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**THE INTERPLAY BETWEEN THE PENNSYLVANIA WORKERS'  
COMPENSATION ACT, THE UNEMPLOYMENT COMPENSATION  
LAW, THE FMLA AND THE ADA**

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**I. INTRODUCTION**

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

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

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

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In order to achieve that goal, the discussion will review the interplay between three statutory provisions and the administration of Pennsylvania workers' compensation claims - the Pennsylvania Unemployment Compensation Law, the Americans with Disability Act and the Family Medical Leave 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, and the Americans with Disabilities Act<sup>3</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 physical or mental disability, but who is otherwise qualified to perform the essential functions of his or her job.

## **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 employer; (b) suffers a physical or emotional injury; (c) occurring in the course of employment and (d) arising out of the employee's employment<sup>4</sup>.

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<sup>3</sup> This presentation does not discuss Title VII of the Civil Rights Act of 1964. That legislation prohibits discrimination when the Family Medical Leave Act is administered.

<sup>4</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).

**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>5</sup>

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

General Rule – The Americans With Disabilities Act, (“ADA”)<sup>6</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.

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

**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.

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<sup>5</sup> 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.

<sup>6</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.

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

Since a compensable work injury will oftentimes involve extended absenteeism from work, the need for wage loss replacement and the need for job modification in order to facilitate a return-to-work, the Workers’ Compensation Act, the Unemployment Compensation Law, the Federal Family Medical Leave Act<sup>7</sup>, and the Americans with Disabilities Act, can all converge upon the administrator responsible for the claim.

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

#### A. THE UNEMPLOYMENT COMPENSATION LAW

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

The Unemployment and Workers’ Compensation regimes often address the individual’s employment status 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).

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.,

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<sup>7</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 Workers’ Compensation, ADA and FMLA,” Gregory G. Pinski and Angela L. Rud, 76 North Dakota Law Review, (2000).

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 obligated to determine whether the post-work injury involuntary discharge was prompted by **the employee's bad faith misconduct**. See Stevens v. Workers' compensation Appeal Board (Consolidated Coal Co.), 563 Pa. 297, 760 A.2d 369 (2000)(injured employee, who was unable to return to work for employer, returns to work for new employer but is thereafter discharged due to inability to perform new job in acceptable fashion, despite effort to do so, awarded reinstatement of disability benefits).

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

Citing the different standards of proof 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>8</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, 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 off-set.

That changed, however with the enactment of "Act 44," remedial legislation designed to reduce the cost of Pennsylvania work injuries<sup>9</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.

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<sup>8</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>9</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.

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

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

(b) For the exclusive purpose of determining eligibility for compensation under the...‘Unemployment Compensation Law,’ weekly compensation paid to an employe under this act shall be deemed to be a credit week as that term is defined in the ‘Unemployment Compensation Law.’”<sup>10</sup>

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).

In a ruling issued **one day** following the promulgation of Section 123.6(a) of the Act 57 Regulations, the Commonwealth Court ruled in Ferrero v. Workers’ Compensation Appeal Board (CH&D Enterprises), 706 A.2d 1278 (Pa. Cmwlth. 1998), 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” offset rule established in Ferrero **was recently set aside** by the Commonwealth Court in its February 4, 2009 Opinion and Order issued in Philadelphia Gas Works v. Workers’ Compensation Appeal Board (Amodei), (Filed 2/4/09). In that hotly contested case the court instructed that when applying the off-sets set forth in Section 204(a) of the Act, the employer is entitled to a credit for the “**net**” - not the “gross” - amount of Unemployment Compensation, Social Security (Old Age) benefits, severance or pension benefits received by the injured employee.<sup>11</sup>

Since the employer in Amodei has filed a Petition for Allowance of Appeal with the Supreme Court, seeking a reversal of the Commonwealth Court ruling, the debate

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<sup>10</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.

<sup>11</sup> In doing so, the court noted that when presented with the issue in Ferrero it was not asked to apply or consider the language set forth in Section 123.6(a) of the Act 57 Regulations.

over whether Section 204(a) affords a “gross” or “net” offset for UC benefits will likely continue for the next six to twelve months.

## **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 of preventing employees from having to choose between the jobs they need and the families who need them.<sup>12</sup>”

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

In order to be eligible for FMLA protection, the employee must: (1) work for a covered employer; (2) work for that employer for a total of twelve months; (3) work at least 1250 hours during the preceding twelve months; and (4) work at a location in the United States or United States Territory where at least fifty employees are employed within seventy-five miles of one another.

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

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 a nervous breakdown that requires substantial treatment but that does not arise out of a subjective reaction to an abnormal working condition, and therefore is not a compensable “mental-mental” work injury. See Baker v. Hunter Douglas, Inc., 270 F.App’x 159, 2008 WL 744734 (3<sup>rd</sup> 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 (3<sup>rd</sup> Circuit 2008)(associate professor requests and receives FMLA leave for stress condition caused by interaction with his department chair).

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

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

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<sup>12</sup> “The Family and Medical Leave Act,” Jill M. Lashay, Esquire, Dealing with Current Employment Issues, Pennsylvania Bar Institute, (2005).

that involves . . . [i]npatient care . . . or [c]ontinuing treatment by a health care provider<sup>13</sup>” e.g. **pregnancy, pre-natal care, severe stroke, terminal cancer, chemotherapy treatments, asthma, diabetes or treatment for restorative surgery**<sup>14</sup>;

(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 – the employer also has the right to challenge the employee’s certification<sup>15</sup>;

(d) while the employee seeking leave should give notice of the need for FMLA “leave,” as soon as he or she is able to do so, he or she has no obligation to specifically mention “FMLA.” Rather, mentioning 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.<sup>16</sup>

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

(f) 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>17</sup> **provided the employee is properly notified in advance that such absences will be counted against FMLA “leave”**<sup>18</sup>;

(g) 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

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<sup>13</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>14</sup> Id.

<sup>15</sup> See 29 C.F.R. § 825.307(a)(2).

<sup>16</sup> 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.

<sup>17</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.

<sup>18</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.

employee is a highly compensated “key employee” whose reinstatement would cause the employer substantial and grievous economic injury;<sup>19</sup>

(h) 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<sup>20</sup>;

(i) the employee’s use of FMLA “leave” cannot be counted against the employee under a “no fault” attendance policy<sup>21</sup>;

(j) 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>22</sup>; and

(k) the employer may have direct contact with the employee’s doctor if the “serious health condition” at issue arises out of a workers’ compensation claim.<sup>23</sup>

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

## **2. Practical Considerations of 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 ADA and the Workers’ Compensation Act:

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

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

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<sup>19</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>20</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>21</sup> *Id.*

<sup>22</sup> See 29 C.F.R. § 825.307(a).

<sup>23</sup> See 29 C.F.R. § 825.307 (a)(1).

(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 (3<sup>rd</sup> Circuit 2008).

(e) 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**, depending upon whether it would be viewed as a “reasonable accommodation” and whether it 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; and

(g) **Effective integration of the FMLA, ADA, and the Workers’ Compensation Act includes satisfaction of relevant notice requirements, communication of rights and responsibilities, 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**

### 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.<sup>24</sup>

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

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<sup>24</sup> 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 conclude 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.

The protection afforded by the ADA applies not only to individuals who are “disabled<sup>25</sup>,” 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.<sup>26</sup>

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, seeks to broaden the definition of “disability” under the ADA, in response to holdings in several Supreme Court decisions and to certain Regulations issued by the EEOC.

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<sup>27</sup>** in response to the narrow definition of “disability” set forth by the U.S. Supreme Court

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<sup>25</sup>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.”

<sup>26</sup> See Eshelman v. Agere Systems, Inc., 554 F.3d 426 (3<sup>rd</sup> Cir. 2009)(Employee returns to work on a part-time basis following an FMLA leave during she received treatment for breast cancer. She informs her supervisors that her chemotherapy treatment has resulted in a cognitive dysfunction. As a consequence of a difficult economic environment the employer lays off 18,000 employees worldwide. When in response to her supervisor’s suggestion that she move to another facility, the employee refuses, citing the memory problems she was experiencing. Immediately thereafter her lay-off score is adjusted thereby subjecting her to a lay-off. In affirming an award under the ADA, the Third Circuit agrees that the employer **regarded** the employee as hindered in her ability to think.

<sup>27</sup> 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).

in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002)<sup>28</sup> 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 common to everyday life,<sup>29</sup> including **“caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”**<sup>30</sup> 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 makes clear that mitigating measures, 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 reasoning of 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;”

(c) the ADAAA clarifies that an impairment that is episodic or in remission is a “disability” if it would substantially limit a major life activity when active;

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

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

## 2. 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 concept is defined and addressed under each statutory scheme.

First, it is important to consider that under the Pennsylvania Workers’ Compensation Act the word “disability” is a term of art that does not address simply the physical and/or emotional ability of the injured worker to engage in gainful employment. Rather, the term contemplates two elements – “work injury” and “wage

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<sup>28</sup> Id.

<sup>29</sup> Id.

<sup>30</sup> The EEOC has recognized “walking” as a major life activity, but has never construed the phrase to include “reading,” “bending” or “communicating.”

loss.” In other words, in order for an employee to be “disabled” under the Act, he or she must suffer a work injury that results in a corresponding wage loss, i.e. **“injury + wage loss = disability.”** Dillon v. Workmen’s Compensation Appeal Board (Greenwich Collieries), 536 Pa. 490, 640 A.2d 386 (1994); Howze v. Workers’ Compensation Appeal Board (General Electric Co.), 714 A.2d 1140 (Pa Cmwlth. 1998). Accordingly, where the employee suffers a work injury and only a partial wage loss, he or she will be deemed to be “partially disabled” and where the employee suffers a work injury and a corresponding wage loss that is total, he or she will be deemed to be “totally disabled.”

Under the ADA, the concept of “disability” does not include an economic component, **but refers to actual or perceived physical or emotional impairment**, without immediate regard for any corresponding wage loss. Furthermore, in order to trigger ADA coverage the particular impairment must substantially limit a major life activity.

In Lloyd v. Washington & Jefferson College, *supra*, a college professor, after having been granted FLMA coverage for the effects of work stress and agoraphobia, was found not to have presented a “disability” under the ADA because despite his emotional condition he remained capable of working and teaching on campus three days per week, as well as serving as a councilman, engaging in family and social outings and spending weekend hours working on IT projects and course development. In dismissing the professor’s ADA lawsuit by summary judgment, the Third Circuit agreed that his alleged inability to be on campus more than three days per week was not sufficient to establish that he was substantially limited in a major life activity.<sup>31</sup>

### 3. Convergence of the ADA and the Act

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

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

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

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

(d) before making a conditional offer of employment the employer may not obtain information about an applicant’s prior workers’ compensation history from

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<sup>31</sup> The reader should note that the case was decided before the enactment of the ADAAA.

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;

(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<sup>32</sup> for the employer;

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

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

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<sup>32</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).

(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<sup>33</sup>, 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<sup>34</sup>.

#### **4. ADA Component to the Act**

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

It is also important to consider that under the longstanding Pennsylvania common law tradition, which declares that 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 to the injured worker suitable open and available 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).

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<sup>33</sup> 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.

<sup>34</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 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).

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 on the employee's behalf. 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.)<sup>35</sup> 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.<sup>36</sup>

#### D. THE LAW OF "REASONABLE ACCOMODATION"<sup>37</sup>

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.<sup>38</sup>

In considering the issue, it is important to understand that reasonable accommodation contemplates the removal of **workplace barriers**, meaning that **non-workplace barriers** are generally not within the employer's reasonable accommodation obligation. Workplace barriers may be **physical**, such as inaccessible facilities or equipment, or "**procedural**," e.g. rules concerning when or where work is performed, when breaks are taken, when leave is given, or how tasks are accomplished.

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.

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<sup>35</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.)

<sup>36</sup> Id.

<sup>37</sup> 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)

<sup>38</sup> Id.

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 (11<sup>th</sup> 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 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 ADA, the EEOC and the courts have identified various accommodations that an employer may be required to provide, including 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)

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

## **1. Unpaid Leave as a Reasonable Accommodation**

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

Although there is general agreement that unpaid leave is a reasonable accommodation, there is 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.”)

## **2. Job Restructuring as a Reasonable Accommodation**

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

Job restructuring can also mean, of course, changing the way essential functions have traditionally been performed. For example, in EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561 (8<sup>th</sup> 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.

## **3. Transitional Duty as a Reasonable Accommodation**

Since an employer is never required to reallocate essential functions, it is **not required to create** a new job – such as a transitional or light duty job in which the employee no longer performs his or her essential 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 exiting 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 **reassign** the disabled employee to one of those jobs if reassignment 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 reassignment 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 reassign 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.)

**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 reassigning 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](http://www.eeoc.gov).**

More recently, the EEOC confused the issue by stating 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.”<sup>39</sup>

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 policies might be challenged under Title VII of the Civil Rights Act of 1964 since an occupationally-based light-duty program might discriminate against pregnant women.

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<sup>39</sup> 1/28/00 Informal Guidance letter from Christopher J. Kuczynski, Assistant Legal Counsel.

#### 4. Changing an Employee's Supervisor as a Reasonable Accommodation

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

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

#### 5. Work-at-Home as a Reasonable Accommodation

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

In EEOC v. Spectacor Management Group, Civ. Act. No. 95-2688 (E.D. Pa., Settled: 6/95), the EEOC maintained that the employer was obligated to provide the opportunity to work at home as a reasonable accommodation. In that case, the employee allegedly needed to work at home because of the medical treatment that he was receiving 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.

#### 6. Modified Work Schedule as a Reasonable Accommodation

An employer, in certain circumstances, may have 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 modified 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 done.** The key – 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.

## 7. Job Reassignment as a Reasonable Accommodation

The courts have consistently held that an employer must reassign someone 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 distinguishes 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 said that reasonable accommodation did not include reassignment.

In Haines v. Bethlehem Lukens Plate Steel, 2001 U.S. App. LEXIS 24678 (3d Cir. 2001) (unpublished), the court noted that reassignment to an existing position is a reasonable accommodation. In this case, the plaintiff alleged that a vacant, permanent light duty position existed at 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 reassignment request under the ADA simply because the request 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 has 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).<sup>40</sup>

An interesting question that has yet to be resolved is whether the disabled employee seeking a reassignment must compete with other qualified non-disabled individuals for the sought-after vacant position.<sup>41</sup>

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<sup>40</sup> 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.

<sup>41</sup> 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).

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 requires 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).

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

#### **E. REASONABLE ACCOMODATIONS AND “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.

While relatively few cases have turned on whether a reasonable accommodation posed an undue hardship, the statute and regulations provide that the following factors are relevant to the undue hardship determination:

- (1) the nature and net cost of the accommodation;
- (2) 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;
- (3) 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

(4) 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.

## F. THE MECHANICS OF "REASONABLE ACCOMMODATIONS"

### 1. 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.<sup>42</sup> 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.

### 2. The Content of the Employee's Request for Reasonable Accommodation

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

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

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<sup>42</sup> See also 7/29/98 Informal Guidance letter from Christopher J. Kuczynski, Assistant Legal Counsel ("In order to receive a reasonable accommodation, an employee with a disability must request one from the employer. The employee should explain why a particular accommodation is needed.")

The courts have similarly endorsed the proposition that 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 (7<sup>th</sup> 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 noted that the employee’s notification to supervisors that she wanted to use a shorter route through a stockroom because the otherwise long walk was difficult for her was enough to put the employer on notice that she had leg problems and needed permission to sue the shortcut. See also Armstrong v. Burdette Tomlin Memorial Hospital, 438 F.3d 240 (3d Cir. 2006)(although the employee must request an accommodation, the request need not be specific.)

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

The EEOC has stated that requests for accommodation do not need to be in writing. Although the employer may ask the individual “to fill out a form or submit the request in written form,” the employer cannot ignore the oral request. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA, No. 915.002 (10/17/02), at Question 3. The EEOC’s internal procedures on reasonable accommodation require, however, that the employee to submit a written request confirming any oral request for accommodation. See Internal EEOC “Procedures for Providing Reasonable Accommodation for Individuals with Disabilities” (2/2001) at III (“employees seeking a reasonable accommodation **must follow up an oral request either by completing the attached ‘Confirmation of Request’ form or otherwise confirming their request in writing (including by e-mail) to the Disability Program Manager.... While the written confirmation should be made as soon as possible following the request, it is not a requirement for the request itself. EEOC will begin processing the request as soon as it is made, whether or not the confirmation has been provided.**”) (bold in original). Courts would likely agree with EEOC’s position. For example, as noted earlier, in Parkinson v. Anne Arundel Medical Center, 2003 U.S. App. LEXIS 22442 (4<sup>th</sup> 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 (6<sup>th</sup> Cir. 2002) (unpublished)(employee did not properly request a reasonable accommodation because he did not use the procedures required by the collective bargaining agreement.)

### **3. Employer's Duty to Engage in Interactive Process When Accommodation is Requested**

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

In Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9<sup>th</sup> 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 (3<sup>rd</sup> Cir. 1999) the Third Circuit observed that the interactive process “as its name implies, requires the employer to take some initiative” and that “the interactive process would have little meaning if it was interpreted to allow the employer, in the face of a request for accommodation, simply to sit back passively, offer nothing, and then, in post-termination litigation, try to knock down every specific accommodation as too burdensome. That’s not the proactive process intended: it does not help avoid litigation by bringing the parties to a negotiated settlement.” The Taylor court noted that employers can demonstrate good faith during the interactive process by “taking steps like the following: meet with the employee who requests the accommodation, request information about the condition and what limitations the employee has, ask the employee what he or she specifically wants, show some sign of having considered employee’s request, and offer an discuss available alternatives when the request is too burdensome.”

Still, the court concluded that an employer who acts in bad faith during the interactive process will be liable under the ADA only “if the jury can reasonably conclude that the employee would have been able to perform the job with accommodations.” See also Donahue v. Consolidated Rail Corporation, 224 F.3d 226 (3<sup>d</sup> Cir. 2000); Mengine v. Runyon, 114 F.3d 415 (3<sup>d</sup> 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.)

### **4. Documenting Disability When Reasonable Accommodation is Requested**

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

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

In its "ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations" (10/10/95), the EEOC has stated that if the disabled employee requests a reasonable accommodation in the context of disability and/or the need for accommodation that is not obvious, the employer may ask for reasonable documentation describing the employee's disability and functional limitations. **This Guidance is available on the internet at [www.eeoc.gov](http://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.

##### **5. Employee's Failure to Cooperate in Providing Medical Documentation and/or Identifying Reasonable Accommodation**

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

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

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

## 6. Employer's Right to Choose the Accommodation

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

Indeed, the EEOC has consistently stated that although an employer must give an "effective" accommodation, it need not be the "best" accommodation.<sup>43</sup> Although it should give consideration to the employer's preferred accommodation, the employer is free to choose any effective accommodation that is less expensive or easier to provide.

While the employee is free to refuse an accommodation offered by the employer, See Appendix to 29 C.F.R. § 1630.9(d), the employer has certainly met its ADA obligations by **offering** an effective accommodation even if the employee chooses not to accept it. In addition, the EEOC and courts have explained that although an employee cannot be forced to accept a reasonable accommodation, if she or cannot perform the job without the accommodation, he or she will not be considered "qualified" under the ADA. 29 C.F.R. §1630.9(d); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 11.<sup>44</sup>

## 7. 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

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<sup>43</sup> 5/15/95 Informal Guidance letter from Elizabeth M. Thornton, Deputy Legal Counsel.

<sup>44</sup> 3/10/94 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.

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). **This Guidance is available on the internet at [www.eeoc.gov](http://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.’ ”)

## V. CONCLUSION

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