception allowing her to wear her bindi (religious forehead marking); an atheist asking to be excused from the religious invocation offered at the beginning of staff meetings; an adherent to Native American spiritual beliefs seeking unpaid leave to attend a ritual ceremony; or an employee who identifies as Christian but is not affiliated

with a particular sect or denomination requests accommodation of his religious belief that working on his Sabbath is prohibited.

4. Sex Discrimination/Harassment

Title VII's broad prohibitions against sex discrimination specifically cover sexual harassment, including direct requests for sexual favors or workplace conditions that create a hostile environment for persons of either gender, including same sex harassment. The "hostile environment" standard also applies to harassment on the bases of race, color, national origin, and religion. Uncomfortable conduct in the workplace, like sexual advances, or gender-based baiting, ridicule, banter or hazing can create a hostile work environment.

There are two types of sexual harassment actionable under Title VII: quid pro quo and hostile work environment.

"Quid pro quo" harassment occurs in the workplace when an employee's submission becomes a term or condition of their employment, or when submission or reject is a basis for decisions affecting the employee. For example, when a manager or other authority figure offers or merely hints that he or she will give the employee something (a raise or a promotion) in return for that employee's satisfaction of a sexual demand. This also occurs when a manager or other authority figure says he or she will not fire or reprimand an employee in exchange for some type of sexual favor. A job applicant also may be the subject of this kind of harassment if the hiring decision was based on the acceptance or rejection of sexual advances.

For harassment to be actionable under Title VII the offensive conduct must be sufficiently **severe or pervasive** to alter the conditions of the victim's employment and create a hostile working environment. This standard requires that the environment be both objectively and subjectively offensive. *Id.* The severe or pervasive requirement is strictly interpreted and many times courts will "filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender related jokes, and occasional teasing" referred to as "stray remarks." Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

In addition, a reasonable person must find the work environment hostile or abusive, and the victim must actually perceive it to be so. Most often this is a subjective analysis supported by objective facts. In deciding what constitutes a hostile work environment, the courts generally consider "the totality of the circumstances" approach looking at the frequency or regularity of the discriminatory conduct, the severity of the conduct, whether the conduct was physical at all or physically threatening and finally, whether the conduct unreasonably interfered with an employee's work performance. In limited circumstances, the presence of a single one time act can be sufficient to establish a claim of hostile work environment harassment – an example of this would be a workplace rape or sexual assault.

The EEOC has issued guidance stating that in determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a "reasonable person." Title VII does not serve "as a vehicle for vindicating the petty slights suffered by the hypersensitive." Zabkowicz v. West Bend Co., 589 F. Supp. 780, 784 (E.D. Wis. 1984). *See also* Ross v. Comsat, 759 F.2d 355 (4th Cir. 1985). Thus, if the challenged conduct would not substantially affect the work environment of a reasonable person, no violation should be found. As the Court noted in Vinson, 682 F.2d 897, 902 (11th Cir. 1982), a mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee may not affect the conditions of employment to a sufficiently significant degree to violate Title VII. 106 S.Ct. at 2406 (quoting Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957, (1972)).

A "hostile environment" claim generally requires a showing of a pattern of offensive conduct. In contrast, in "quid pro quo" cases a single sexual advance may constitute harassment if it is linked to the granting or denial of employment benefits. Claims of "hostile environment" sexual harassment often are coupled with claims of constructive discharge. If constructive discharge due to a hostile environment is proven, the claim will also become one of "quid pro quo" harassment. It is the position of the Equal Employment Opportunity Commission and a majority of courts that an employer is liable for constructive discharge when it imposes intolerable working conditions in violation of Title VII when those conditions foreseeably would compel a reasonable employee to quit, whether or not the employer specifically intended to force the victim's resignation.

In order to prove a disparate treatment claim under Title VII, an employee must establish that he or she suffered some unfair treatment and that the reason for the unfair treatment was the employee's protected class.

D. ENFORCING TITLE VII

The Equal Employment Opportunity Commission ("EEOC") is the federal law enforcement agency charged with investigating complaints of discrimination that violate anti-discrimination laws such as Title VII and the ADA. If an individual believes he has been subject to discrimination, he can file a complaint (commonly called a "charge") with the EEOC.

In Pennsylvania, in order to preserve a state law cause of action, the employee must file with the Pennsylvania Human Relations Commission ("PHRC") as well.

The information below was largely taken from the EEOC website at www.eeoc.gov and describes the general procedures for filing a charge of discrimination. Federal employees or applicants for employment should see the fact sheet about Federal Sector Equal Employment Opportunity Complaint Processing on the EEOC website at http://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm.

A. Who Can File a Charge of Discrimination?

- Any individual who believes that his or her employment rights have been violated may file a charge of discrimination with the EEOC and/or the PHRC.
- In addition, an individual, organization, or agency may file a charge on behalf of another person in order to protect the aggrieved person's identity.

B. How Is a Charge of Discrimination Filed?

- A charge may be filed by mail or in person at the nearest EEOC office. Individuals may consult their local telephone directory (U.S. Government listing) or call 1-800-669-4000 (voice) or 1-800-669-6820 (TTY) to contact the nearest EEOC office for more information on specific procedures for filing a charge.
- Individuals who need an accommodation in order to file a charge (e.g., sign language interpreter, print materials in an accessible format) should inform the EEOC field office so appropriate arrangements can be made.

C. What Information Must Be Provided to File a Charge?

- The complaining party's name, address, and telephone number;
- The name, address, and telephone number of the respondent employer, employment agency, or union that is alleged to have discriminated, and number of employees (or union members), if known;
- A short description of the alleged violation (the event that caused the complaining party to believe that his or her rights were violated); and
- The date(s) of the alleged violation(s).

D. What Are the Time Limits for Filing a Charge of Discrimination?

All laws enforced by EEOC, except the Equal Pay Act, require filing a charge with EEOC before a private lawsuit may be filed in court. There are strict time limits within which charges must be filed:

- A charge must be filed with EEOC within 180 days from the date of the alleged violation, in order to protect the charging party's rights. The 180 day timeframe is also mandated by the Pennsylvania Human Relations Act. ("PHRA")
- This 180-day filing deadline is extended to 300 days if the charge also is covered by a state or local anti-discrimination law.
- To protect legal rights, it is always best to contact EEOC promptly when discrimination is suspected.

E. What Happens after a Charge is Filed with EEOC?

The employer is notified that the charge has been filed. From this point there are a number of ways a charge may be handled:

- A charge may be assigned for priority investigation if the initial facts appear to support a violation of law. When the evidence is less strong, the charge may be

assigned for follow up investigation to determine whether it is likely that a violation has occurred.

- EEOC can seek to settle a charge at any stage of the investigation if the charging party and the employer express an interest in doing so. If settlement efforts are not successful, the investigation continues.
- In investigating a charge, EEOC may make written requests for information, interview people, review documents, and, as needed, visit the facility where the alleged discrimination occurred. When the investigation is complete, EEOC will discuss the evidence with the charging party or employer, as appropriate.
- The charge may be selected for EEOC's mediation program if both the charging party and the employer express an interest in this option. Mediation is offered as an alternative to a lengthy investigation. Participation in the mediation program is confidential, voluntary, and requires consent from both charging party and employer. If mediation is unsuccessful, the charge is returned for investigation.
- A charge may be dismissed at any point if, in the agency's best judgment, further investigation will not establish a violation of the law. A charge may be dismissed at the time it is filed, if an initial in-depth interview does not produce evidence to support the claim. When a charge is dismissed, a notice is issued in accordance with the law which gives the charging party ninety days in which to file a lawsuit on his or her own behalf.

F. How Does EEOC Resolve Discrimination Charges?

- If the evidence obtained in an investigation does not establish that discrimination occurred, this will be explained to the charging party. A required notice is then issued, closing the case and giving the charging party ninety days in which to file a lawsuit on his or her own behalf.
- If the evidence establishes that discrimination has occurred, the employer and the charging party will be informed of this in a letter of determination that explains the finding. EEOC will then attempt conciliation with the employer to develop a remedy for the discrimination.
- If the case is successfully conciliated, or if a case has earlier been successfully mediated or settled, neither EEOC nor the charging party may go to court unless the conciliation, mediation, or settlement agreement is not honored.
- If EEOC is unable to successfully conciliate the case, the agency will decide whether to bring suit in federal court. If the EEOC decides not to sue, it will issue a notice closing the case and giving the charging party ninety days in which to file a lawsuit on his or her own behalf. In Title VII and ADA cases against state or local governments, the Department of Justice takes these actions.

G. When Can an Individual File an Employment Discrimination Lawsuit in Court?

A charging party may file a lawsuit within ninety days after receiving a notice of a "right to sue" from EEOC, as stated above.

Under Title VII, and the ADA, a charging party also can request a notice of "right to sue" from EEOC 180 days after the charge was first filed with the Commission, and may then bring suit within 90 days after receiving the notice.

H. What Remedies Are Available When Discrimination Is Found?

The "relief" or remedies available for employment discrimination, whether caused by intentional acts or by practices that have a discriminatory effect, may include: (1) back pay; (2) hiring; (3) promotion; (4) reinstatement; (5) front pay; (6) reasonable accommodation, or (7) other actions that will make an individual "whole" (in the condition s/he would have been but for the discrimination).

Remedies also may include payment of: (1) attorneys' fees; (2) expert witness fees, and (3) court costs.

- Title VII provides a cap on damages according to the number of employees as follows:

TABLE 1: LIMITS ON DAMAGES

Number of Employees in Company	Maximum Sum of Compensatory and Punitive Damages
15-100	$ 50,000
101-200	$ 100,000
201-500	$ 200,000
501 or more	$ 300,000

Under most EEOC-enforced laws, compensatory and punitive damages also may be available where intentional discrimination is found. Damages may be available to compensate for actual monetary losses, for future monetary losses, and for mental anguish and inconvenience. Punitive damages also may be available if an employer acted with malice or reckless indifference. Punitive damages are not available against the federal, state or local governments.

In cases concerning reasonable accommodation under the ADA, compensatory or punitive damages may not be awarded to the charging party if an employer can demonstrate that "good faith" efforts were made to provide reasonable accommodation.

An employer may be required to post notices to all employees addressing the violations of a specific charge and advising them of their rights under the laws EEOC enforces and their right to be free from retaliation. Such notices must be accessible, as needed, to persons with visual or other disabilities that affect reading.

The employer also may be required to take corrective or preventive actions to cure the source of the identified discrimination and minimize the chance of its recurrence, as well as discontinue the specific discriminatory practices involved in the case.

I. Employer Remedial Action

Since Title VII "affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult" an employer is liable for failing to remedy known hostile or offensive work environments. *See, e.g.,* Garziano v. E.I. Dupont de Nemours & Co., 818 F.2d 380, 388 (5th Cir. 1987) (Vinson holds employers have an "affirmative duty to eradicate 'hostile or offensive' work environments"); Bundy v. Jackson, 641 F.2d 934, 947 (D.C. Cir. 1981) (employer violated Title VII by failing to investigate and correct sexual harassment despite notice); Tompkins v. Public Service Electric & Gas Co., 568 F.2d 1044, 1049 (3d Cir. 1977) (same); Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982) (same); Munford v. James T. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977) (employer has an affirmative duty to investigate complaints of sexual harassment and to deal appropriately with the offending personnel; "failure to investigate gives tactic support to the discrimination because the absence of sanctions encourages abusive behavior").

When an employer receives a complaint or otherwise learns of alleged sexual harassment in the workplace, the employer should investigate promptly and thoroughly. The employer should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from recurring. Disciplinary action against the offending supervisor or employee, ranging from reprimand to discharge, may be necessary. Generally, the corrective action should reflect the severity of the conduct. *See* Waltman v. International Paper Co., 875 F.2d at 479 (appropriateness of remedial action will depend on the severity and persistence of the harassment and the effectiveness of any initial remedial steps). Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309-10 (5th Cir. 1987) (the employer's remedy may be "assessed proportionately to the seriousness of the offense"). The employer should make follow-up inquiries to ensure the harassment has not resumed and the victim has not suffered retaliation.

If an employer acts promptly to investigate the harassment, once notified, and also takes appropriate disciplinary action under the circumstances, an employer may be relieved of liability under Title VII. When an employer asserts it has taken remedial action, the Commission will investigate to determine whether the action was appropriate and, more important, effective. The EEOC investigator should conduct an independent investigation of the harassment claim, and the Commission will reach its own conclusion as to whether the law has been violated. If the Commission finds that the harassment has been eliminated, all victims made whole, and preventive measures instituted, it will normally administratively close the charge because of the employer's prompt remedial action.

In Barrett v. Omaha National Bank, 726 F.2d 424 (8th Cir. 1984), the victim informed her employer that her co-worker had talked to her about sexual activities and touched her in an offensive manner. Within four days of receiving this information, the employer investigated the charges, reprimanded the guilty employee placed him on probation, and warned him that further misconduct would result in discharge. A second co-worker who had witnessed the harassment was also reprimanded for not intervening on the victim's behalf or reporting the conduct. The court ruled that the employer's response constituted immediate and appropriate corrective action, and on this basis found the employer not liable.

In Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987), the court found the employer's policy against sexual harassment failed to function effectively. The victim's first-level supervisor had responsibility for reporting and correcting harassment at the company, yet he was the harasser. The employer told the victims not to go to the EEOC. While giving the accused harasser administrative leave pending investigation, the employer made the plaintiffs take sick leave, which was never credited back to them and was recorded in their personnel files as excessive absenteeism without indicating they were absent because of sexual harassment.[54]

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 Act[55]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

---

[54] **The authors acknowledge www.eeoc.gov which was utilized as a reference for selected portions of the text.**

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

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]

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 as 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.

---

[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 her group health plan under COBRA, he or she can be charged one hundred percent of the premium 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 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).

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 coverage where it would otherwise be lost due to certain "qualifying events."

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

QUALIFYING EVENT	ELIGIBLE BENEFICIARIES	MAXIMUM COVERAGE TIME
Voluntary Termination	•Employee •Spouse •Dependent Child	18 months
Involuntary Termination	•Employee •Spouse •Dependent Child	18 months
Reduced Hours	•Employee •Spouse	18 months

	• Dependent Child	
Total Disability	• Employee	29 months
Employee Entitled To Medicare	• Spouse • Dependent Child	36 months
Divorce Or Legal Separation from Employee	• Spouse • Dependent Child	36 months
Death Of Employee	• Spouse • Dependent Child	36 months
Loss Of Dependent-Child Status	• 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 – preserving medical coverage for the work-related condition or assuring continuation of weekly wage loss benefits - following an economic lay-off from a light-duty position, or in response to a disciplinary discharge.

Employment separation, in the form of a voluntary resignation, may result in conjunction with 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.

F. THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

Signed into law on March 23, 2010 by President Barack Obama, and declared constitutional by the United States Supreme Court on June 28, 2012, The Patient

Protection and Affordable Care Act, also referred to as "The Affordable Care Act" or "Obama Care" has engendered substantial political rhetoric and maneuvering by the U.S. Congress, state legislatures, governors and political pundits and lobbyists.

President Obama has described the Affordable Care Act as "the most important piece of social legislation since the Social Security Act passed in the 1930's and the most important reform of our health care system since Medicare passed in the 1960s."[57]

1. Statutory Integration with State Workers' Compensation Laws

Although The Affordable Care Act includes minor changes to the federal Black Lung workers' compensation benefits, it does not presume to address or integrate state workers' compensation laws on a direct basis.[58]

As Dr. Dean Hashimoto summarized at an April 2011 ABA workers' compensation session, "While the 1993 Clinton proposal sought to combine workers' compensation medical care with mainstream medical care, the 2010 Health Care Reform rejected this '24 hour care' approach."[59]

Perhaps this was so because the reformers were anxious to avoid "tangential and unnecessary political battles," as the contemporary observer would put it that could interfere with the broader debate.

Many in the compensation community opposed such integration. Counsel for an insurance lobby, for example, wrote that superseding state workers' compensation laws would be harmful for both employees and employers, the former by introducing deductibles into medical and the latter by disallowing managed care with a focus on return-to-work.[60]

a. The Impact of the Affordable Care

---

[57] See again "The Affordable Care Act and Effects on the Workers' Compensation System: In General, Cost-Shifting, and the Implications of Employer-Sponsored Wellness Programs" presented by Judge David B. Torrey at the National Association of Workers' Compensation Judiciary, National Workers' Compensation Judicial College on August 20, 2013 in Orlando, Florida and written and "The Affordable Care Act and Its Effects on Workers' Compensation" presented by Dr. Dean Hashimoto at the same conference.

[58] In the run-up to passage of the ACA, the ABA TTIPS Section submitted a recommendation that Congress be "urged not to adopt legislation that merges medical payment components of workers compensation and medical payment components of automobile insurance with health insurance, commonly referred to as Universal 24 Hour Health Coverage." *TTIPS Recommendation* (Nov. 13, 2009) [on file with the Author.]

[59] Dean Hashimoto, M.D., J.D., ABA WC Sections CLE, Boston, MA (Apr. 7, 2011) [power-point slide].

[60] *Id.*

Because the Affordable Care Act has yet to be fully implemented,[61] the impact it will have on the filing and administration of state workers' compensation claims is pure speculation.

Indeed, in his 2011 remarks, Dr. Hashimoto observed that "many unknowns" exist in this area, and uncertainty may well continue to be the case, considering that "flexibility was built in to the reform"[62] and that impacts may vary among states.

He proposed at that time that the new law would have "no immediate impact" on compensation in the short-term with "long-term impact likely related to reduction in Medicare Costs."[63]

It would probably be fair to conclude that Affordable Care Act could impact state workers' compensation and other similar systems in a number of indirect ways; (1) the filing of fewer workers' compensation claims or auto claims due to increased insurance coverage for individuals through employers and exchanges – "cost shifting;"(2) fewer work-related injuries through implementation of wellness initiatives; (3) increased filing of workers' compensation claims or general liability claims for injuries occurring as a result of employee participation in wellness exercise programs; (4) reduced workers' compensation costs through global payment systems, and stricter regulation of premium increases; (5) reduced workers' compensation administrative costs through increased coordination of employee benefits; and (6) increased workers' compensation costs and reduced access to treatment due to possible physician shortages resulting from expanded health insurance coverage and expanded treatment.[64]

1. Cost-Shifting

A large proportion of workers' compensation claimants involved in litigated cases are members of the working poor or near-poor. The high percentage of claimants who labor full time yet have no health insurance is a key indicator of belonging in these categories. The number may be as high as 40%.

In assessing this issue, Judge Torrey had occasion to systematically evaluate Pennsylvania workers who were accepting lump sum settlements during 2005 and 2006. He calculated that the uninsured rate among that group of workers was easily over

---

[61] Most recently, on October 1, 2013 the health insurance exchanges created by the Affordable Care Act opened for business. See "Only The Beginning – What's Next at the Health Insurance Exchanges?" Henry J. Aaron, Ph. D. and Kevin W. Lucia, J.D., M.H.P., September 4, 2013, The New England Journal of Medicine.

[62] Comments of Dean Hashimoto, M.D., J.D., ABA WC Sections CLE, Boston, MA (Apr. 7, 2011).

[63] Dean Hashimoto, M.D., J.D., ABA WC Sections CLE, Boston, MA (Apr. 7, 2011) [power-point slide].

[64] See Philly I-Day presentation "The Affordable Care Act (ACA) Ramifications for WC in 2013 and Beyond" by Catharine J. Flynn, Esquire, Weber, Gallagher, Simpson, Stapleton, Fires & Newby, LLP, Joseph M. DiBella, Conner, Strong & Buckelew, Christian Davis, Esquire, Weber, Gallagher, Simpson, Stapleton, Fires & Newby, LLP and Ben Evans, Director of Risk Management, University of Pennsylvania.

50%,[65] a figure that he did not find surprising since many workers who have health insurance through work lose coverage within a few months of employment separation.

This lack of general health insurance is unsatisfactory, but the lack of such insurance has also long generated a "perverse motivation" – workers and their healthcare providers seeking to characterize what are essentially non-work-related illnesses as work-related, in order to facilitate workers' compensation medical coverage.

This phenomenon, universally known as "cost-shifting," may be intentional and overt – what some might consider fraud or in many cases - or may simply reflect uncertainty as to "medical causation" e.g. "aggravation" injuries or conditions. Under such circumstances it would not be unreasonable for the worker and his or her provider to characterize the condition as having been caused by work.

The prospect of the Affordable Care Act extending coverage to a larger number of workers, including those with pre-existing conditions, has the potential to end this type of cost-shifting. In 2011, the National Council on Compensation Insurance opined, "[t]hose without health insurance or with non-work-related pre-existing conditions could potentially be accessing workers compensation currently for medical care. Since the healthcare law expands the number of people covered and requires coverage of preexisting conditions, there may be a decline in workers compensation funding of treatments for preexisting non-work related conditions."[66]

A writer who examined the effects of the predecessor Massachusetts Health Care Insurance Reform Law[67] reported that, long before the advent of the Affordable Care Act, Massachusetts observers believed that expanding coverage in that state "would reduce workers' compensation for medical service needs that did not directly relate to compensable harm." Perhaps that belief was borne out, as a study "suggested … 'that the reform can account for a roughly 5 percent to 10 percent decline in WC [emergency room] ER bill volume."[68]

On the other hand, Dr. Hashimoto, reported in 2011 that the Massachusetts experience with 24/7 medical coverage to date had not shown "an impact on reducing litigation and costs." He ventured that perhaps this was so as many of the uninsured who had become covered were "young and healthy" anyway.[69]

It is, however, worth remembering one of Dr. Hashimoto's admonitions - that the expected reduced costs through cost-shifting may not unfold since a major incentive for

---

[65] David B. Torrey, *Compromise Settlements Under State Workers' Compensation Acts: Law, Policy, Practice and Ten Years of the Pennsylvania Experience*, 16 WIDENER LAW JOURNAL 199 (2007).
[66] *The Affordable Care Act and Workers Comp*, WORKERS COMPENSATION ISSUES REPORT, p.32 (2011), available at https://www.ncci.com/Documents/IssuesRpt-2011-AffordableCare.pdf.
[67] This is the so-called "Romneycare." Chapter 58 of the Acts of 2006, available at http://www.malegislature.gov/Laws/SessionLaws/Acts/2006/Chapter58.
[68] John Stahl, *Workers' Compensation Under Romneycare Provides Clues for Nationwide Future of Systems*, LexisNexis Workers' Compensation Law Community (Jun. 29, 2012).
[69] Comments of Dean Hashimoto, M.D., J.D., ABA WC Sections CLE, Boston, MA (Apr. 7, 2011).

an injured worker to advance a compensation claim is the **disability benefits** that accompany the same.

For those who litigate these matters, his admonition probably rings true.

2. Reducing Frequency/Severity of Work Injuries Through Employee Wellness Programs

An employee wellness program is one where the worker, to secure a discount on his/her healthcare premium contribution, or receive some other award, agrees to such programs as diet modification, exercise, or smoking cessation. Under the Affordable Care Act, such programs are encouraged since the new law presumes that preventive medicine can lower health care costs and at once improve the quality of life.

It is certainly not uncommon for employers to experience the frustrating circumstance where, say, a middle-aged obese employee with underlying arthritis, suffers a minor meniscus tear in the course of his employment, only to require months later a total knee replacement, the cost for which the employee submits to his workers' compensation carrier.

Active participation in an employer-sponsored wellness program would be expected to reduce the incidence of obesity or diabetes and, in turn, the kind of unanticipated workers' compensation claims described above.

Indeed, individuals who lose weight, eat properly, stop smoking, and regularly exercise reduce the incidence of illness and injury.

Rules under the Affordable Care Act, released in November 2012 gave "employers new freedom to reward employees who participate in workplace wellness programs intended to help them lower blood pressure, lose weight or reduce cholesterol levels. The maximum permissible reward would be increased to 30 percent of the cost of coverage, from the current 20 percent…. The rules would further increase the maximum reward to 50 percent for wellness programs intended to prevent or reduce tobacco use."[70]

The regulations which accompany and implement the ACA elaborate at length on the manner in which employers incentivize workers into taking part in wellness programs:

> Incentives are offered in a variety of forms, such as cash, gift cards, merchandise, time off, awards, recognition, raffles or lotteries, reduced health plan premiums and co-pays, and contributions to flexible spending or health savings accounts….[T]he Kaiser/HRET 2011 survey reported that among firms offering health benefits with more than 200 workers, 27

[70] Robert Pear, "Administration Defines Benefits that Must be Offered Under the Health Law," NEW YORK TIMES, p.A17 (Nov. 21, 2012).

> percent offered cash or cash equivalent incentives (including gift cards, merchandise, or travel incentives). In addition, 11 percent of these firms offered lower employee health plan premiums to wellness participants, two percent offered lower deductibles, and 11 percent offered higher health reimbursement account or health savings account contributions. Meanwhile, 13 percent of firms with fewer than 200 workers offered cash or equivalent incentives, and each of the other types of incentives were offered by only two percent or less of firms.[71]

The increased availability of these plans, made possible by the expansion of insurance coverage and grants for the same for small employers,[72] may reduce workers' compensation costs.[73] This is so because poor lifestyle habits – the focus of employee wellness programs – are known to drive up workers' compensation costs. Indeed, obesity,[74] diabetes, and hypertension are frequently identified as imposing these types of costs.[75] In 2010, notably, NCCI chief Stephen Klingel, predicting the effects of the ACA on workers' compensation law, ventured that the new law's promotion of "wellness initiatives" could "reduce the incidence and duration of workers' compensation claims" – for example, if lessened obesity in the working population generates better health.[76]

Under the Affordable Care Act, no wellness program **tax credit** is to be implemented. However, "as was true previously, the expense of an employer-provided wellness program for employees is deductible as a business expense [under section 162 of the IRC]." And, as foreshadowed above, "The new regulations, scheduled to be implemented in January of 2014, further clarify previous wellness-related regulations as well as expand the options of employers…."[77]

---

[71] Federal Register Volume 77, Number 227, p.70629 (Monday, November 26, 2012), available at http://www.regulations.gov/contentStreamer?objectId=0900006481172f19&disposition=attachment&contentType=html.

[72] *See* Shannon C. Egle, *Effective Dates are Lurking: What you Should Know About Healthcare Reform*, THE BRIEF, p.12, at 16-17 (ABA, Winter 2013).

[73] *Cf.* Comments of Gregory Krohm, Ph.D, IAIABC Webinar Briefing (Dec. 13, 2012) (referring in general to the expansion of insurance coverage as potentially reducing costs by causing better health).

[74] T. Ostybe, T.M. Dement, & K.M. Krause, *Obesity and Workers' Compensation*, 167 ARCHIVES OF INTERNAL MEDICINE 766 (April 23, 2007).

[75] Mary Anne Hawrylak, *Obesity and Workers' Compensation Costs*, INSURANCE JOURNAL (Jan. 13, 2013), available at http://www.insurancejournal.com/magazines/features/2013/01/14/276698.htm ("Diabetes and smoking are right behind an expanding waistline in their impact on workers' comp claims. Diabetes is directly correlated with obesity and affects the wound-healing process. Smoking, in addition to all of its well-publicized health risks, also affects surgery to repair fractures. A smoker's bones take longer to knit, and there is a higher risk of re-fracture. In fact, there is a growing trend for physicians to delay or avoid surgery on a heavy smoker because of potential complications.").

[76] Steve Klingel, *Federal Health Care and Workers' Compensation*, FLORIDA UNDERWRITER (Special Supplement, Summer 2010).

[77] *See* http://www.wellnesstaxcredit.com/.

In sum, the tangible benefits of employee wellness program which directly result in economic savings can best be seen in these four areas:

a. Reduction in demand for medical services. Businesses that incorporate an employee wellness programs enjoy significant savings on medical expenses and other related costs.

b. Reduction in employee absenteeism. Simply put healthy employees miss less work. This is another factor that makes employee wellness programs a very cost effective maneuver.

c. Reduction in on-the-job injuries and worker's compensation costs. Employee wellness programs that educate employees about workplace safety have fewer injuries on the job thereby lower worker's compensation costs.

d. Reduction in Disability Costs. Healthy employees are less likely to require disability care. With employee wellness programs educating employees on health issues such as heart disease, diabetes, mental health issues and work related injuries, awareness leads to prevention.[78]

3. Injuries Arising out of Participation in Wellness Programs

An ironic phenomenon may be created by this positive component of the Affordable Care Act is the potential filing of workers' compensation and general liability claims suffered during the administration of wellness programs.

Indeed, if participation in active wellness programs expands, it is likely that more claims may be heard that participation in the same has **itself** given rise to injury. This assertion is hardly speculative.

In a 1992 case from Pennsylvania, for example, the claimant, prior to work, was exercising on the premises as part of his employer's wellness plan. He had a heart attack, and the appellate court awarded benefits.[79] The employee's workout was, notably, developed for him by the staff of the employer's fitness center. The court, in awarding

---

[78] John Bates, *Companies Make Great Gains with Employee Wellness Programs* (undated), available at http://wellnessproposals.com/wellness-articles/companies-make-great-*gains-with-employee-wellness-programs/*. *See also Workers' Compensation: The Impact of Health-Related Claims* (Sept. 27, 2012), available at http://www.associatedfinancialgroup.com/Data/eLineNewsletters/RiskManagement/Vol11/No8sep12/riskartsep12.asp. See also Hawrylak, supra ("These issues may not have seemed as imperative in the past several years, but with a rise in both workers' comp rates, increasing non-renewals and tightening capacity, it's time for agents, brokers and other insurance partners to discuss obesity and other wellness issues with their clients – and help these employers find solutions to improve worker health and control medical and workers' comp costs.").

[79] Stanner v. WCAB (Westinghouse Electric Co.), 604 A.2d 1167 (1992), *appeal denied*, 615 A.2d 1314 (Pa. 1992).

benefits, held that the deceased was engaged in activities "in furtherance of employer's business or affairs" at the time of his death; he was hence in course of his employment.

In a 2009 case from New York, meanwhile, the claimant sustained a spinal cord injury while taking part in an exercise class at a gym that his employer had made available for employees during work hours. In this case, too, the appellate court awarded benefits, holding that when an employee can show an employer's overt act, or overt encouragement, supporting participation, the injury arises out of the course of employment.[80] This holding led Jackson Lewis attorneys to counsel, "Employers … need to consider the effects of a potential increase in workers' compensation claims on the effectiveness of their wellness programs, and how the design of their programs can mitigate those risks."[81]

These types of claims are most likely cognizable when the state in question has a broad conceptualization of the pivotal, time-honored statutory test of "arising out of the employment." This test is broader than the slang phrase "on-the-job injuries," or the tort-law import, "course and scope." Instead, a liberal court, applying the Larson test, will often define the phrase broadly, as capturing those risks that have their origin in the "conditions and obligations" of work.[82] And, when an employer encourages a certain employee behavior, an injury that results may easily be conceived of as having arisen from his employment.

Evidence that an employer benefits from an activity like a wellness program effort, even if participation is not mandatory, may give rise to the legal/causal connection to the circumstances and obligations of work. And, notably, it is easy to find promotions of wellness programs that advertise direct benefits to employers. The following is an example:

> Companies can benefit greatly from adopting and maintaining employee wellness programs. Employee wellness programs can include things like health risk assessments, onsite health screening, health coaching, alcohol and drug counseling, mental health assistance, safety in the workplace, preventing violence in the workplace and diversity education.

While wellness program cases are not found in abundance in the precedents, another type of case is analogous. These are the precedents that feature a worker

---

[80] Torre v. Logic Technology, Inc., 881 N.Y.S.2d 675 (A.D. 2009). Under the New York statute, notably, a claimant cannot recover workers' compensation benefits for an injury arising out of his or her "voluntary participation in an off-duty athletic activity not constituting part of the employee's work related duties unless the employer (a) requires the employee to participate in such activity, (b) compensates the employee for participating in such activity or (c) otherwise sponsors the activity." N.Y. Workers Compensation Law § 10 (McKinney 2011).

[81] "Can Your Wellness Program Trigger a Workers' Compensation Claim?," Jackson Lewis LLP Workplace Resource Center (Oct. 9, 2009), available at http://www.jacksonlewis.com/resources.php?NewsID=1879.

[82] *See in re Question Submitted by the US Ct. App., 10th Cir. v. Martin Marietta Corp.*, 759 P.2d 17 (Col. 1988) (citing 1 LARSON, WORKERS' COMPENSATION LAW, § 6.50 (1985)).

becoming ill after receiving an inoculation – like a flu shot – on the urging of the employer. The Larson treatise position, notably, has long been that if an employer has strongly urged such inoculations, and a mutual benefit may be discerned in the employee's presumed continued wellness, the pathological reaction is compensable.[83]

Thus, in a Florida case, a worker who was sickened by a typhoid shot sponsored by her employer, after a hurricane damaged the water supply, was held by the state supreme court to have suffered a compensable injury.[84]

4. Reduced Access to Medical Treatment for Injured Individuals

It has been observed that a greater number of individuals possessing health insurance will lead to increased treatment, resulting in a physician shortage, causing increased costs and longer wait times for treatment of occupational and non-occupational injuries and/or increased recovery time due to reduced treatment access.[85]

5. Decreased Costs Due to Revised Medicare Reimbursement Rates

Section 127.101(a) of the Medical Cost Containment Regulations promulgated by the Pennsylvania Department of Labor & Industry provides that "Generally, medical fees for services rendered under the [Pennsylvania Workers' Compensation Act] shall be capped at 113% of the Medicare reimbursement rate applicable in this Commonwealth under the Medicare Program for comparable services rendered."

It is anticipated that the Affordable Care Act will bring about reduced Medicare Reimbursement rates for providers.

If that occurs, healthcare professionals who treat occupational injuries will presumably be subject to reduced reimbursement rates, resulting in reduced employer and insurer medical costs.

The same will presumably result for other responsible entities such as auto insurance carriers.

6. Increased Costs Due to Medical Device Excise Tax

---

[83] See, e.g., E.I. Dupont DeNemours Co. v. Faupel, 859 A.2d 1042 (Del. Super. 2004). *See also Hick's Case*, 820 N.E.2d 826 (Mass. App. 2005) (employee blinded as a result of flu shot) (court citing Larson treatise as follows: "When the inoculation is not . . . strongly tied to the employment either by employer compulsion or by the special risks of the assignment, it may still be covered if there is a combination of strong urging by the employer and some element of mutual benefit in the form of lessened absenteeism and improved employee relations.").

[84] Suniland Toys and Juvenile Furniture, Inc. v. Karns, 148 So. 2d 523 (Fl. 1963).

[85] See Philly I-Day presentation "The Affordable Care Act (ACA) Ramifications for WC in 2013 and Beyond" by Catharine J. Flynn, Esquire, Weber, Gallagher, Simpson, Stapleton, Fires & Newby, LLP, Joseph M. DiBella, Conner, Strong & Buckelew, Christian Davis, Esquire, Weber, Gallagher, Simpson, Stapleton, Fires & Newby, LLP and Ben Evans, Director of Risk Management, University of Pennsylvania.

Effective January 1, 2013 an excise tax of 2.3% on medical devices became effective as part of the Affordable Care Act.

The excise tax, which is expected to provide $20 billion in funding for healthcare reform[86], will likely increase workers' compensation costs and auto-related medical costs as manufacturers pass along the tax to providers and patients.

7. Motivation for Increased Personal Injury Litigation

With a greater number of individuals possessing health insurance one could foresee a willingness on the part of potential plaintiffs and claimants to pursue additional treatment – covered by private insurance – in order to enhance the value of a workers' compensation or auto claim or drive up the medical "specials" in a general liability claim.

Joseph Paduda reports, however, that a 2005 RAND paper found that workers possessing their own insurance were actually **less likely** to file workers' compensation claims – that workplace environment incentives may have a more significant impact on workers' compensation claims filing.[87]

8. Impact of Integrated Care

It has been observed by Dr. Hashimoto that hospitals and providers will be required to offer "better integrated care" perhaps resulting in decreased costs in not only Medicare/Medicaid, but also in WC and group health insurance systems."[88]

V. CONCLUSION

While the language of statutes and the case law construing statutes, or any accompanying regulation, must always be applied judiciously, the human resource director, and 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.

---

[86] Joe Paduda, *Obamacare and Workers' Comp* (Eight Semi-consecutive Blog Postings), available at http://www.joepaduda.com/2013/07/obamacare-workers-comp-part-1-8/

[87] Joe Paduda, *Obamacare and Workers' Comp* (Eight Semi-consecutive Blog Postings), available at http://www.joepaduda.com/2013/07/obamacare-workers-comp-part-1-8/

[88] "The Affordable Care Act and Its Effects on Workers' Compensation" Dr. Dean Hashimoto, Workers' Compensation Institute, 68th Annual Workers' Compensation Conference, August 20, 2013, Orlando, Florida.