

**PENNSYLVANIA WORKERS' COMPENSATION INTERPLAY WITH  
THE PENNSYLVANIA UNEMPLOYMENT COMPENSATION LAW,  
THE FAMILY MEDICAL LEAVE ACT, THE AMERICANS WITH  
DISABILITIES ACT, THE HIPAA PRIVACY RULE AND THE  
SOCIAL SECURITY ACT**

PRESENTATION FOR  
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**I. INTRODUCTION**

The job of human resource director is a challenging one that requires a wide range of skill sets. Indeed, at any given time, the director must assume the role of accountant, physician, psychologist, attorney, and benefits specialist.

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

The primary goal of this discussion is to facilitate the efficient and effective administration of claims made under the Pennsylvania Workers' Compensation Act. In pursuing that goal, the discussion will review the inter-relationships of a series of statutory provisions that often arise in the normal course of a Pennsylvania Workers' Compensation claim.

**II. STATUTORY PROVISIONS - RELEVANT POLICY CONSIDERATIONS**

The provisions to be addressed include the Pennsylvania Workers' Compensation Act, the Pennsylvania Unemployment Compensation Law, the Federal Family Medical Leave Act, the Federal Americans with Disabilities Act, the Federal HIPAA Privacy Rule and the Social Security Act.

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The basic policy considerations underlying statutes/regulations<sup>2</sup> 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 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 disability, but who is otherwise qualified to perform the essential function of the particular job at issue.
- (e) The Health Insurance Portability and Accountability Act ("Privacy Rule") – The basic purpose of the HIPAA Privacy Rule is to guarantee the confidentiality of the individual's "protected health information."
- (f) The Social Security Act – A leading source of benefits afforded by the Federal Government, the basic purpose of the program is to provide wage loss replacement on the basis of "superannuation" (old age), survivorship or disability that renders the worker unable to engage in any "kind of substantial gainful work which exists in the national economy."

### **III. RELEVANT STATUTORY PROVISIONS - FUNDAMENTAL 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 there is: (a) an employer-employee relationship; (b) a physical

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<sup>2</sup> This presentation does not discuss Title VII of the Civil Rights Act of 1964. That legislation prohibits discrimination when the Family Leave Act is administered.

or emotional injury; (c) occurring in the course of employment and (d) arising out of the employee's employment<sup>3</sup>.

**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 - Private employers with 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, must provide the qualified individual employee twelve weeks of unpaid leave per year in order to allow the employee to attend to his own "serious health condition" or the serious health condition of a spouse, child or parent or the birth/adoption/placement of a child, while guaranteeing a continuation of group health benefits.<sup>4</sup>

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

General Rule - The Americans With Disabilities Act, ("ADA")<sup>5</sup>, which applies to private employers who employ fifteen or more employees, and to state and local government employers, regardless of the number of employees, prohibits discrimination against persons with "disabilities," who are otherwise qualified to perform the essential functions of the job, with respect to all aspects of employment including application, hiring, wages, benefits, discipline, promotion, and work environment.

**E. HIPAA - PRIVACY RULE - 45 CFR PARTS 160 AND 164**

General Rule - The "Privacy Rule" generally prohibits a "covered entity" from using or disclosing "individually identifiable health information" created or received by a healthcare provider/health plan/employer/healthcare clearing house, that relates to an individual's present, past, or future physical or mental condition or the provision of

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<sup>3</sup> 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).

<sup>4</sup> 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.

<sup>5</sup> 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.

treatment for any such condition that is transmitted or maintained electronically or through any form of medium, without individual authorization.

**F. THE SOCIAL SECURITY ACT - 42 U.S.C.A. §§401-433, 1381-1383(C)**

General Rule – A national program of social insurance<sup>6</sup>, the Old-Age, Survivors and Disability Insurance (“OASDI”) provided by the Social Security Act is intended to “cover the income security risks associated with not being able to continue to earn a living due to old age, disability, or the death of a worker with surviving dependants.”<sup>7</sup>

For Old Age and Survivor benefits, there is no requirement that the applicant establish a “need” for benefits or a compensable wage loss, since with the occurrence of certain events triggers the entitlement i.e. the age of retirement or the death of the insured worker, with a surviving spouse and/or surviving children under the age of eighteen years.

Disability-based Social Security payments will be provided to a worker, who is fully insured, who has a sufficient record of recent work<sup>8</sup> and who is suffering from a disability that renders him or her unable to engage in any “kind of substantial gainful work which exists in the national economy.”

**IV. INTERPLAY WITH PENNSYLVANIA 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 their employment.

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

Since a compensable work injury will oftentimes involve extended absenteeism from work, the need for wage loss replacement, the need for job modification in order to facilitate return-to-work efforts, and the need to generate and review medical records, the rules and procedures of the Workers’ Compensation Act and the various statutory/regulatory schemes set forth in the Pennsylvania Unemployment Compensation Law, the Federal Family Medical Leave Act<sup>9</sup>, the Americans with

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<sup>6</sup> See Fundamentals of Private Pensions, Eight Edition, McGill, Brown, Haley, Schieber (Oxford University Press 2005), at 41.

<sup>7</sup> See Fundamentals of Private Pensions, Eight Edition, McGill, Brown, Haley, Schieber (Oxford University Press 2005), at 41.

<sup>8</sup> For example, for a worker age 31 or older, the applicant must have at least twenty quarters of coverage – during which certain earnings must be generated- in the forty quarters before the onset of disability.

<sup>9</sup> 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

Disabilities Act, and the HIPAA Privacy Rule can all converge upon an isolated claim and the administrator responsible for the claim.

In order to assist those who might be interested in a more detailed discussion of some of the issues included in this presentation, the following materials can be accessed on my law firm's website: (1) the *Amicus Curiae* Brief I prepared and filed in the Supreme Court matter of Kramer v. Workers' Compensation Appeal Board (Rite Aid Corporation), 584 Pa. 309, 883 A.2d 518 (2005) addressing the availability of the "severance" off-set afforded by Section 204(a) of the Act to insured employers; (2) an article presented to the Bureau of Workers' Compensation addressing the relationship between Pennsylvania Workers' Compensation and the HIPAA Privacy Rule; and (3) the *Amicus Curiae* Brief I prepared in The Pennsylvania State University/The PMA Group v. Workers' Compensation Appeal Board (Hensal) addressing the manner in which the pension off-set contemplated by Section 204(a) of the Act applies to defined benefit pension plans.

Below, I have addressed those circumstances where there is interplay between the Pennsylvania Workers' Compensation Act and the other statutory/regulatory schemes referenced above following the occurrence of an occupational injury.

#### A. THE UNEMPLOYMENT COMPENSATION LAW

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

The Unemployment and Workers' Compensation regimes typically address the individual's employment status either simultaneously or in close proximity to one another, where, for example, following the occurrence of a compensable work injury, the employer discharges the employee for alleged disciplinary reasons. In those instances the two provisions will address **the basis for the discharge** while applying similar but distinct standards.

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

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Workers' Compensation, ADA and FMLA," Gregory G. Pinski and Angela L. Rud, 76 North Dakota Law Review, (2000).

When an employment discharge occurs in the context of a workers' compensation claim, the question to be resolved by the WCJ is 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).

Claimants' counsel have traditionally argued 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 on the basis of his or her “fault.”

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

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

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 off-set.

That changed, however with the enactment of “Act 44,” remedial legislation designed to begin the process of reducing the cost of Pennsylvania work injuries<sup>11</sup>.

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 injured workers, receiving workers' compensation wage loss benefits.

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

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<sup>10</sup> 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).

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

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

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

In Ferrero v. Workers’ Compensation Appeal Board (CH&D Enterprises), 706 A.2d 1278 (Pa. Cmwlth. 1998), the Commonwealth Court ruled that the Unemployment Compensation credit applies to the **gross UC benefit** the injured worker receives since “applying the off-set to the net amount of UC benefits would create unnecessary administrative problems. The UC benefits are not taxed until year end, and the amount taxed will vary depending upon the employee’s tax bracket, deductions and filing status. Furthermore, as we have noted in the context of subrogation...workers’ compensation benefits are exempt from income taxation and UC [Benefits] are not so exempt...”

The “gross” versus “net” question has not necessarily been fully resolved since Section 123.6(a) of the Act 57 Regulations, which was promulgated one day before the Ferrero decision was circulated, 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).

Despite the foregoing Bureau Regulation, it seems that in general, most practitioners agree that the **gross** Unemployment Compensation figure should be used when calculating the employer’s UC off-set.

The reference in Section 204 (b) to “credit weeks,” represents a period of time prior to the employee’s unemployment status, during which the employee earned wages sufficient to qualify for UC benefits. In order to assure eligibility for UC benefits, the employee must demonstrate that he or she earned a certain level of wages during the “credit weeks” at issue. Since workers’ compensation disability benefits are not considered “wages,” it has been observed that Section 204(b) does not afford an employee receiving workers’ compensation disability benefits any particular advantage or entitlement in connection with a UC claim. See *Pennsylvania Workers’ Compensation: Law and Practice*, Second Edition, Torrey and Greenberg §14:13 (Thomson-West 2005).

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

1. Related Discussion - Severance/Pension Benefits - Section 204(a) provides, in pertinent part, as follows:

“**Severance** benefits paid by the employer directly liable for the payment of compensation and the benefits from a **pension** plan to the extent funded by the employer directly liable for the payment of compensation which were received by the employe (sic) shall also be credited against the amount of the award made under sections 108 and 306, except for benefits payable under section 306(c)...”

The enhancement of Section 204, quoted above, was an important feature of “Act 57 of 1996” which sought to further advance the Pennsylvania Legislature’s 1993 determination to reduce the cost of Pennsylvania work injuries, through the introduction of “impairment ratings”, “Compromise and Release” settlements, and the above-referenced “off-sets,” which were designed to prohibit injured workers from receiving wage loss replacement “double recoveries.” See Kramer v. Workers’ Compensation Appeal Board (Rite Aid Corporation), 584 Pa. 309, 883 A.2d 518 (2005); Township of Lower Merion v. Workers’ Compensation Appeal Board (Tansey), 783 A.2d 878 (Pa. Cmwlth. 2001).

In addressing the policy considerations underlying the Section 204(a) “off-sets”<sup>13</sup> the Pennsylvania Supreme Court explained in Kramer, supra., that “the subject legislation serves a legitimate state interest in reducing the cost of workers’ compensation benefits in Pennsylvania **by allowing employers to avoid paying duplicate benefits for the same loss of earnings.**”

Seizing upon the language “paid by the employer directly liable for the payment of compensation” the claimant’s bar took the position in Kramer that with respect to severance benefits, and necessarily pension benefits, the Section 204(a) off-set could only be implemented by a self-insured employer or an employer who had actually paid the employee workers’ compensation disability benefits, as opposed to the employer whose insurance carrier had paid such benefits. Ultimately, however, the Supreme Court in Kramer, supra. ruled that the off-set provision **applies equally** to self-insured employers and insured employers.

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<sup>13</sup> It should be noted that off-sets for other collateral benefits such as pension benefits and severance benefits were available to employers, before the enactment of Act 57 on a common law basis. At that time, an employer could obtain an off-set provided it could demonstrate, for example, that the pension received by the injured worker, had been made by the employer in lieu of the payment of workers’ compensation indemnity benefits, i.e. on the basis of the employee’s inability to work. See Murphy v. Workers’ Compensation Appeal Board (City of Philadelphia), 871 A.2d 312 (Pa. Cmwlth. 2005) *citing* Bethlehem Steel Corp. v. Workers’ Compensation Appeal Board (Gounaris), 557 Pa. 641, 732 A.2d 1211 (1998); Toborkey v. Workmen’s Compensation Appeal Board (H.J. Heinz), 655 A.2d 636 (Pa. Cmwlth. 1995).



Most recently, the pension off-set language of Section 204(a) has prompted an intense battle between public employers and their injured employees.

Indeed, the Commonwealth Court's ruling in Department of Public Welfare/Polk Center v. Workers' Compensation Appeal Board (King), 884 A.2d 343 (Pa. Cmwlth. 2005) in which the court rejected the public employer's effort to enforce a Section 204(a) off-set for defined pension benefits provided to its injured employee through the Pennsylvania State Employees' Retirement system, has prompted a barrage of such contests.

On November 17, 2006, however, the Commonwealth Court brought an end, at least temporarily, to the success the claimants' enjoyed following King with its en banc holding, permitting the pension offset in The Pennsylvania State University/The PMA Insurance Group v. Workers' Compensation Appeal Board (Hensal).

In reversing the Appeal Board's offset disallowance; the court sanctioned the use of actuarial analysis in establishing the extent of employer funding in the context of a defined benefit plan:

"Since an employer cannot provide evidence of actual contributions for the use of an individual member of a defined benefit pension plan, it may meet its burden of proof, as Employer attempted in this case, with expert actuarial testimony. **Employer's expert evidence here, if accepted as credible, is legally sufficient to establish the extent to which Employer funded Claimant's defined benefit pension for purposes of the offset.** In this regard we discern no merit in Claimant's argument that Employer's evidence is impermissibly speculative." (emphasis supplied).

In a companion ruling issued the same day the court reiterated in Department of Public Welfare/Western Center v. Workers' Compensation Appeal Board (Cato), that "credible actuarial opinion is competent to prove the basis for a [pension] offset [Section 204(a) of the Act in the context of a defined benefit pension plan]."

Accordingly, the law of the land now **permits** the pension offset methodology embraced by both PSERS and SERS.

The issue raised by the claimants' bar in King has not necessarily been laid to rest, however, since on December 7, 2006 Mr. Hensal filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court seeking an opportunity to Appeal the Commonwealth Court ruling.

Although the Court has not yet ruled on claimant's "Petition for Allowance," I would not be surprised if the Court were to grant the Appeal request, considering the far-reaching impact it will have upon public employees throughout the Commonwealth.

Please note that the Act 57 Regulations provide detailed instructions on how an employer must proceed when attempting to perfect an off-set under Section 204(a) of the Act. In sum, the Regulations permit the employer to unilaterally perfect the off-set for any covered collateral benefit received subsequent to the compensable work injury at issue.

## **B. THE FAMILY MEDICAL LEAVE ACT**

The Family Medical Leave Act ("FMLA") became law on August 5, 1993 while the FMLA final regulatory rulemaking became effective April 6, 1995.

The law, as noted above, "was promulgated with the intent to prevent employees from having to choose between the jobs they need and the families who need them.<sup>14</sup>"

The reader should be mindful of the following FMLA principles: (1) the protection afforded by the FMLA is generally triggered by a "serious health condition" which has been defined as "an illness, injury, impairment, or physical or mental condition that involves . . . [i]npatient care . . . or [c]ontinuing treatment by a health care provider<sup>15</sup>" e.g. pregnancy, pre-natal care, severe stroke, terminal cancer, chemotherapy treatments, asthma, diabetes or treatment for restorative surgery<sup>16</sup>; (2) a "serious health condition" under the FMLA is not necessarily the equivalent of a "disability" under either the ADA or the Workers' Compensation Act; (3) 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 - the employer also has the right to challenge the employee's certification<sup>17</sup>; (4) the employee's need for more than the twelve-week leave period prescribed by the FMLA will, in certain instances, be construed as a request for a "reasonable accommodation" under the ADA, and will not necessarily be deemed an "undue hardship" for ADA purposes; (5) the relevant federal regulations permit FMLA "leave" to run on the basis of absences attributable to the disabling effects of a compensable work injury<sup>18</sup> provided the employee is properly notified in advance that such absences will be counted against

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<sup>14</sup> "The Family and Medical Leave Act," Jill M. Lashay, Esquire, *Dealing with Current Employment Issues*, Pennsylvania Bar Institute, (2005).

<sup>15</sup> See "Everything You Want to Know About the FMLA *And More*" Debbie Rodman Sandler, 12th Annual Employment Law Institute, (PBI 2006) at 3-4.

<sup>16</sup> *Id.*

<sup>17</sup> See 29 C.F.R. § 825.307(a)(2).

<sup>18</sup> 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.

FMLA leave<sup>19</sup>; (6) while the Workers' Compensation Act does not require that the injured employee return to work for the employer in his or her pre-injury capacity or its equivalent, the FMLA generally **does** require such an assignment, unless the employer 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;<sup>20</sup> (7) the employee's use of FMLA leave cannot result in the loss of any benefit that the employee earned or was entitled to before taking the leave<sup>21</sup>; (8) the employee's use of FMLA leave cannot be counted against the employee under a "no fault" attendance policy<sup>22</sup>; (9) the employer is prohibited from having direct contact with the employee's doctor, though a health care provider representing the employer may have such contact but only with the employee's permission<sup>23</sup>; and (10) the employer may have contact direct contact with the employee's doctor if the condition at issue involves a workers' compensation claim.<sup>24</sup>

### 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 people with disabilities.

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," 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 one or more of his or her major life activities;" (2) he or she has a record of such impairment; or (3) he or she is regarded as having such an impairment.

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.

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<sup>19</sup> 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.

<sup>20</sup> 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.

<sup>21</sup> See "Everything You Want to Know About the FMLA *And More*" Debbie Rodman Sandler, 12th Annual Employment Law Institute, (PBI 2006) at 4..

<sup>22</sup> *Id.*

<sup>23</sup> See 29 C.F.R. § 825.307(a).

<sup>24</sup> See 29 C.F.R. § 825.307 (a)(1).

With respect to the “Employment” component of the ADA, the basic protection afforded by the law, requires the employer to provide “reasonable accommodations<sup>25</sup>” in order to protect the rights of individuals with disabilities in all aspects of employment, including the application process, the hiring process and the payment of wages and benefits.

In accomplishing its primary goal, the ADA may require the restructuring of jobs by reallocating or reassigning marginal job functions or modifying work schedules, altering of the lay-out of work stations, and/or modifying work equipment.<sup>26</sup>

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 concept is defined and addressed under each statutory scheme.

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

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

The following are some general rules to remember when comparing the ADA to the Workers’ Compensation Act: (1) 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” or may be temporary or non-chronic, thereby disqualifying it as a “disability” for ADA purposes; (2) an employer may ask a prospective employee about his or her prior workers’ compensation only after providing a conditional offer of employment; (3) an employer may ask a prospective employee to undergo a physical examination to obtain information about the existence or nature of a

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<sup>25</sup> A reasonable accommodation is any change or modification that allows a disabled individual to either apply for a position or perform the essential functions of a job or enjoy the benefits of the workplace as similarly employed individuals who are not disabled. 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).

<sup>26</sup> Id.

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**; (4) 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; (5) if the injured worker requests a reasonable accommodation from the employer, provided the accommodation is not obviously required, the employer is permitted to require a medical report supporting the request; (6) the ADA requires confidentiality of the injured worker's occupational injury and workers' compensation claim; (7) 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 somehow 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**"; (8) the employer cannot condition a return to work on the occupationally injured employee's ability to work 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; (9) 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 have a "permanent disability"; (10) 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; (11) 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<sup>27</sup> for the employer; (12) 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; (13) 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; (14) 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; (15) 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, or if there is an available lower graded position, absent any undue hardship to the employer; (16) 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; (17) the ADA does not require the creation of a light-duty job for a non-occupationally injured employee, but if the

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<sup>27</sup> 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).

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; (18) 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 (19) the workers' compensation "exclusive remedy provision" does not preclude the employee from pursuing an ADA claim against the employer<sup>28</sup>.

It is, of course, important to recall that Section 306(b)(2) of the Act contains language that seems to reference the ADA "reasonable accommodation" concept by instructing, in pertinent part, that "[i]f the employer has a specific job vacancy the employee (sic) is capable of performing, the employer shall offer such job to the employee (sic)."

It is also important to recall that under the common law, where the injured employee is physically incapable of returning to work in his or her pre-injury job, the employer has the right to refer to the employee alternative employment in accordance with the regime set forth in Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction), 516 Pa. 240, 532 A.2d 374 (1987). Accordingly, it appears that an employer could face ADA liability following the occurrence of a compensable work injury, by refusing to bring the employee back to work in an available job comparable to the pre-injury job, while retaining the services of a vocational specialist to perform a Kachinski job search on the employee's behalf.

In fact, the United States Supreme Court ruled in Cleveland v. Policy Management Systems Corporation, 119 S. Ct. 1597 (1999) that an individual's receipt of Social Security Disability benefits does not judicially estop the individual 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.<sup>29</sup>

Consistent with the Supreme Court ruling, the EEOC issued a "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'

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<sup>28</sup> 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 the employee's ADA recovery against the discharging employer. See Brubacher Excavating, Inc. v. Workers' Compensation Appeal Board (Bridges), 774 A.2d 1274 (Pa. Cmwlth. 2001).

<sup>29</sup> 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 (7<sup>th</sup> 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 (3<sup>rd</sup> Cir. 1996) (an individual's representation to the Social Security Administration that he was disabled and unable to work barred his subsequent ADA claim.)

compensation and other disability benefits should not automatically bar an ADA claim.<sup>30</sup>

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 ADA and the Workers' Compensation Act: (1) the employer should always request FMLA certification from an employee at the commencement of an unforeseen leave or immediately following a leave request; (2) the employer should always maintain separate confidential medical examination files from regular personnel files; (3) 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; (4) after the prescribed twelve-week period has expired, however, ADA principles are triggered, meaning that the employee may or may not be entitled to additional leave, under the ADA, depending upon whether it would be viewed as a "reasonable accommodation" and whether it would impose an undue hardship on the employer's business; (5) 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; and (6) effective integration of the FMLA, ADA, and the Workers' Compensation Act includes use of relevant notice requirements, communication of rights and responsibilities of employees, preparation of and use of required documentation, careful accounting of benefits and wages, use of return to work programs, knowledge of applicable collective bargaining agreement provisions, consistent application of leave policies, and appropriate record keeping

#### **D. THE HIPAA "PRIVACY RULE"**

For a full discussion of the application of the Privacy Rule to employers and workers' compensation administration, see the "Pennsylvania Workers' Compensation and the HIPAA Privacy Rule" article presented to the Bureau of Workers' Compensation Annual Conference in December, 2003, included as Attachment "B" below.

Both the FMLA and the ADA have rules requiring the confidentiality of employee medical information and medical record keeping.<sup>31</sup>

There are two important general rules under the Privacy Rule with which the human resource director and workers' compensation claims representative should be familiar: (1) the Privacy Rule does not apply to the administration of workers' compensation claims; and (2) the Privacy Rule does not apply to employers.

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<sup>30</sup> Id.

<sup>31</sup> "What's Up Doc? Employee Medical Information: What an Employer Can Ask For, When & How" Rick Grimaldi, 12<sup>th</sup> Annual Employment Institute, (PBI 2006) at 11 (ADA and FMLA medical records can be maintained together by the employer, provided the ADA confidentiality requirements are honored).

Section 164.512(l) of the Rule provides that “a covered entity may disclose “protected health information” or “PHI” as authorized by and to the extent necessary to comply with laws relating to workers’ compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault” and (2) Section 160.103 of the Rule defines “health plan” as “an individual or group plan that provides, pays the cost of, medical care” and includes “a health insurance insurer as defined in this section.” While the foregoing provision does not **specifically** exclude workers’ compensation programs from the definition of “health plan”, it does exclude any “policy, plan, or program to the extent that it provides, or pays for the cost of” benefits that are excepted from coverage under the Public Health Services Act<sup>32</sup>. The Public Health Services Act specifically **excepts** or excludes benefits under “workers’ compensation or similar insurance.”<sup>33</sup> Since workers’ compensation insurance is **excepted** from coverage under the Public Health Services Act, it is necessarily **excluded** from coverage under the Privacy Rule. Accordingly, a workers’ compensation program is **not** a “covered entity” under the Privacy Rule and (3) although by definition, PHI includes “individually identifiable health information” created or received **by employers**<sup>34</sup>, thereby including employers in the discussion, an “employer” is not a covered entity under the Rule. Of course, an employer group health plan, which constitutes a separate legal entity, is a covered entity.

Despite the foregoing propositions, there will be circumstances where the Privacy Rule impacts upon the administration of a workers’ compensation claim.

Perhaps the most significant impact arises in those instances where the concerned health care provider refuses to disclose PHI to claims representatives, rehabilitation nurses, attorneys or vocational rehabilitation specialists.

Because that eventuality can arise in inopportune moments during the litigation or administrative process, it is crucial that from the outset of a claim the claims representative obtain from the injured worker a HIPAA-approved Medical Release Form permitting access to relevant PHI/treating physicians.

The human resource director should be mindful that the right of an employer to interact with a treating physician while attempting accommodate the employee’s physical condition, is an important one that has been recognized by the courts in a non-HIPAA/FMLA setting. Indeed, most recently, the Pennsylvania Superior Court ruled in Grimminger v. Maitra, 887 A.2d 276 (Pa. Super. 2005) that a treating physician will not be deemed to have violated the “physician-patient privilege” set forth in the Pennsylvania Judicial Code by offering information and analysis regarding the employee’s physical ability to work to his or her employer<sup>35</sup>.

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<sup>32</sup> See 45 CFR §160.103(2)(i).

<sup>33</sup> See 42 U.S.C. 300 gg – 91 (c)(1)(D).

<sup>34</sup> See 45 CFR §160.103.

<sup>35</sup> The court ruled that the physician did not disclose information provided to him by the patient/employee and therefore did not breach a privilege.



The Grimminger court did not presume to address the application of the FMLA restriction on employee physician contact.

#### E. THE SOCIAL SECURITY ACT - OLD AGE/DISABILITY BENEFITS

When originally enacted in 1935, the Social Security Act was intended to provide wage loss benefits for “superannuated” or elderly workers.<sup>36</sup>

In 1939, survivor benefits for spouses and children of deceased workers were introduced and in 1957 disability insurance was added to the protections already afforded by this important social program.<sup>37</sup>

By the end of the 20<sup>th</sup> Century, nearly all U.S. workers were covered by the Social Security Act.<sup>38</sup>

With respect to an injured employee’s receipt of Social Security Old Age benefits, Section 204(a) provides in pertinent part as follows:

“...fifty per centum of the benefits commonly characterized as ‘old age’ benefits under the Social Security Act (49 Stat. 620, 42 U.S.C. 301 *et seq.*) shall also be credited against the amount of payments made under sections 108 306, except for benefits payable under section 306(c) Provided, however, That the Social Security off-set shall not apply if old age Social Security benefits were received prior to the compensable injury.”

Accordingly, in order for an employer to enjoy a Social Security off-set, the injured employee must become eligible for and obtain Social Security Old Age benefits **following the occurrence** of the compensable work injury and may only take an off-set

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<sup>36</sup> See Fundamentals of Private Pensions, Eight Edition, McGill, Brown, Haley, Schieber (Oxford University Press 2005), at 4-5. (By the early 20<sup>th</sup> Century, as the working population grew older, employers found it necessary to encourage their older and less productive employees to retire. At the same time, because of changing social dynamics, including increased geographic mobility, the extended family that had traditionally provided, post-retirement, safety net that had become less available - “[this] traditional approach to old-age care and support was weakened.” The convergence of these social, economic and demographic factors eventually prompted the development of the “institutional provision of retirement benefits in the United States.”)

<sup>37</sup> See Fundamentals of Private Pensions, Eight Edition, McGill, Brown, Haley, Schieber (Oxford University Press 2005), at 39-40.

<sup>38</sup> See Fundamentals of Private Pensions, Eight Edition, McGill, Brown, Haley, Schieber (Oxford University Press 2005) at 41. (“Today the only workers still outside the system are a few remaining federal civilian employees hired before the beginning of 1984, about 20 percent of all state and local government employees who work for entities that had joined the system by the end of 1983, and employee covered by the Railroad Retirement System”).

of 50% of those Social Security benefits awarded.<sup>39</sup> Indeed, the employer will not be permitted an off-set where the claimant applies for and becomes entitled to Social Security benefits prior to the occurrence of the work injury, but does not receive his first Social Security benefit check until after the occurrence of the work injury. See Pittsburgh Board of Education v. Workers' Compensation Appeal Board (Davis), 878 A.2d 173 (Pa. Cmwlth. 2005).

It should also be noted that the Social Security off-set - or any off-set contemplated by Section 204(a) - does not apply to benefits received under Section 306(c) of the Act, which does not afford not "wage loss" benefits, rather provides scheduled "specific loss" benefits for which an injured worker may be entitled even in the absence of a work-related disability or wage loss.

1. Related Discussion - Investigating Employee Receipt of Collateral Benefits

Under Section 311.1(a) of the Act, the injured employee has an obligation to report any receipt of pension, severance, or Social Security Old Age benefits in writing to the insurer or employer.

Under Section 311.1(d) of the Act, the insurer or employer has the right to submit investigative forms, including a "verification form" to the injured employee every six months in order to obtain information that could impact upon the employee's eligibility for continued benefits, including receipt of pension benefits, severance benefits, Unemployment Compensation benefits, and/or Social Security Old Age benefits.

With respect to Social Security disability benefits, it is important to remember that although an injured worker may recover both workers' compensation disability benefits and Social Security disability benefits, where that occurs, the Social Security Administration will normally seek an off-set for the worker's receipt of workers' compensation benefits. In fact, whenever a workers' compensation claim is settled in a manner that affords the claimant a lump sum payment, language is always included in the Compromise & Release Agreement referencing the Third Circuit ruling in Sciarotta v. Bowen, 837 F.2d 135 (3d Cir. 1988) which provides that a lump sum permanent partial disability award can be included by the Social Security Administration as an off-set against the individual's receipt of Social Security disability benefits. In order to allow the claimant to continue to receive Social Security disability benefits, the Compromise & Release Agreement typically breaks down the lump sum settlement payment over the course of the claimant's life expectancy, thereby reducing the Social Security disability off-set.

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<sup>39</sup> Section 123.7(c) of the Act 57 Regulations provides that "to calculate the weekly off-set, 50% of the net monthly Social Security (old age) benefit received by the employe (sic) shall be divided by 4.34."

2. Related Discussion - Reinstatement of Disability Benefits Following Resignation/Termination/Lay-Off

Generally, an injured employee will only be entitled to recover disability benefits where he or she experiences wage loss resulting from the effects of a compensable work injury.

There are situations, however, where, in the context of a compensable work injury, the claimant experiences wage loss that is not directly attributable to the work injury but that, nevertheless, requires the payment of disability benefits.

The fact pattern that seems to cause employers, insurance carriers, and third-party administrators great frustration is the situation where the injured employee returns to work without wage loss, but without having fully recovered from the work injury, only to suffer total wage loss as a consequence of an unrelated economic lay-off. Despite the fact that the wage loss experienced by the injured worker resulted from a phenomenon that affected either the entire work force or a portion of the work force, the worker is entitled to a reinstatement of benefits because he or she is viewed as requiring compensation for his or her continuing diminished ability to generate earning power in the general labor market. See Harper & Collins v. Workmen's Compensation Appeal Board (Brown), 543 Pa. 484, 672 A.2d 1319 (1996); Weber v. Workers' Compensation Appeal Board (Shenango, Inc.), 729 A.2d 1249 (Pa. Cmwlth. 1999).

In Vista International Hotel v. Workers' Compensation Appeal Board (Daniels), 742 A.2d 649 (Pa. 2000), the Pennsylvania Supreme Court ruled that where, following the occurrence of a compensable work injury, the injured employee is fired or terminated for "fault" the resulting wage loss is not compensable, while in assessing the employee's actions, imposing a good/bad faith analysis of the employee's actions that led to the discharge. See also Hertz-Penske v. Workmen's Compensation Appeal Board (Bowers), 546 Pa. 257, 684 A.2d 547 (1996).

With the concept of "fault" or "good/bad faith" included in the analysis, the courts have provided the following guidance: (a) where the injured employee is discharged for business reasons, but through no fault of the employee, benefits will be reinstated. Pappans Family Restaurant v. Workers' Compensation Appeal Board (Ganoe), 729 A.2d 661 (Pa. Cmwlth. 1999), Cryder v. Workers' Compensation Appeal Board (National City), 828 A.2d 1155 (Pa. Cmwlth. 2003), B&B Drywall v. Workers' Compensation Appeal Board (Griffo), 784 A.2d 250 (Pa. Cmwlth. 2001); (b) where the employee is discharged after testing positive on a drug screening, benefits will not be awarded Edwards v. Workers' Compensation Appeal Board (Sears Logistic Services), 770 A.2d 805 (Pa. Cmwlth. 2001); (c) where an employee is discharged from modified duty after being convicted for assaulting a child - not in the course of employment - benefits will not be reinstated. St. Luke's Hospital v. Workers' Compensation Appeal Board (Ingle), 823 A.2d 277 (Pa. Cmwlth. 2003); (d) as noted above, a ruling by an Unemployment Compensation Referee that an employee did not engage in "willful misconduct" will not collaterally estop the employer from defending the employee's

reinstatement petition, though in connection with such a petition the burden will be upon the employer to demonstrate that the claimant's wage loss is attributable to his own fault. See Kane v. Workmen's Compensation Appeal Board (Weiss Markets, Inc.), 682 A.2d 17 (Pa. Cmwlth. 1996); (e) where the injured employee voluntarily leaves his employment for reasons unrelated to the work injury, he or she will not be entitled to a reinstatement of disability benefits. See Carbaugh v. Workmen's Compensation Appeal Board (T.B. Woods Sons Company), 639 A.2d 853 (Pa. Cmwlth. 1994); Possumato v. Midvale-Heppenstal Company, 287 A.2d 915 (Pa. Cmwlth. 1972); and (f) as noted above, where, following a compensable work injury, the employee returns to work with wage loss, and is subsequently discharged for fault, he or she will still be entitled to receive partial disability benefits. Howze v. Workers' Compensation Appeal Board, (General Electric Co.), 714 A.2d 1140 (Pa. Cmwlth. 1998).

### 3. Related Discussion - "At Will" Employment Considerations

It is a firmly entrenched legal principle in Pennsylvania that an employer may terminate an employee **at its will**, and that an employee may terminate his or her employment at his or her will, i.e. **for a good reason, bad reason, or for no reason at all absent some contractual or statutory restriction**. See Yetter v. Ward Trucking Corp., 401 Pa. Super. 467, 585 A.2d 1022 *allocatur denied* 529 Pa. 623, 600 A.2d 539 (1991).

Over the years, the "at will" rule has continued to prevail despite efforts to carve out various "bad faith" exceptions. In fact, the Pennsylvania courts have consistently held that no implied duty of good faith applies to the employer seeking to terminate the employment of a pure at-will employee. See Donahue v. Federal Express Corp., 753 A.2d 238 (Pa. Super. 2000).

Although efforts have been made to challenge a discharge on the basis of the employer's failure to abide by the terms of its Employee Handbook, the courts have been reluctant to construe Handbooks as legally binding contracts, Luteran v. Loral Fairchild Corp., 455 Pa. Super. 364, 688 A.2d 211, *allocatur denied*, 549 Pa. 717, 701 A.2d 578 (1997) particularly where the Handbook contains an appropriate and conspicuous disclaimer declaring that regardless of the content of the Handbook, the employee remains an at-will employee. Martin v. Capital Cities Media, Inc., 354 Pa. Super. 199, 511 A.2d 830 (1986) *allocatur denied*, 514 Pa. 643, 523 A.2d 1132 (1987)<sup>40</sup>.

There are a number of statutory exceptions to the "at will" rule, including, as noted above, the ADA and the FMLA, as well as The Pennsylvania Whistle Blowers Act, The Pennsylvania Human Relations Act, Title VII, The Uniform Services and Reemployment Rights Act, The Employee Polygraph Protection Act and The Jury System Improvement Act of 1978.

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<sup>40</sup> The author wishes to thank Michael J. Torchia, Esquire and Stephen C. Goldblum, Esquire for the guidance provided in their piece "Fire At-Will: Wrongful Discharge in Pennsylvania" 12<sup>th</sup> Annual Northeast Regional Employment Law Institute, PBI (2006).

There are also some isolated “public policy” exceptions to the rule that prohibit an employer from terminating an employee, even in the absence of a statutory restriction or contractual restriction, including the workers’ compensation exception.

In the seminal case of Schick v. Shirey, 552 Pa. 590, 716 A.2d 1231 (1998) the Pennsylvania Supreme Court ruled that an employee who is terminated by the employer for having reported a work-related injury, has the right to file a civil wrongful discharge action against the employer, regardless of the exclusive remedy provision. Most recently, in Rothrock v. Rothrock Motor Sales, Inc., 883 A.2d 511 (Pa. 2005) the Supreme Court extended the rule by declaring that where an employee is fired for refusing to dissuade **another employee** from pursuing a workers’ compensation claim, the fired employee will have available a wrongful discharge cause of action against the employer. But see McNichols v. Commonwealth of Pennsylvania Department of Transportation, 804 A.2d 1264 (Pa. Cmwlth. 2002) (no wrongful discharge cause of action available to terminated employee due to sovereign immunity protection afforded to commonwealth agency). See also Shafinsky v. Bell Atlantic, Inc., No. Civ. A. 01-3044, 2002 W.L. 3151355 (E.D. Pa. 11/5/02) (workers’ compensation retaliatory discharge civil cause of action only available to at-will employees).

## V. CONCLUSION

While the instruction of the particular statute and the case law construing the statute, or any accompanying regulation, must always be applied, the human resource director as well as any other individual assigned the task of administering a workers’ compensation claim should never forget that an application of the law will rarely afford a good result in the absence of common sense and compassion for the employee.