QUINN JOHNSTON

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2018 Employment Law Update

By Stephen M. Buck
309.674.1133
sbuck@quinnjohnston.com

Employment Law Update - 2018

The latest efforts at improving our lives through governmental regulation

New Illinois Statutes: Illinois "Religious Garb" Law

- Effective August 11, 2017
- **Amends the ILLINOIS HUMAN RIGHTS ACT**
- **Makes it a Civil Rights Violation/Religious Discrimination**: For an Employer to impose as a condition of employment any requirement that would require a person "*to violate or forgo a sincerely held practice of his/her religion*"
  - Including but not limited to ***the wearing of any attire, clothing or facial hair*** in accordance with the requirements of his/her religion

New Illinois Statutes:
Illinois "Religious Garb" Law

- Amendment states that it **does not prohibit** an employer from enacting a dress code or grooming policy that includes restrictions on attire or facial hair to maintain ***workplace safety*** or ***food sanitation***
- ***Undue Hardship:*** If an employer can show an undue hardship on the conduct of its business it may not be required to reasonably accommodate the employee's religious belief
  - Undue Hardship is a difficult showing
  - Co-worker or customer complaints or preferences are not undue hardships
- Not entirely "new"
  - IHRA and Title VII of Civil Rights Act already required employers to reasonably accommodate sincerely held religious beliefs

New Illinois Statutes:
Illinois "Religious Garb" Law

- Review existing uniform, dress and grooming policies
- Employers should explore accommodation requests on case-by-case basis
- Train supervisors to recognize when a "request" is made

New Illinois Statutes:
IL Genetic Information Privacy Act

- Amended effective on January 1, 2018
- GIPA originally intended to prohibit an employer from using an employee's genetic information to make an employment decision or discriminate against employee
  - However, GIPA did allow an employer to use genetic information as part of a workplace wellness program benefitting an employee, when (1) employer offered health services, (2) employee gave written authorization, (3) only employee and licensed health care professional receive individually identifying info, and (4) individually identifying info is not provided to employer

New Illinois Statutes:
IL Genetic Information Privacy Act

- GIPA now amended to prohibit an employer from penalizing an employee who does not disclose his/her genetic information, OR
- Penalizing an employee who elects not to participate in an employer program requiring the disclosure of the employee's genetic information

IL Biometric Information Privacy Act

- BIPA signed into law in 2008
- Nothing new here --- BIPA is 10 years old
  - BUT – since July 2017 more than 25 lawsuits have been filed against companies and employers for violations of Act
- BIPA regulates the "collection, use, safeguarding, storage, retention and destruction of ***biometric identifiers and information***"
  - Defined as: a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry

IL Biometric Information Privacy Act

- **Employer Uses**:
  - Time Management
  - Security Access
  - Health/Wellness Plans

IL Biometric Information Privacy Act

Requirements of BIPA

1. Prohibits any private company from collecting biometric info without written authorization
2. Prohibits anyone in possession of biometric info from selling or otherwise profiting from the info
3. Prohibits disclosure of biometric info without person's consent or as otherwise required by law
4. Must store and protect biometric info from disclosure using reasonable standard of care within industry
5. Must develop written policy on retention and destruction of biometric info (when purpose for collection ceases)

IL Biometric Information Privacy Act

Penalties for Violations of BIPA

1. Negligent Violation: $1000 per violation
2. Intentional Violation: $5000 per violation
3. Attorney Fees
4. Injunction

IL Biometric Information Privacy Act

Best Practices to avoid a BIPA suit:

1. Identify what biometric info is being collected
2. Only collect the information needed for business operations
3. Develop a plan to securely store and transmit information per applicable industry standards
4. Develop and follow a plan to permanently destroy biometric information when no longer needed

Legislation Pending in Illinois: *How may the government help you?*

SB 20: Reform of Human Rights Act– If enacted into law, it would make a number of changes aimed in significant part at reducing back log of cases, including:

- – Expands time to file charge of discrimination from 180 days to 300 days (to be same as EEOC requirements);
- – Allows a complainant to opt out of IDHR Investigation within 60 days of filing to file a lawsuit in circuit court;
- – Decreases size of Commission from 13 part-time to 7 full-time commissioners, while creating a temporary 3 person panel to address backlog
- – Allows IDHR to dismiss charge if another action is pending which would preclude claims in charge

- IL House and Senate have unanimously approved bill and are sending it on to Governor

Legislation Pending in Illinois: *How may the government help you?*

HB 4572: Amend Human Rights Act– Would change the definition of "Employer" under IHRA to include any person employing one (1) employee [currently a person must employ 15 or more employees to be covered under Act].

– Has been approved by House and Senate and sent to Governor

HB 4743: Amend Equal Pay Act – Would prohibit an employer from asking an applicant about salary/wage history

– Includes punitive and compensatory damage provisions

– Passed both House and Senate and sent to Governor

Legislation Pending in Illinois: *How may the government help you?*

HB 2771: Mandatory Sick Leave – Would require employers to provide employees with 40 hours of paid sick leave, which can be earned after 180 days of employment [exempts union construction companies, railroads, school districts and park districts].

- Failed to receive enough votes in House before end of session, but expected to be brought up again next legislative session

HB 5046 and SB 202: Fair Scheduling Act – Would require employers to provide work schedules at least 72 hours before start of shift, and requires that employee be paid if shift is canceled or reduced within 72 hours of the beginning of shift

- Expected to be brought to vote next legislative session

Workplace Drug Testing, Practical Considerations and Use in Litigation

Christopher Crawford
309.674.1133
ccrawford@quinnjohnston.com

OSHA Regulations

- In 2016 OSHA published new final rules on discrimination and injury and illness reporting
- OSHA's aim was to prevent employers from discouraging or deterring workers from reporting workplace injuries and illnesses
- Reluctant to report injuries if going to be drug tested.

OSHA Regulations

- **Establishments with 250 or more employees** that are subject to OSHA's recordkeeping regulation must electronically submit to OSHA some of the information from the Log of Work-Related Injuries and Illnesses (OSHA Form 300), the Summary of Work-Related Injuries and Illnesses (OSHA Form 300A), and the Injury and Illness Incident Report (OSHA Form 301).
- **Establishments with 20-249 employees** in certain high-risk industries must electronically submit to OSHA some of the information from the Summary of Work-Related Injuries and Illnesses (OSHA Form 300A).
- **Establishments with fewer than 20 employees** at all times during the year do not have to routinely submit information electronically to OSHA.

OSHA Regulation- 29 CFR 1904

- The final rule revises OSHA's regulation on Recording and Reporting Occupational Injuries and Illnesses (29 CFR 1904). The new rule requires certain employers to electronically submit injury and illness data to OSHA that they are already required to keep under OSHA regulations. The content of these establishment-specific submissions depends on the size and industry of the employer.
- In order to ensure the completeness and accuracy of injury and illness data collected by employers and reported to OSHA, the final rule also:
  1. requires employers to inform employees of their right to report work-related injuries and illnesses free from retaliation;
  2. clarifies the existing implicit requirement that an employer's procedure for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting; and
  3. incorporates the existing statutory prohibition on retaliating against employees for reporting work-related injuries or illnesses.

OSHA Guidance

Guidance provides that post accident drug testing should be limited to those situations where drug or alcohol use likely caused or contributed to the incident and drug test can accurately show impairment.

It will be viewed as suspicious in those situations where a drug test is ordered after <u>every</u> accident.

There must be a reasonable possibility that drug use was a causal factor in the incident.

Takeaways from OSHA Regulations

- Make sure Written Substance Abuse Policy or the Workplace Drug & Alcohol Testing Policy defines circumstances under which the post-accident testing will be conducted.
- Replace general testing provisions with a list of specific criteria.
- All post-accident policies should be reviewed and updated to ensure that the language is not retaliatory and does not deter or discourage the reporting of illnesses or injuries.

Takeaways from OSHA Regulation

- Review Your Policy Based on the State Laws: State laws need to be adhered to when an employer drafts his/her company's policies, especially those related to enforcement of post-accident or post-injury drug testing.
- Laws for a drug-free workplace and worker's compensation will remain unchanged.
- Companies won't be accused of violating OSHA rules if post-accident testing is conducted after reasonable suspicion.

OSHA Takeaways

Supervisors need to be inducted into the revised rules announced by the OSHA. These training programs need to include aspects like building reasonable suspicion drug testing post workplace accidents.

ADA Considerations

- A test for illegal drugs is not considered a medical examination under the ADA
- ADA does not encourage, prohibit or authorize drug tests
- Still may conduct five point screening test.

ADA Considerations

- Individuals who currently engage in the illegal use of drugs are specifically excluded from the definition of a “qualified individuals with a disability” protected by the ADA when an action is taken on the basis of their drug use.

EEOC Guidelines on Drug Testing

- EEOC litigation designed to be in harmony with and enforce provisions of ADA.
- Testing for and taking action on illegal drugs is o.k.
- Testing for prescription drugs and taking action raises questions.
- Timely given growing concerns about opiate abuse and its affect in employment setting.

EEOC Litigation and Drug Testing

- The Equal Employment Opportunity Commission (EEOC) filed suit against a car dealership alleging that its drug testing policy did not contain exceptions for qualified persons with disabilities. The EEOC alleges the employer made a job offer to an applicant contingent upon a successful drug test. Applicant tested positive for use of prohibited substance. EEOC said is was a legal prescription drug.

- https://www.eeoc.gov/eeoc/newsroom/release/8-26-16.cfm

EEOC Litigation and Drug Testing

- On September 14, 2016, the EEOC filed suit against Happy Jack's Casino challenging the implementation of its drug testing policy. Happy Jack's withdrew its offer of employment to applicant after she failed a pre-employment drug test due to her use of lawfully prescribed hydrocodone for neck and back pain.
- Cited Happy Jack's failure to provide a medical review of the drug test results, failure to allow applicant to present evidence of her prescription drug use, and failure to allow her to present evidence of her underlying impairment. The EEOC also took issue with Happy Jack's policy that required all employees (safety-sensitive and non-safety-sensitive) to disclose all prescription and non-prescription drug use.

- https://www.eeoc.gov/eeoc/newsroom/release/9-15-16.cfm

EEOC Litigation and Drug Testing

- On September 28, 2016, the EEOC Hospitalists Group in the U.S. District Court for the Northern District of Georgia after the defendants fired physician for his use of narcotic pain medication to treat chronic pain. Dr. Hunt was regarded as disabled by defendants as there was no indication that the prescription medication impacted Dr. Hunt's ability to do the job or maintain his medical license. No conversation with physician prior to termination about nature of prescription drug use and its relationship to his employment.

- EEOC vs. Georgia Hospitalists Assn. N.D. Georgia

EEOC Litigation and Drug Testing

- EEOC filed suit against an employer who refused to hire a recovering drug addict using methadone, alleging violations of the Americans with Disabilities Act.
- *EEOC v. Randstad, US, LP, 1:15-cv-03354 (D. MD. Nov. 3, 2015).*
- Several examples of EEOC filing suit against employers who refuse to hire recovering drug addicts
- Must always consider whether applicant can perform essential functions of job.
- Case by case analysis is important.

EEOC, ADA and the Safety Sensitive Position

- Using designation of Safety Sensitive Position as a layer of protection against criticism of drug testing policy.
- An employer must be able to demonstrate that the employee's inability or impaired ability to perform job-related tasks could result in a direct threat to their safety and/or the safety of others.
- EEOC at one time said municipal bus drivers did not hold a "safety sensitive" position.

Safety Sensitive Position

- Designating a position as a safety sensitive position allows for more flexibility in testing for prescriptions medications that could affect and employees performance to safely perform the position.
- Illinois' consideration for safety sensitive position.

Safety Sensitive Position- ADA

- ADA and pre-offer, post-offer and employment stages
- Pre-offer- Employers cannot administer disability related inquiries and medical examinations.
- Post Offer- Employers can make disability related inquiries and conduct medical examinations regardless of whether they are related to job so long as such inquiries are made for each prospective hire in same job category.
- Employment- During employment can make disability related inquiries and medical examinations so long as they are job related and consistent with business necessity.

Safety Sensitive Position- ADA

- Sometimes job related inquiries or medical examinations are warranted considering observations about an employee's behavior or performance at work.
- Information may also be provided by credible third party.
- Inquiries about prescription drugs within this framework may be permissible.

Interpreting Drug Test Results

- Testing for alcohol and whether a person is intoxicated is well established.
- Difficulties arise with other illegal substances such as marijuana.
- How do we measure intoxication based upon positive drug test for illegal substances.

Employee Handbooks:

Why You Should Have One, Policies You Need and Mistakes To Avoid

Paige M. Blumenshine
309.674.1133
pblumenshine@quinnjohnston.com

WHY EMPLOYERS SHOULD HAVE AN EMPLOYEE HANDBOOK

Reasons to Create a Handbook for Employees

- Opportunity to formally welcome new employees, teach them about the company and lay down ground rules and expectations
- Ensures that each new employee receives copies of all company polices in a manner that is easy to access and review and sets expectations from the start
- Centralized place for employees to look for answers to common questions (benefits, pay procedure, dress code, sick time, PTO, etc.)
- Gives clarity and direction for managers and supervisors on how to handle employment issues and ensures that all issues are handled consistently and fairly with each employee

Protection for the Employer

- First line of defense in the event a suit is brought against you by a current or former employee - Handbooks and signed acknowledgements can assist in the legal defense
- Communicates information employers are legally obligated to provide so there is no confusion or disputes
- Provides the employee with employer's expectations from the start of their job
- Ensures and demonstrates compliance with federal and local laws

WHAT POLICIES MUST AND SHOULD BE INCLUDED IN AN EMPLOYEE HANDBOOK

What Should be Included

- Introduction/Company overview: history, mission statement, vision statement, information about the company's culture, ethics
- Contact information for an employer representative who employees can contact if they do not understand or have questions about the policies
- Disclaimer: nothing in the handbook creates an employment contract, employer has the right to modify or delete policies without notice, employment relationship is at-will
- Payroll Practices and Compensation, workweek and business hours, pay period and payday, bonus information, timekeeping procedures, break & lunch periods, attendance policy

What Should be Included (cont.)

- Performance Review Policy
- Dress code and Grooming Policy
- Social Media Policy
- Substance Abuse in the Workplace Policy: Marijuana Use Policy
- Employee Benefits Information

Handbook "Must Haves"

- Acknowledgment of receipt, review and understanding of the policies and procedures
  - minimizes potential for employees to claim ignorance of a policy
  - Employees should have to acknowledge receipt and understanding of handbook
  - Similar acknowledgment form should be used anytime the handbook or a certain policy is modified, deleted or added

- Equal Employment Opportunity Policy
  - not required by federal law
  - Demonstrates compliance with anti-discrimination laws
  - Outline a complaint procedure for employees who feels they have been discriminated against
  - Consider making this the first policy

Handbook "Must Haves" (cont.)

- Anti-Harassment Policy
  - not required by federal law
  - Prevent harassing behavior
  - Describe harassing behavior
- Anti-Retaliation Policy
  - Should be included in EEO and anti-harassment policies
  - Stand alone policy
- Disability Accommodations Policy under the ADA
  - Reasonable accommodations
- Complaint Procedure

Handbook Acknowledgement Form Example Language

By signing this form, I acknowledge that I have received a copy of the Company's Employee Handbook. I understand that it contains important information about the Company's policies, that I am expected to read the Handbook and familiarize myself with its contents, and that the policies in the Handbook apply to me. I understand that nothing in the Handbook constitutes a contract or promise of continued employment and that the company may change the policies in the Handbook at any time.

I acknowledge that my employment is at will. I understand that I have the right to end the employment relationship at any time and for any reason, with or without notice, with or without cause, and that the Company has that same right. I acknowledge that neither the Company nor I have entered into an employment agreement for a specified period of time.

Signed ________________________ Date ______________________

"Must Haves" (cont.)

- Leave Policies
  - Family and Medical Leave (50+ employees)
    - Employees are eligible for FMLA leave if they have worked for the company for at least a year, for at least 1,250 hours over a year, and company as at least 50 employees within 75 miles of the employee's location
  - Pregnancy Accommodation
    - Federal and Illinois law differ in regards to "pregnancy leave"
      - Under the Federal Pregnancy Discrimination Act, pregnancy must be treated the same as any other medical disability (FMLA)
      - In Illinois under the Illinois Human Rights Act , employers are required to include specific policies emphasizing that employees affected by pregnancy or have a medical/common condition related to pregnancy shall be accommodated
  - Sick/Personal Days
  - PTO
  - Paid sick leave
  - Jury duty leave
  - Military service leave

Hot Topic: Medical Marijuana

- 29 states and DC allow medical marijuana
- Under Illinois law, an employer cannot refuse to hire a candidate or terminate an employee based on them having a medical marijuana card however Illinois explicitly allows employers to prohibit marijuana use and intoxication at work
- Establish a "drug-free workplace" policy that includes accommodation language for off-site use for those with a medical marijuana card to avoid discrimination
- Update old policies that may not be in compliance

MISTAKES TO AVOID

Mistakes to Avoid

- Handbooks should be drafted in a manner that does not create legal obligations that the employer did not intend
- Employers should only include policies they intend to follow – failure to follow written polices can cause confusion and create legal liability
- Avoid using unnecessary complex language or legal terms-plain language should be used to explain policies and procedures
- Avoid providing too much detail- include just enough information that the policies can be understood but does not overwhelm employees
  - Handbooks do not need to contain every company procedure
- Uneven enforcement of policies can lead to discrimination claims

Mistakes to Avoid (cont.)

- Avoid using language that may come across as promises to employees
  - "Our company always promotes from within"
  - "Employment will be terminated only if the following offenses are committed…"
  - "If employees meet expectations, they will remain employed for as long as they wish"
- Avoid using vague terms that could result in different enforcement of policies by different people within the company
  - "Our company pays salaries that are competitive within the industry"
  - "Employees will only be terminated for misconduct"
  - "All employees will be treated fairly"

Mistakes to Avoid (cont.)

- If creating a handbook from existing policies, employer should conduct an audit to confirm all existing policies are up-to-date
- Policies should be consistent and not contradict each other
- Confirm that policies comply with the National Labor Relations Act so that policies and handbooks do not infringe on rights employees have under the Act

NATIONAL LABOR RELATIONS BOARD'S GUIDANCE ON EMPLOYEE HANDBOOK RULES POST-*BOEING*

- The National Labor Relations Board (NLRB) General Counsel's office issued guidance in the aftermath of the NLRB's decision in *The Boeing Company*, 365 NLRB 154 (Dec. 14, 2017).

- The NLRB overruled *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which articulated the Board's previous standard governing whether facially neutral workplace rules, policies and employee handbook provisions unlawfully interfere with the exercise of rights protected by the National Labor Relations Act (NLRA).

- Under the prior *Lutheran Heritage* standard, the Board found that employers violated the NLRA by maintaining workplace rules that do not explicitly prohibit protected activities, were not adopted in response to such activities, and were not applied to restrict such activities, if the rules would be "reasonably construed" by an employee to prohibit the exercise of NLRA rights.

- *Boeing* established a new standard for workplace policies that balances employee rights to engage in protected concerted activity and a business's right to maintain order, discipline and productivity (legitimate business justifications).
- *Boeing* divided rules into three categories:
  - 1. rules that are generally lawful to maintain;
  - 2. Rules warranting individualized scrutiny; and
  - 3. Rules that are unlawful to maintain
- Rules are no longer interpreted against the drafter, and generalized provisions should not be interpreted as banning all activity that could conceivably be included.
- The application of a facially neutral rule against employees engaged in protected concerted activity is still unlawful and a neutral handbook rule does not render protected activity unprotected.

Category 1: Rules That are Generally Lawful to Maintain

There are rules that do not tend to infringe on employee Section 7 rights and are outweighed by legitimate business justifications (avoiding an unsafe and hostile work environment). Included are:

- Rules prohibiting uncivil behavior, such as name-calling, disparaging the company's employees, rude unbusinesslike behavior, offensive language, rudeness;
- Rules prohibiting photography and recording at work or requiring approval;
- Rules against insubordination, non-cooperation, or on the job conduct that adversely affects operations;
- Rules prohibiting disruptive behavior, such as boisterous and disruptive conduct, creating a disturbance on the premises, disorderly conduct on the premises and/or during work hours (no disruption rules that explicitly ban walk-outs or strikes are not category 1 rules);
- Rules protecting confidential, proprietary, and customer information or documents ;
- Rules against defamation or misrepresentation;
- Rules against using employer logos or intellectual property;
- Rules requiring authorization to speak for company;
- Rules banning disloyalty, nepotism or self-enrichment.

Category 2: Rules Warranting Individualized Scrutiny

There rules are not obviously lawful or unlawful, and must be evaluated on a case-by-case basis to determine whether they would interfere with protected rights, and, if so, whether any adverse impact on those rights is outweighed by legitimate business justifications. Often, legality will depend on context. Examples include:

- Broad conflict of interest rules that do not specifically target fraud and self-enrichment and do not restrict membership in, or voting for, a union;
- Confidentiality rules broadly encompassing “employer business” or “employee information,” rather than confidential, proprietary, or customer information or documents;
- Rules prohibiting disparagement or criticism of the employer (as opposed to civility rules regarding disparagement of employees);
- Rules regulating use of the employer’s name (as opposed to rules regulating use of the employers logo or trademark);
- Rules generally restricting speaking to the media or third parties ;
- Rules banning off-duty conduct that might harm the employer or rules specifically banning participation in outside organizations;
- Rules against making false or inaccurate statements.

Category 3: Rules That Are Unlawful to Maintain

Rules in the final category are generally unlawful because they would prohibit or limit protected conduct and the adverse impact on these rights would outweigh any legitimate business justification. Included are:

- Confidentiality rules specifically regarding wages, benefits, or working conditions and rules expressly prohibiting discussion of working conditions or other terms of employment;
- Rules against joining outside organizations or voting on matters concerning employer (generally interpreted as prohibiting union participation)

Navigating the Americans with Disabilities Act:

Who is Qualified and What Exactly is a Reasonable Accommodation?

Stephen M. Buck
309.674.1133
sbuck@quinnjohnston.com

What is the Americans with Disabilities Act (ADA)?

- "Anti-discrimination statute"
- ADA was enacted in 1990 to prohibit employers from discriminating against "qualified individuals with disabilities" in regard to the terms and conditions of their employment
  - i.e., hiring, firing, promotion, discipline, compensation
- The ADA applies to employers with 15 or more employees

What is a disability under the ADA?

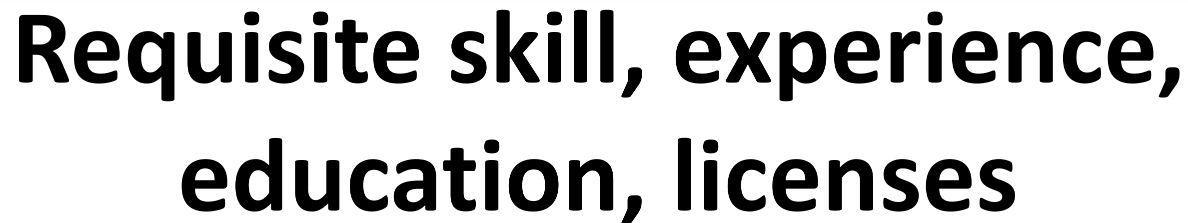
- The ADA defines ***Disability*** as a "physical or mental impairment that substantially limits one or more of the major life activities" of an individual.
- An impairment substantially limits a major life activity when a person is either unable to perform that activity, or is significantly restricted as to the condition, manner or duration under which they can perform the activity.
- Not every medical condition amounts to a disability under the ADA.
  – Merely having a medical condition, such as diabetes or high blood pressure, does not equate to a disability. Prince v. Ill. Dept. of Revenue (7th Cir. 1997)

What is a disability under the ADA?

- An individual with a disability under the ADA may also include a person who:
  - Has a record of a physical or mental impairment that substantially limits one or more major life activities; or
  - Is regarded as having a physical or mental impairment that substantially limits one or more major life activities.

What is “qualified” under the ADA?

- The ADA only protects an individual who has a disability and who is “Qualified”.
- To be “Qualified” under the ADA, an individual must:
  1. Have the requisite skills, experience, education, licenses, etc. for the job;
  2. Be able to perform the essential functions of the job, either with or without reasonable accommodation.
- Determination of whether an individual is qualified, must be made at the time of the employment decision and not at some point in the future.



- In general, if an individual does not have the skills/licenses/background required for the job, that person is not qualified.

- Examples:
  - Mechanic with back problems who does not have the required certificate from a trade school is not qualified
  - Teacher’s assistant with anxiety issues who lacks state required teaching certificate is not qualified to be an elementary school teacher
  - Individual who lost FAA certification because of medical condition is not qualified to be a pilot/flight instructor

Requisite skill, experience, education, licenses

- Caution: Where the particular skills, requirements or qualification standards for a position act to screen out persons with disabilities, the burden is on the employer to show that the requirements/standards are "***job related and consistent with business necessity***"
- Examples:
  - Physical fitness standards upheld for firefighters and police officers;
  - Vision test to screen for ability to see colors (red and green) upheld as a standard for bus drivers;
- Employers must enforce any requirements/standards uniformly and consistently

Able to Perform the Essential Functions of the Job

- Courts have adopted the EEOC framework for analyzing when a function is essential:
  1. The position exists to perform the job function;
  2. There are a limited number of employees available who can perform the function;
  3. The function is highly specialized.
- The job function must be essential – not a marginal or nominal function
- Burden is on the employer to prove a function is essential to the job

Able to Perform the Essential Functions of the Job

In determining if a job function is essential courts will examine and consider:

- The employer's judgment;
- A written job description;
- Whether the function is actually performed and the amount of time spent performing the function;
- The consequences of not requiring someone in the job to perform the function.

Ability to handle stress/Get along with others

- A welder was found "not qualified" under the ADA where his major depressive disorder led him to threaten to kill his co-workers in chilling detail on multiple occasions. Mayo v. PCC Structurals, Inc. (9th Cir. 2015);
- Supervisor "not qualified" under the ADA when her return to work note indicated that she could not have contact with any of her former subordinates and should not have contact with co-workers or the public. Sapp v. Donohoe (5th Cir. 2013)
- Janitor with autism disorder "not qualified" where his disability caused him to leer at and engage in the sexual harassment of female staff members. McElwee v. County of Orange (2nd Cir. 2012)
- Court reversed a determination of the EEOC and found a grocery store bagger with autism was "not qualified" for the job where his autism led him to make loud, rude and inappropriate personal comments to customers. Taylor v. Food World, Inc. (11th Cir. 1998)

Attendance/Punctuality

- Where attendance at the job is an essential function has been subject to debate between the EEOC and courts.
- EEOC guidelines provide that attendance is not an essential function of the job.
- Courts disagree with the EEOC:
  - Economic support specialist job found to require regular attendance to answer calls, attend client and staff meetings, and use internal computers. Whitaker v. Wisconsin Dept. of Health (7th Cir. 2017)
  - Employee was not qualified under the ADA where his back problems precluded him from regular attendance at work even on shorter shifts. Starts v. Mars Chocolate (5th Cir. 2015)
  - Employee with MS not qualified for position of truck dispatcher where she was undergoing no treatment and had no anticipated date by which she could be expected to attend work regularly. Basden v. Professional Transportation, Inc. (7th Cir. 2013)

Ability to Stay Awake/Conscious

- The EEOC has taken the position that “consciousness” is not an essential function of a train dispatchers job.
  - Specifically, the EEOC stated that while consciousness may be necessary, it is not itself a job function because otherwise an individual who is unable to remain conscious based on a heart disorder would be disqualified from every job imaginable.
- Fortunately the courts disagreed with EEOC, and held that a train dispatcher must be conscious and alert because constant monitoring and communication was critical to avoid train accidents. Donahue v. Consolidated Rail Corp. (3rd Cir. 2000)
- Court also found that ability to stay awake was essential function of the job of a security officer, and officer was not qualified based upon her sleep apnea. Smith v. Sturgill (11th Cir. 2013)
- Court found correctional officer was unqualified for job due to narcolepsy which prevented him from performing his security duties of watching over prisoners while he was sleeping. Roetter v. Michigan Dept. of Corrections (6th Cir. 2012)

What functions have been found essential?

Ability to Work Overtime

- The EEOC has taken the position that mandatory overtime was not an essential function for a Border Patrol Officer because it was not an "outcome" of the job.
- The courts, however, have again disagreed with the EEOC on this point:
  - Overtime was an essential function for an apartment complex service technician responsible for responding to issues after hours. <u>Gavurnik v. Home Properties LP</u> (3rd Cir. 2017)
  - Overtime found to be an essential function of the job for a utilities service employee who was responsible for reconnecting service and fixing disruptions on the same day. <u>Davis v. Florida Power & Light Co.</u> (11th Cir. 2000)

Ability to Work a Specific Shift

- The EEOC has been inconsistent on this issue
- The EEOC held that the shift was not an essential function of a lab position, which was to analyze samples and not on any particular schedule. EEOC v. Union Carbide Chemicals (E.D. LA 1996)
- However, EEOC Enforcement Guidelines acknowledges that for certain positions the time during which an essential function is performed may be critical.
- Courts are also inconsistent as to whether specific shift work is essential:
  - The ability to work rotating shift hours and a consistent schedule was an essential function of the position of a deputy sheriff. Spears v. Creel (11 Cir. 2015)
  - Rotating shifts for nurses at a hospital was an essential function of the position in order to provide 24-hour coverage. Laurin v. Providence Hospital (1st Cir. 1998)
  - But: courts have also held that changing an employee's work schedule to alleviate her disability related difficulties in getting to work early in the morning is the type of accommodation that the ADA contemplates. Colwell v. Rite Aid Corp. (3rd Cir. 2010)

Standing/walking

- Both the courts and the EEOC have taken conflicting positions as to whether standing or walking is an essential function, based primarily over whether it truly is an essential function or is simply one way to perform a function.
- Many cases have found it is not an essential function:
  - Reasonable to let a retail salespersons sit on a stool during the day because of a leg impairment. Gleed v. AT&T Mobility Services (6th Cir. 2015)
  - Allowing a cashier to use a stool during her shift instead of standing is a reasonable accommodation. Talley v. Family Dollar Stores (6th Cir. 2008)
  - Not an essential function for a machine assembler with a back impairment to stand while assembling cylinders on the factory line. Weber v. Titan Distribution (8th Circ. 2001)
- Other cases have found standing or walking to be an essential function:
  - Walking on uneven and wet surfaces and standing were essential function of a park groundskeeper's job. Bagwell v. Morgan (11th Cir. 2017)
  - A pharmacist was held unqualified for his position when he could not perform the task of standing and frequent walking around the pharmacy during an 8-hour shift. Williams v. Revco Discount Drug Centers (11th Cir. 2014)

What functions have been found essential?

Oral communication

- Held to be an essential function of the job
  - Elementary school teacher unqualified because of stroke which prevented her from communicating with students orally. Rabb v. School Board of Orange County (11th Cir. 2014)
  - Deaf employee who could not read lips or communicate orally was not qualified for job as a photographer which required him to communicate and respond to families with children. EEOC v. The Picture People (10th Cir. 2012)
- Held not to be an essential function of the job
  - Although finding that communication was necessary for a lifeguard, the court held that a deaf individual could be able to perform these functions through use of a whistle, visual cue cards and hand signals. Keith v. County of Oakland (6th Cir. 2013)

Lifting as an Essential Function

- Lifting has typically been found to be an essential function of a job:
  - Woman with shoulder injury was found not qualified to perform the essential functions of a nursing assistant job where she could not lift more than 50 pounds or raise her arm above shoulder level. Taylor v. Renown Health (9th Cir. 2017)
  - Lifting was an essential function of an auto parts sales manager job as the manager needed to lift and move items in the store 30 or 40 times a day. EEOC v. Autozone, Inc. (7th Cir. 2016)
  - Employee not qualified to be a boiler plant operator because of mobility issues caused by a disability which prevented him from performing heavy lifting in an emergency. Wilkerson v. Shinseki (10th Cir. 2010)
- Lifting has not been found to be an essential function of the job where:
  - An ambulance service employer did not routinely screen all of its prospective employees to confirm their ability to lift over 70 pounds. Gillen v. Fallon Ambulance Service (1st Cir. 2002)
  - Heavy lifting is not an essential function of the job where employee had been required to do heavy lifting only 4 to 5 times over an 18-year period and there were other devices available in the plant to help perform lifting. Duty v. Norton-Alcoa (8th Cir. 2012)

Duty to provide a reasonable accommodation under the ADA

- The duty to provide a reasonable accommodation to qualified individuals with disabilities is one of the most important requirements of the ADA.
- An accommodation typically involves removal of a “***workplace barrier***”.
  - The barrier could be a physical obstacle; or
  - The barrier could be a procedure or rule hindering performance
- The U.S. Supreme Court has held that a reasonable accommodation is one that “seems reasonable on its face” and typically requires a cost/benefit analysis.
  - In determining whether an accommodation is reasonable, the employer should look at the cost of providing the accommodation weighed against the benefit of the accommodation

Duty to provide a reasonable accommodation under the ADA

- The ADA and EEOC regulations identify many types of "Reasonable Accommodations" that an employer may have to provide, including:
  - Job restructuring;
  - Part time or modified work schedules;
  - Reassignment to a vacant position;
  - Acquiring or modifying equipment;
  - Changing exams, materials or policies; and
  - Providing qualified readers or interpreters

- Generally an employee must request an accommodation – although no specific words are required
  - Employee need only put the employer on notice that they need help/assistance due to a medical condition

Documenting the request/need for accommodation

- If the employee asks for an accommodation, the employer may inquire about the disability.
- If the disability is not obvious, the employer may request documentation of the disability and the functional limitations from same.
- The employer may not ask for unrelated medical information or the employee's complete medical files or record.
- If an employee fails to provide the requested documentation, the employer may deny the request for the accommodation.

Duty to provide a reasonable accommodation under the ADA

Employers are obligated to provide an "***effective***" accommodation – not necessarily the one the employee most wants.

- The EEOC states that while an employer should give consideration to the individual's preferred accommodation, an employer is free to choose any effective accommodation that is less expensive or easier to provide.
- Examples:
  - When hospital employee with respiratory impairment requested her work area be cooled to 68 degrees as an accommodation, EEOC approved hospital's accommodation of air purifier with a fan in work area;
  - Accommodation of train travel with sleeper car upgrade approved even though employee with leg injury requested first class air travel which would allow him to stretch.

What is a reasonable accommodation?

Unpaid Leave of Absence

- The EEOC has consistently taken the position that a leave of absence is a reasonable accommodation.
- The courts have held that a leave of absence can be a reasonable accommodation under certain circumstances:
  - Most courts, however, say a 6-month leave is too long and not reasonable
  - The courts also hold that an indefinite leave is unreasonable (EEOC agrees)
- Severson v. Heartland Woodcraft, Inc. (7th Cir. 2017)
  - After employee exhausted FMLA leave for back surgery, requested additional unpaid leave of 2 to 3 months to continue recovery
  - Court denied the request under ADA, finding 2 to 3 month leave was not reasonable and that the ADA is not a leave of absence statute
  - Court found that a leave of absence does not assist an employee in performing the essential functions of the job, but rather excuses performance thereby making any long-term request for leave unreasonable

What is a reasonable accommodation?

Job Restructuring

- ADA regulations make clear that an employer must restructure an employee's job as a reasonable accommodation.
  - Miller v. IDOT (7th Cir. 2011): The court held that IDOT would have to allow a bridge repairman with acrophobia the ability to avoid working at heights where the employer routinely allowed members of the crew to swap tasks.
- Employer does not have to reallocate essential functions of a job as a reasonable accommodation.
  - Thaddeus v. Vilsack (EEOC 2016): The EEOC held that employer was not required to restructure the functions of a meat inspector who was color blind and could not differentiate between red and green – and thus could not detect the differences between contaminated meat and non-contaminated meat.
  - Stern v. St. Anthony's Health Center (7th Cir. 2015): Where chief psychologist at hospital could not perform duties because of his memory loss, employer not required to reassign those duties to another employee as a reasonable accommodation.
- An employer is not required to lower quality or productivity standards as a reasonable accommodation.

What is a reasonable accommodation?

- Light duty
- An employer is never required to create a new job or a position as a reasonable accommodation.
  – However, if an employer has light duty positions, the employer may be required to reassign an employee with a disability to one of those positions.
  – A more difficult question is whether an employer can reserve light duty jobs for employees who suffer on-the-job/work comp injuries.
    - The EEOC takes the position that an employer cannot reserve existing light duty jobs for on-job injuries only and must reassign any disabled employee.
    - Dalton v. Subaru–Isuzu (7th Cir. 1998): court held that employer could reserve light duty positions for those injured on the job, noting that nothing in the ADA requires an employer to abandon a legitimate, non-discriminatory policy or practice.

What is a reasonable accommodation?

Changing an Employee's Supervisor

- The EEOC has consistently taken the position that an employer is **not required** to change an employee's supervisor as a reasonable accommodation.
  - Specifically, the EEOC held that an employer was not required to reassign an employee suffering from depression and stress disorders to a new supervisor, even where the employee alleged that the supervisor exacerbated the condition.
- Similarly, a court denied a request by an employee that he have "restricted/limited visual and verbal contact" with his direct supervisor as a reasonable accommodation, because the court found this was effectively a request for a new supervisor which was per se unreasonable. Roberts v. Permanente Medical Group, (9th Cir. 2017).

What is a reasonable accommodation?

Rescinding discipline

- Both the court and the EEOC are in agreement that rescinding discipline is not a reasonable accommodation under the ADA.
  - The EEOC has stated that an employer is not required to rescind the termination of an employee who engaged in a profane outburst against the supervisor as a result of the employee's bipolar disorder.
    - In Alamillo v. BNSF Railway (9th Cir. 2017), the court held that an employee's request that the employer not terminate him for misconduct was not a reasonable accommodation.
    - Similarly in **Yarberry v. Greg Appliances** (6th Cir. 2015) the court upheld the termination of an employee for his bizarre misconduct in entering store after hours, roaming around, opening safe and leaving without turning on the alarm even though conduct caused by disability.
  - NOTE: While an employer does not need to forgive an employee for past misconduct or rule violations, the employer may have to provide a reasonable accommodation so the employee does not break rules in the future.

What is a reasonable accommodation?

Working from Home

- In finding that working from home is a reasonable accommodation, the EEOC takes the position that ***"where"*** the work is performed is just another policy that may have to be modified.
  - The EEOC found an employee was allowed to work from home during loud construction periods when the exposure to the loud noises precipitated her migraine headaches.
- Courts are more split on the issue:
  - Humphry v. Memorial Hospital (9th Cir. 2001): The court concluded that a medical transcriptionist could perform the essential functions of her job from home where she could not reliably attend work due to her obsessive-compulsive disorder.
- Courts do tend to focus on the essential functions of the position and whether those functions can be performed from home.
  - Lalla v. ConEd Co. (2nd Cir. 2002) The essential functions of plaintiff's job, including conducting on-site inspections and working on electric lines, could not be performed at home and thus it was not a reasonable accommodation.
  - Valdez v. McGill and Mueller Supply Co. (10th Cir. 2012), warehouse manager's essential job functions of inventory counts, customer interaction, and supervision of staff could not be performed from home.
- Most important factor in determining whether working at home is a reasonable accommodation is whether the person can in fact perform those functions from home.

What is a reasonable accommodation?

Irritant-Free Environment

- The courts generally have held employers have no obligation to provide an irritant or odor-free environment.
  - Horn v. Knight Management (6th Cir. 2014), janitor with respiratory issues could not be accommodated where exposure to chemicals was inevitable in performance of her job.
  - Dickerson v. Dept. of Veteran Affairs (11th Cir. 2012), employer was not responsible for providing a chemical free environment to nursing employee who worked around chemicals and medications.
- The EEOC appears more split on this issue:
  - Held that it was reasonable for employer to prohibit employees from making popcorn in the workplace in response to an employee with an allergy to corn products. Habluetzel v. Potter (EEOC 2006)
  - Complainant v. Bay (EEOC 2016): The EEOC found an employee's request that the employer insulate her entirely from imperfect air quality, imperfect office temperatures, crowded refrigerates, bad food quality, food odors and window cleaning supplies to be simply unreasonable.

What is a reasonable accommodation?

Reassignment to a new position

- Based upon the language of the ADA statute, courts have consistently held that an employer must reassign an employee to an available position as a reasonable accommodation.
- Courts are in agreement as to certain principles regarding reassignment:
  - Reassignment is available only to current employees and not to job applicants or former employees.
  - An employer does not have bump any employee from a job in order to create a vacancy.
  - An employer does not have to promote an employee as a form of reassignment.
  - An individual may only be reassigned to a job for which he or she is qualified.

Undue hardship

The ADA and EEOC regulations identify a number of factors used to determine whether an accommodation imposes an undue hardship on the employer.

- The nature and net cost of the accommodation;
- The financial resources of the employer, the number of employees at the facility, the effect on expenses and resources, and other impacts on the operation of the employer's facility.
- The overall financial resources of the entity, the size of the business, the number, type and location of its facilities; and
- The type of operation of the employer, including the composition, structure and functions of the workforce, and the geographic separateness and administrative or fiscal relationship of the facility in question to the employer.

Undue hardship

- The EEOC and some courts have stated that an accommodation might pose an undue hardship based upon the adverse effect it has on other employees.
  - For instance, if modifying one employee's schedule would so overburden another employee that he would not be able to handle his own duties, the employer could establish undue hardship
- Where an employer has done certain things for other employees, it will be difficult for the employer to argue that it would cause an undue hardship to do the same thing for an individual with an ADA covered disability.

Undue hardship

- Many employers have tried to argue that an accommodation was simply too expensive, but as a practical matter most courts do not seem receptive to the argument.
  - In Reyazuddin v. Montgomery County (4th Cir. 2015), the court stated that a $129,000 workplace modification to allow a blind employee to work in a call center did not pose an undue hardship.
- When arguing that an accommodation imposes an undue hardship, employers are typically required to open up their financial books to the courts or the EEOC.
  - In doing so, employers often have a tough time justifying expenses such as company cars and country club memberships when they claim they cannot afford reasonable accommodations.
- The EEOC and courts have also rejected any claim that the cost of an accommodation is too high relative to the accommodated employee's low salary.
  - The EEOC takes the position that the cost spent on an accommodation depends on the employer's total resources, and not an employee's salary, position or status in the company.

Employer Challenges in a #MeToo World

Michael Kraft
309.674.1133
mkraft@quinnjohnston.com

What is the #MeToo World?

Is It Really Any Different?

Acting Chair of the EEOC notes that only 30% of women who experience harassment ever complain internally – and fewer still ever file charges with the EEOC.

EEOC 2017 Enforcement Statistics

Fiscal Year 2017:

- 84,254 charges of discrimination filed
- 6,696 of those charges were for sexual harassment (only 7.9% of the total)
  - Since 2010, there has been a slow but steady decline in number of sexual harassment charges filed each year
- 41,907 retaliation charges (48.8%)
- 28,528 race discrimination charges (33.9%)
- 26,838 disability discrimination charges (31.9%)

#Metoo: What can we expect?

- Many experts/pundits predict an uptick in number of sexual harassment charges filed in FY 2018
  - Fiscal year 2017 ended September 30, 2017, before #metoo movement went viral
- October 2017: EEOC announces new training and outreach programs addressing “Respect in the Workplace”
- #Metoo movement has its own website now, providing resources, support and education to encourage women and victims of sexual harassment and violence to speak out.
- Illinois legislature has recently taken action to address sexual harassment within the state government.

What is Sexual Harassment? Illinois State Law

- Illinois Human Rights Act (IHRA 775 ILCS 5/2-101(B) defines “employer” as any person employing **one** or more persons when a complaint alleges discrimination based upon sexual harassment (or disability or pregnancy discrimination.)

- Otherwise, to be subject to IHRA an employers must have 15 or more employees.

What is Sexual Harassment? Illinois State Law

Illinois Department of Human Rights (IDHR) defines sexual harassment as:

- any unwelcomed sexual advances, requests for sexual favors or any conduct of a sexual nature when:

  1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
  2. Submission to or rejection of such conduct by an individual is used as the bases for employment decisions affecting such individual; or
  3. Such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.

What is Sexual Harassment? Federal Law

- Title VII of the Civil Rights Act of 1964 is the federal law that prohibits employers from discriminating against employees on the basis of race, color, national origin, sex, disability and religion.
- Title VII does not expressly define sexual harassment, but the U.S. Supreme Court has held that sexual harassment is discrimination "because of sex" within the meaning of Title VII.

What is Sexual Harassment? Federal Law

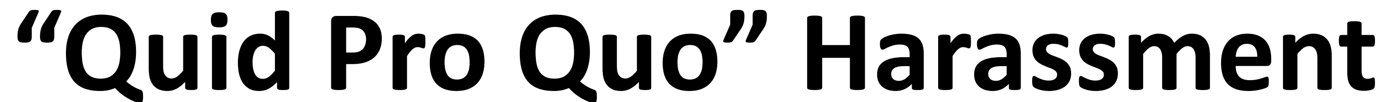
- Per the U.S. Supreme Court, the critical issue in sexual harassment is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.
- Title VII applies to employers who have 15 or more employees.

Harassment Must be Unwelcome

- Under both state and federal law, the conduct at the core of sexual harassment must be unwelcome, meaning it was not solicited or invited, and is undesirable and offensive
  - Did the employee solicit or instigate the alleged conduct?
  - Did the alleged victim participate or encourage the alleged conduct or engage in any alleged sexual banter?
  - Was there a consensual relationship between the alleged victim and alleged harasser?
- Courts will examine the totality of the circumstances:
  - The substance of the conduct
  - The frequency of the conduct
  - The relationship of the parties

Conduct Which May Constitute Sexual Harassment:

- Verbal: Sexual innuendoes, insults, humor, jokes about sex, propositions, threats, repeated requests for dates, etc.
- Non-verbal: Suggestive or insulting sounds, leering, obscene gestures, kissing noises, licking of the lips, etc.
- Visual: Posters, signs, slogans of a sexual nature, viewing pornography at work, etc.
- Physical: touching, unwelcome hugging or kissing, pinching, brushing up against the body, any coerced sexual act or actual assault.
- Textual/Electronic: sexting, cyberstalking, inappropriate electronic communication of all forms (e-mail, text, company intranet, social networks, etc.)



"Quid Pro Quo" Harassment

- Latin phrase meaning "Something for Something" or "This for That"
- Refers to sexual harassment where tangible employment benefits are conditioned on compliance with sexual demands
- Tangible employment benefits include: hiring, firing, promotions, reassigning with significantly different responsibilities, or other decision causing significant change in person's employment benefits
- The alleged harassment must be sexually motivated

“Hostile Environment” Sexual Harassment

- Unwelcome conduct of a sexual nature, directed at the person because of his or her sex, and that is so severe, ongoing and pervasive that it negatively alters the work environment
- Occasional or offhand teasing or crude remarks of sexual nature, or isolated incidents, do not create a hostile work environment.
- The harassment must be sufficiently severe or pervasive to make a reasonable person feel that the work environment has been altered.
- Courts will analyze the impact of the alleged harassment from both a subjective and objective viewpoint, considering what a “reasonable person” would find hostile or abusive.

Employer Liability: Harassment by a Supervisor

- If harassment by a supervisor results in an adverse or tangible employment action, the employer is ***strictly liable***.
- A supervisor is "someone empowered by the employer to affect the terms and conditions of a person's employment, i.e. to hire, fire, transfer and discipline the employee."
- If no adverse or tangible employment action is taken, an employer may escape liability by proving that:
  - The employer exercised reasonable care to prevent and correct any harassing behavior, and
  - The plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided.

See, Faragher v. City of Boca Raton

Burling Industries, Inc. v. Ellerth

Employer Liability: Harassment by a Co-Worker

- Employer is liable for sexual harassment by an employee's co-worker only when the employee can show that the employer "has been negligent in either discovering or remedying the harassment."

- The employer must have notice or knowledge that the harassment is occurring before the employer can be liable.

- If an employer does not have a good Anti-Harassment Policy in place, the employer may lack an adequate defense to any claim of sexual harassment even by a co-worker.

Retaliation Claims

Under both federal and state law, no supervisor or agent of the employer shall take any retaliatory action against any employee due to the employee's:

1. Disclosure or reporting of any sexual harassment;
2. Providing information related to any investigation, hearing or inquiry into sexual harassment conducted by any public body or agency ; or
3. Assisting or participating in a any proceeding to enforce the provisions of the employer's policy prohibiting sexual harassment.

Even if the employer finds no sexual harassment occurred there can be no retaliation if the report was made in good faith.

BUT, employers may discipline employees for filing bad-faith claims of sexual harassment.

Damages Which May Awarded to An Alleged Victim of Sexual Harassment

1. Back pay
2. Front pay
3. Compensatory damages
   - Emotional distress
   - Pain and suffering
   - Harm to reputation
4. Punitive damages
5. Attorney's fees

What Can Employers Do to Protect Themselves?

Develop and Implement a Strong Anti-Harassment Policy

- Must include policy on prohibition of all forms of harassment, including specific reference to sexual harassment
- Policy should define what constitutes sexual harassment and provide examples
- Policy should provide alternative methods for an employee to report sexual harassment
- Policy should provide a procedure for investigation of complaints of sexual harassment, including procedures for making findings and decisions based upon the investigation
- Policy should include statement prohibiting retaliation

Should the Employer Investigate?

What are the possible Triggering Events:

- Potential violations of Employment Discrimination Law
  - Civil Rights Act of 1964, ADA, ADEA, GINA, State Law (IHRA)
- Personal Observations by Supervisor/Management
- Complaint by Employee
- Retaliation or Whistleblowing claims
- Rumors of Inappropriate Conduct

Conducting an Investigation

Why conduct One?

- Allows employer to gather relevant facts that can lead to proper employment decision
- Prompt investigation may well satisfy an otherwise upset employee, preserve morale (and possibly avoid a lawsuit)
- Proper and thorough investigation may serve as a defense in any lawsuit related to conduct at issue

- Remember, an Employer may avoid liability for co-worker's conduct if:
  - it can show it exercised reasonable care to prevent/correct behavior; and
  - employee failed to take advantage of corrective opportunities

Conducting an Investigation

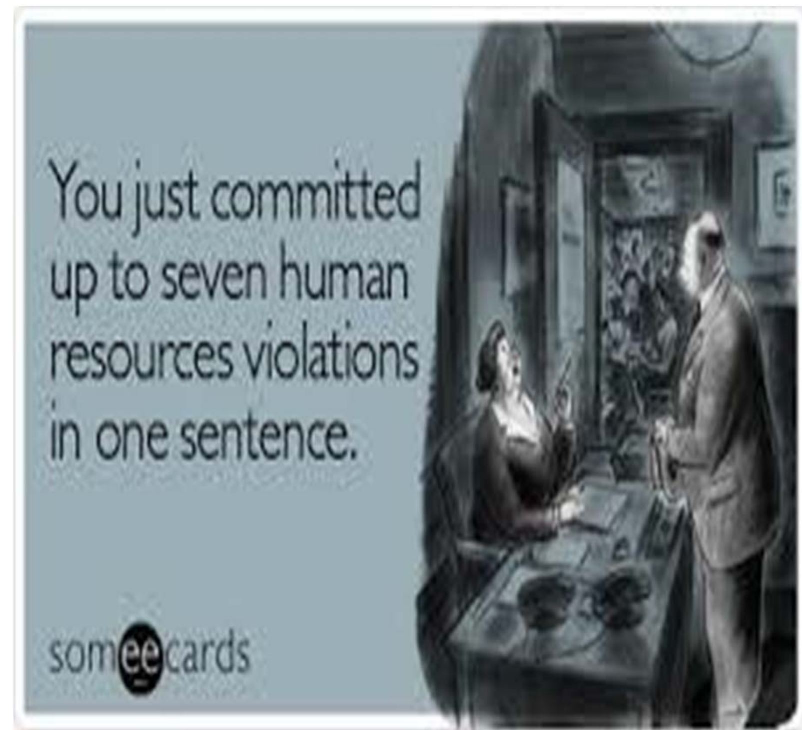
Be Objective

Be Impartial

Conducting an Investigation

“I complained, but the company did nothing”

- In cases where alleged misconduct is minor, many attorneys will focus on employer investigation
- If fail to promptly and properly investigate, the employee will use this to make the employer look bad – as either complicit, inept or indifferent



Conducting an Investigation

Who should conduct the investigation?

- Knowledgeable about applicable laws, employer policies, and/or collective bargaining agreement
- Experience with investigations, skilled in interviewing and assessing credibility
  - IMPORTANT: Will he/she make a good witness
- Unbiased, no relationships with parties involved, ability to remain impartial
  - IMPORTANT: Must also be perceived as unbiased
- Job Titles/Positions of employees involved in alleged misconduct or wrongdoing

Conducting an Investigation

MAKE A PLAN FOR THE INVESTIGATION

1. What is being investigated?
2. What employer policies, guidelines or terms of a collective bargaining agreement apply?
3. What type of documentary or other evidence is likely to exist and/or needs to be collected?
4. Who will be interviewed (and in what order)?
5. How has agency/employer handled similar situations in the past (better to be consistent)
6. Is specialized expertise needed to understand the situation, laws or policies at issue?

Conducting an Investigation

PREPARING FOR THE INTERVIEWS

- Don't just go into the interview and plan to wing it
- Gather as much documentary evidence as possible before commencing the interviews
- Consider the order of the witnesses to be questioned
  - Start with the complaining employee
  - Interviewing other identified witnesses next, considering:
    - Likelihood the witness has actual or relevant knowledge;
    - Risk of that employee witness feeding the rumor mill;
    - Bias of the witness
  - Generally prefer to conclude with the accused employee
- Outline and compile the questions you wish to ask each witness

Conducting an Investigation

CONDUCTING THE INTERVIEW

– Take Notes (take a lot of notes)
  - Consider having another person sit in on the interview
    - – Particularly for interview of the complainant and the accused
  - One person takes notes while the other questions witness
    - – Interviewer should still feel fee to take own notes as well

– Assess the Credibility of the Witness [EEOC Factors]
  - Demeanor: Is witness nervous, combative? Appear truthful?
  - Motive: Does the witness have a reason to lie?
  - Plausible: Does the witness' story make sense?
  - Supportable: Are there documents/evidence which support story?
  - Prior Record: What is the disciplinary or performance review history of the witness?

Conducting an Investigation

OTHER CONSIDERATIONS IN COURSE OF INVESTIGATION:

- Record the Interviews?
  - May make witness more hesitant to open up
  - Cannot record without consent
    - Violates Illinois Eavesdropping Act to record without consent of all parties, Act makes it a criminal offense in Illinois
- Review of Emails and/or Text Messages
  - Do you go into accused's computer at work and start reviewing?
  - Again must have consent of the parties to do so
  - Can have implied consent based on Employer's computer usage policies – but the policy must be clear that all work emails are monitored and no privacy expectation by employees
  - Run the risk of violating Electronic Communication Privacy Act, Stored Communication Act, and even Illinois Eavesdropping Act

Conducting an Investigation

MAKE CONCLUSIONS AND TAKE ACTION

- Have a meeting to discuss Report/Make Decision
  - Investigator should present Report to Decision Makers
  - Decision Makers should include HR Director, relevant Managers and/or Department Heads, and even agency or outside attorney if deemed appropriate
  - Answer Question: Were employer policies violated and/or did misconduct occur?
- Make the Decision as to what action should be taken based on conclusions, facts and information contained in the report, and on the advice of counsel as necessary

Conducting an Investigation

IF HARASSMENT/DISCRIMINATION OCCURRED:

- Employer MUST remedy harassment/discrimination
- Remedies as to the accused wrong-doer include (depending on severity and aggravating and mitigating factors):
  - Transfer, demotion, loss of bonus, reduction in pay
  - Counseling
  - Training
  - Discipline (including suspension without pay, written reprimand in file, verbal warning, etc.)
  - Termination of employment

Conducting an Investigation

FOLLOW UP WITH COMPLAINANT AFTER INVESTIGATION

- Prepare a written memo and meet with complainant to inform of the findings/conclusions of the investigation
- Confirm what action, if any, will be taken as a result of the investigation
- Confirm that retaliation against the complainant is prohibited, and request that complainant immediately report any perceived retaliation
- Encourage complainant to discuss any concerns or disappointment with results and/or action taken

Conducting an Investigation

Follow Up with Accused Wrong-Doer

- Prepare memo and meet with the Accused and Union Rep, if applicable, to advise of conclusions and findings of the investigation and any action to be taken
- Remind accused of prohibition against retaliation and consequences of same
- Inform accused that he may discuss any concerns or disappointment with results and/or action taken (unless the decision is to terminate, then do not engage in discussion/argument during termination)
- If terminating, advise accused to put concerns in writing to the company for appropriate response

Getting the Injured Worker Back to Work:

Impact of Light Duty and Wellness Programs

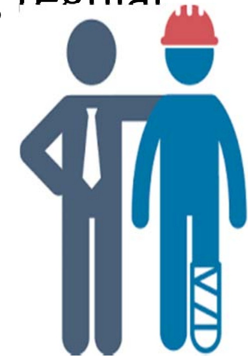
John F. Kamin
309.674.1133
jkamin@quinnjohnston.com

Return-to-Work Programs

- Return-to-work (RTW) is an employer-designed program with the goal of accommodating an injured employee's medical restrictions while simultaneously allowing the employee to return to work.
- The implementation of a RTW program allows a company to reduce workers' compensation costs, comply with disability-related legislation, and quickly get valued employees back to work.
- RTW programs help companies reduce the expenses usually related to an injured out-of-work employee. While the company is still bound to pay the injured employee, the company receives greater "bang-for-their-buck" than they would by simply paying lost-time benefits.
- Under RTW, companies place an injured employee in a meaningful job that meets the employee's medical restrictions. As a result, the company is able to extract some production from the injured employee, which helps recoup the costs of the wages paid. Conversely, when an employee is out of work collecting benefits, the employer receives no production at all.
- Moreover, companies avoid the headaches of, and save the costs associated with, having to go through the process of searching for, hiring, and training replacement employees.
- Finally, RTW programs can boost workplace morale by demonstrating that companies value their employees as integral assets. This is true for both the injured employee returning to work and for non-injured employees simply observing the process.

The Employee Also Benefits Under RTW

- RTW programs help to increase the perception of an employee's value to a company and can lead to improved self-esteem after an injury.
- The injured employee is able to make a meaningful contribution to the company without overexerting themselves.
- RTW programs allow an injured employee to stay engaged with co-workers and reduce the isolation that is often experienced when an employee is off work.
- The injured employee is able to retain a semi-normal schedule, avoid deterioration of skills, and stay in the mindset of maintaining regular work.
- Additionally, it reduces the financial impact experienced by the injured employee by allowing them to collect their full-wages.



Issues to Avoid with Return-to-Work

- Be careful about having a 100% rule in place!
  - If an employer has a rule that states an injured employee must be 100% recovered prior to returning to work, and applies said rule to an employee covered by the ADA, the employer has committed a per se violation of the ADA.
- As permitted by state workers' compensation statutes, an employer may have an injured employee undergo a medical exam prior to returning to work.
  - However, the ADA requires that an employer must demonstrate that such an exam is related to the job and associated with a business necessity.
  - Additionally, while no specific time frame is stipulated by the 7th Circuit, if an employer wants an employee to undergo further medical examination, it could be considered bad-faith for an employer to request a secondary exam prior to the employee's return. Upon their return, employees should have meaningful time to demonstrate their abilities before an additional exam is requested.
- When an employee is returning from FMLA leave, companies should make sure to have a policy that informs the injured employee that they must have a physician's certification to return to work.
- Employers should avoid contacting an employee's healthcare provider without direct authorization from the employee.
  - Even if the employee consents, only the company's own healthcare provider should contact the employee's provider for the purposes of authentication or clarification.

Light-Duty Programs

- In order to reduce worker's compensation liability, employers can create light duty programs to allow an employee on leave and receiving workers' compensation to return to work.
- Light-duty positions are temporary positions created specifically for the purposes of providing work for employees who are unable to perform their normal duties.
- The primary goal of light-duty positions are to reduce an employer's workers' compensation costs by mitigating an employee's potential lost earnings. Under the IWCA, an employee's refusal to accept a reasonable light-duty position can result in the termination of worker's compensation benefits.
- Companies should not create permanent light-duty positions and light-duty programs are not meant to last for long periods of time. Light-duty programs are most efficient when they are flexible to an injured worker's restrictions and conducted on an ad hoc basis.
- Employers should clearly express the availability of light-duty positions to injured workers. However, an employee's acceptance of a light-duty position must be completely voluntary. Under the FMLA, an employer cannot require an employee to accept such a position.
- Upon an injured employee's release to resume full-duty work, the employee should be sent notification when a full-duty position becomes available.

Important Pieces of Disability-Related Legislation to Consider When Implementing a Light-Duty Program

1. Family Medical Leave Act (FMLA)
2. American's With Disabilities Act (ADA)
3. Illinois Workers' Compensation Act (IWCA)

Also Consider

Equal Employment Opportunity Commission (EEOC) opinions

Ensure Your Light-Duty Program is Compliant with Disability-Related Legislation

- Acceptance of a light-duty position does not waive an employee's rights under the FMLA. Accordingly, an employee retains the right to be restored to the same position he or she had prior to the injury.
- An employee's time spent employed in a light-duty position does not count against the 12 weeks allotted for FMLA leave.
- However, if an employee is taking an FMLA leave and worker's compensation leave concurrently, the employee may lose worker's compensation benefits for refusing the light-duty option. Nevertheless, the employee would still be entitled to continue on unpaid FMLA leave until they have exhausted the 12 week time period or they are able to return to the same or an equivalent job.
- The FMLA does not address what the rate of compensation should be for an employee working in a light-duty position. Accordingly, as long as it does not violate state workers' compensation laws, an employee may be compensated at an appropriate rate for the light-duty position as opposed to their regular salary. Temporary Partial Disability benefits may be used under the IWCA
- Under the ADA, companies aren't required to create light-duty work if an acceptable position does not already exist. However, a less demanding job may be considered a reasonable accommodation. Additionally, if a company opts to create a light-duty position, it is allowable for that specific position to only be offered on a temporary basis.
- Companies may establish explicit guidelines that specify what temporary means in regard to light-duty. Such as: "Temporary light-duty positions do not usually last longer than (X) weeks. If the employee has not been cleared to return to regular employment at the end of (X) weeks, discussions will be had with the employee to see how the company may help them return to their job."
- Conversely, companies may take a flexible approach to light-duty positions dependent upon the employee's injuries. However, this approach can lock a company into maintaining a light-duty position for longer than desired.
- The EEOC has taken the position that companies cannot restrict light-duty jobs solely to individuals who have suffered on the job injuries. However, many of the jobs the EEOC's opinion may effect would likely already constitute reasonable accommodations under the ADA.
- Companies should not make exceptions regarding performance expectations and policies for light-duty jobs.

Be Wary of Terminating Employees on Light-Duty

Interstate Scaffolding v. Illinois Workers' Comp. Comm'n, 236 Ill. 2d 132, 923 N.E.2d 266, 274 (2010).

- In 2010, the Illinois Supreme Court set the workers compensation world on its head by handing down its decision in *Interstate Scaffolding*.
- In *Interstate Scaffolding*, the claimant was on a light-duty assignment stemming from a work-related injury two years earlier. While employed in the light-duty position, the claimant was terminated for cause after defacing company property with religious graffiti. Interstate Scaffolding subsequently refused to pay TTD benefits upon the claimant's termination. The Illinois Workers' Compensation Commission (IWCC) held that since the claimant had not reached maximum medical improvement (MMI) prior to his termination, he was entitled to TTD benefits.
- On appeal, the Illinois Supreme Court agreed with the IWCC, holding that the Illinois Workers' Compensation Act contained "no provision for the denial, suspension, or termination of TTD benefits as a result of an employee's discharge by his employer. Nor does the Act condition TTD benefits on whether there has been 'cause' for the employee's dismissal. Such an inquiry is foreign to the Illinois workers' compensation system." *Id.* at 146.
- Under this ruling, if a claimant is working in a light-duty position and has not yet reached MMI, even if they are fired for cause, the claimant will be entitled to TTD benefits in most situations.
- The Illinois Supreme Court's ruling in *Interstate Scaffolding,* created a gray area as to whether employers would still be liable for the payment of TTD benefits even if an employee was terminated for criminal acts committed against the employer.

Some Expensive Packs of Cigarettes for Wal-Mart

Matuszczak v. Illinois Workers' Comp. Comm'n, 2014 IL App (2d) 130532WC, 22 N.E.3d 341, (Dec. 22, 2014).

- In 2014, the consequences of *Interstate Scaffolding* became woefully apparent.
- In *Matuszczak*, the claimant was employed at Wal-Mart when he injured his back, neck, and arm in a work-related accident. Subsequently, the claimant returned to work in a light-duty position. While working in the light-duty position, the claimant was terminated for cause because he admitted to stealing cigarettes on multiple occasions in 2011. After the claimant's termination, he was unable to find similar light-duty work. At arbitration, the arbitrator found that the claimant had sustained his injuries in the course of his employment and awarded 23 weeks of TTD benefits. On appeal, the IWCC reversed the arbitrator's TTD award. Subsequently, the circuit court fully reinstated the arbitrator's decision.
- Ultimately, the appellate court agreed with the circuit court, upholding both the 23 weeks of TTD benefits.
- "The record shows claimant was entitled to benefits under the Act as a result of his work-related injury but was terminated from his employment for conduct unrelated to his injury. Per *Interstate Scaffolding*, the critical inquiry for the Commission when determining claimant's entitlement to TTD was whether his medical condition had stabilized and he had reached MMI." *Id.* at ¶ 27.
- The *Matuszczak* court agreed with the court in *Interstate Scaffolding*, reiterating that the Illinois "[S]upreme Court specifically considered and rejected an analysis which included inquiry into whether the 'employee has engaged in misconduct constituting a constructive refusal to perform the work.' " *Id.* at ¶ 26 (quoting Interstate Scaffolding, 385 Ill.App.3d at 1051–52, 324 Ill.Dec. 913, 896 N.E.2d at 1142 (Donovan, J., dissenting, joined by Holdridge, J.))

Interstate Scaffolding's termination restrictions don't apply if they force an employer to violate the law

<u>Lopez v. Channel Distrib.</u>,14 IL. W.C. 27884 (Ill. Indus. Com'n Feb. 4, 2016)
If an employer is legally prohibited from keeping an injured employee on staff, the termination of that employee is not volitional on the part of the employer.

- In <u>Lopez v. Channel Distribution</u>, the claimant was an illegal alien who experienced a workplace injury. The claimant then underwent surgery for the injury and received TTD benefits. After the injury, the claimant was placed in a light-duty position. In the following months, TSA conducted background checks into the company's employees and discovered issues with the claimant's immigration status. Due to this, the employee was given the option to rectify his immigration status with TSA, resign, or be fired.

- At the advice of counsel, the claimant resigned. However, the claimant contended that his resignation was a actually a constructive termination because he ultimately would have been fired. Additionally, at the time of his resignation, the claimant had not reached MMI. As a result, the claimant argued that the precedent set forth by *Interstate Scaffolding* should apply to his case.

- The IWCC found that since *Matuszczak* had discounted the notion of a claimant's constructive rejection of light duty, a constructive termination argument must also be discounted. Ultimately, the IWCC found that *Lopez* was distinguishable from both *Matuszczak* and *Interstate Scaffolding.* In *Lopez*, the claimant's failure to resolve the issues with his employment status was inseparably linked to his own volitional decisions.

- Therefore, Lopez's employer could not keep Lopez employed without breaking federal laws regarding both immigration and national security. As a result, the arbitrator denied Lopez's requested TTD benefits from the day of his resignation to the date of trial.

An Injured Employee’s Refusal of Accommodated Work Can Serve as a Reason to Terminate TTD Benefits

<u>Weller v. Illinois Workers' Comp. Comm'n</u>, 2018 IL App (3d) 170047WC-U. (Tazewell County case)
In cases where a claimant is terminated while injured but has failed to establish that they were unable to perform light-duty work for the respondent, *Interstate Scaffolding*’s holding is inapplicable to the award of TTD benefits.

- In *Weller*, the claimant was operating a forklift when he suffered a workplace injury on September 20th, 2011. After seeking treatment, he was diagnosed with a serious back injury stemming from a herniated disk. The claimant’s doctor opined that the claimant could perform light-duty tasks, such as lifting up to 20 pounds and operate heavy machinery as long as he was not required to move his neck.

- Subsequently, the employer’s doctor performed an examination and came to the conclusion that the claimant’s condition had not been caused by his workplace activities and that the claimant could engage in light duty work. The company made an offer of light duty work pursuant to both of the doctors’ opinions. Despite this, the claimant never returned to work after October 4th, 2011, and contended that he was unable to do any work at all.

- The claimant only received medical authorization to miss work on October 19th, 2011, after he had already walked off of his job. Eventually, the claimant was terminated and his TTD benefits were terminated. At arbitration, the claimant was awarded 232 weeks of TTD benefits from Oct. 5, 2011-April 14, 2015. However, the IWCC modified the award, finding that the claimant had only proved entitlement to TTD benefits from Oct. 5-Oct. 19, 2011.

- On appeal, the claimant argued that since he was terminated from his position after he was injured, he was entitled to TTD benefits under *Interstate Scaffolding*. Unpersuaded, the Appellate Court held that the claimant did not present “any evidence to support a claim that his termination played a role in the Commission's decision to reduce his TTD benefits.” *Id.* ¶ 26. Additionally, the Appellate Court noted that “the Commission's finding was premised on the fact that claimant failed to establish that he was unable to perform the functions of his position for respondent after October 19, 2011.” *Id.*

An Injured Employee's Refusal of Accommodated Work Can Serve as a Reason to Terminate TTD Benefits (Cont.)

Deprow v. U.S. Steel, 24 ILWCLB 30 (Ill. W.C. Comm. 2015).
Penalties and fees are not justified for an employer's termination of TTD benefits once an injured employee has refused a light or restricted duty position. When an employer relies on a physician's judgement that the injured employee is capable of light or restricted duty work in the weeks following surgery, and there is no testimony to dispute the physician's opinion, then the employer has not engaged in conduct so unreasonable to warrant additional penalties.

- In *Deprow*, while working at a steel mill in July 2013, the claimant injured his right shoulder and underwent surgery. At a March 25, 2014 hearing, the claimant testified that for 8-12 hours per day he wore an arm-sling to immobilize his shoulder. The claimant was evaluated by the employer's doctor while still fully restricted from work. The doctor found that the claimant should be allowed to perform restricted duty office work without the use of his right arm. Subsequently, the defendant offered claimant appropriate one-armed work.

- Instead of accepting the position, the claimant decided to follow his personal doctor's orders and did not return to work. As a result, the defendant terminated the claimant's TTD benefits. At arbitration, it was found that the claimant was entitled to TTD payments from Feb. 21, 2014-March 25, 2014 and the defendant was ordered to pay continuing temporary compensation benefits until the claimant was allowed to return to light duty, and awarded penalties and attorney's fees.

- Upon review, the IWCC agreed with the TTD award for the time up until the hearing but found the arbitrator's award of continuing temporary compensation inappropriate.

- Finally, the IWCC reversed the award of penalties and attorney's fees, noting that the defendant relied on a doctor's judgement and there was no testimony that the claimant was incapable of making use of his left arm after surgery. Additionally, the the defendant had previously provided the claimant with similar work for months before his surgery.

- While the defendant may have displayed undue eagerness by offering the claimant one-armed work just two weeks after the surgery, the defendant did not engage in conduct so unreasonable to warrant penalties and fees.

If They Sit at Home They Can Sit at Work

Powell v. Manchester Tank & Equipment, 25 ILWCLB 194 (Ill. W.C. Comm. 2017)
A claimant who refuses light-duty work that exceeds his specified restrictions, but engages in the same activity during his personal time, has no claim for further TTD benefits.

- In *Powell*, the claimant was a welder who injured his back during an April 2015 work injury. At arbitration, the claimant was awarded TTD benefits through June 1st, 2016.
- The claimant was offered light-duty work by the company, but he rejected the position because it required him to sit for long periods of time which violated his medical restrictions.
- However, the claimant admitted that starting in April 2016, he routinely violated his medical restriction against sitting for long periods of time when he was at home.
- On review, the IWCC modified the awarded benefits, finding that the claimant wasn't entitled to TTD benefits after April 1st, 2016.
- The IWCC found that since the claimant volitionally violated his restrictions on his own time, his refusal to do so for his employer warranted the termination of further TTD benefits. Accordingly, since the claimant did not give a precise date in April for when he started violating his restrictions, the IWCC found that first day of the month was an appropriate termination date.

Preventative Action: Workplace Wellness Programs

- A common trend among both private and public sector employers is the establishment of workplace wellness programs.
- In total, over 50 million American workers have access to workplace wellness programs.
- A study done by the University of Chicago found that in 2016 alone, companies spent close to $8 billion on wellness programs. In 2011, companies spent only $1billion on wellness programs.
- Ideally, workplace wellness programs hope to improve the overall health of employees, increase worker productivity, healthcare costs.
- Previous studies have found that for every $1 an employer spends on a wellness program, medical costs fall approximately $3.27. (Workplace Wellness Programs Can Generate Savings by Katherine Baicker, David cutler, and Zirui Song (2010))

Know the Legal Pitfalls of Wellness Programs

- Workplace Wellness programs must comply with federal legislation such as the ADA, Genetic Information Nondiscrimination Act (GINA), and other laws and regulations set forth by the EEOC.
- Additionally, if a workplace wellness program is provided through a health insurance program or is part of a group health plan, it must also comply with the Affordable Care Act and the Health Insurance Portability and Accountability Act (HIPAA).
- Pursuant to Title 1 of the ADA, if an employee wellness program requires participants to undergo a physical exam or respond to disability or illness related questionnaires, the extent to which employers may use incentives is limited.
  - When inquiries for medical information are a voluntary component of a workplace wellness program, they are protected under the ADA. However, the definition of what constitutes a voluntary component of an employer-sponsored wellness program is abstract and can ensnare unsuspecting companies.
  - Similarly, Title 2 of GINA has nearly identical restrictions on incentives for the production of medical information. However, it also extends the permissibility of incentives to an employee's spouse if they are allowed to participate in the wellness program.
    - But an employee's spouse may only be offered incentives to provide information pertaining to the potential existence of a disease or disorder.
- The ADA also requires reasonable accommodations for employer-sponsored wellness programs.
  - If a disabled employee is unable to participate in a physical activity required under the program, the program is required to offer a replacement activity for that employee to participate in.
  - The same is true for goals or penalties mandated under the program. If an employee is unable to reach a mandatory goal or avoid a penalty due to a disability or illness, the program must offer alternative goals and penalties for the employee.
  - Alternative standards or activities can be created on an ad hoc basis and may be individually crafted for each specific employee.

When is a Workplace Wellness Program Considered Voluntary?

Under the ADA

1. It must be reasonably designed to promote health or prevent disease;
2. It must be voluntary;
3. The incentives offered under the program cannot exceed 30% of the total cost of self-only coverage; (Until January 1st, 2019)
4. It must meet certain confidentiality requirements;
5. It must comply with all of the anti-discrimination laws enforced by the EEOC; and
6. It cannot utilize certain safe harbor provisions that are applicable to underwriting.

Under GINA

1. The program must be designed to prevent disease or promote health;
2. Production of genetic information by the employee must be volitional;
3. In regard to genetic information, the employee must provide written authorization meeting certain requirements that demonstrate prior knowledge and volitional consent;
4. Only approved personnel may be given use of and access to genetic information; and
5. Incentives for employees to produce genetic information are only acceptable for the completion of Health Risk Assessments which include questions specifically related to genetic information.

Participatory Wellness Programs under the ACA

- Participatory wellness programs are permissible as long as they are available to any employee regardless of health. If incentives or rewards are provided, they are not based on the satisfaction of a health-related standard or requirement.
- The Department of Labor provided these examples:
  1. A program that reimburses employees for all or part of the cost for memberships in a fitness center.
  2. A diagnostic testing program that provides a reward for participation and does not base any part of the reward on outcomes.
  3. A program that reimburses employees for the costs of participating, or that otherwise provides a reward for participating, in a smoking cessation program without regard to whether the employee quits smoking.
  4. A program that provides a reward to employees for attending a monthly, no-cost health education seminar.

Health-Contingent Programs Require participants to meet health related goals and expectations in order to obtain an award

Requirements for compliance:

1. The program must give individuals eligible to participate the opportunity to qualify for the reward at least once per year.
2. The total reward for all the plan's wellness programs that require satisfaction of a standard related to a health factor must not exceed 30 % (or 50% for programs designed to prevent or reduce tobacco use) of the cost of employee-only coverage.
   - If dependents may participate in the wellness program, the reward must not exceed
     30 %(or 50%) of the cost of the coverage in which an employee and any dependents are enrolled.

* Only true until January 1st, 2019

3. The program must be reasonably designed to promote health and prevent disease.
4. The incentives must be available to all similarly situated individuals.
   This means the program must have reasonable accommodations, alternatives, or a waiver policy.
5. In all materials describing the terms of the program, the plan must disclose the availability of a reasonable alternative standard or have a waiver policy.

Changes Are Coming for Permissible Incentives

- Recently, the voluntariness of wellness programs which offer incentives of up to 30% of the cost of employee-only coverage were challenged in **AARP v. United States Equal Employment Opportunity Comm'n**. 292 F. Supp. 3d 238 (D.D.C. 2017).
- The AARP challenged the EEOC's regulation, which was in compliance with the language of the ADA and GINA, that wellness programs which had 30% incentives were voluntary if they met certain requirements.
- The federal district court in Washington D.C. agreed with the AARP, ruling that the EEOC had failed to effectively establish that a 30% incentive did not render a program involuntary.
- The district court ruled that it would vacate the EEOC's regulation on January 1st, 2019, and demanded that the EEOC present a notice of proposed rulemaking before September 2018.
- As of May 2018, the EEOC had yet to decide whether it would create new regulations on wellness program incentives.

Are Wellness Plans Worth the Headache?

- According to a recent study by the University of Illinois, workplace wellness programs may not be the godsend employers once believed them to be.
- The 2017 Illinois Workplace Wellness Study used the employees of the University of Illinois at Urbana-Champaign to conduct a controlled and randomized trial of a comprehensive wellness program.
- The study randomly assigned U of I employees to either a control group without access to a wellness program or one of six groups with access to a wellness program called "iThrive".
- Participants in the six groups were allowed and encouraged to participate in health screenings, risk assessments, and physical/wellness activities. In total, 3,300 U of I employees were given access to the wellness program while 1,534 were part of the control group.
- Ultimately, the U of I researchers wanted to answer three qu workplace wellness programs:

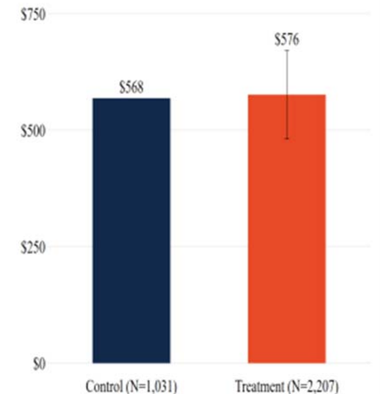
  1) Do they have any effect on health outcomes, medical spending, and worker productivity?

  2) Can financial incentives attract more participants?

  3) What types of employees are likely to participate?

The Results After 1 year

1. Do they have any effect on health outcomes, medical spending, and worker productivity?
   - U of I found that a workplace wellness program did not change health care costs
     - The control group (without a wellness program) actually had slightly lower average monthly medical spending!
     - Control group: $568 iThrive Groups: $576
   - Having a wellness program showed no measurable health benefits!
     - Running event participation and gym usage were nearly identical between the control group and the participating groups



2. Can financial incentives attract more participants?
   - The study found that financial incentives work, but only to a certain extent.
     - Participation rates in health screenings
       - $0 incentive: 47% participation rate
       - $100 incentive: 59% participation rate (12% increase as opposed to $0)
       - $200 incentive: 63% participation rate (4% increase as opposed to $100)
3. What types of employees are likely to participate?
   - The employees who chose to participate were already healthier!
     - The employees who participated already had a higher rate of gym usage and nearly 3x the rate of prior running experience.

But…

- The study is still in its infancy. U of I plans to continue the study for two more years to see if, over time, savings start to emerge.
  - Prior studies have estimated that wellness programs take around three years to show any benefits.
- The study did find two potential benefits of wellness programs:
  - Employees who participated in iThrive became more likely to seek a health screening
    - The same employees were also more likely to say that their employer cared about their health
  - Employees who participated were less likely to take sick days
- While wellness programs may not have a direct and immediate impact on workplace health savings, eventually they may reduce healthcare costs by attracting and retaining healthier employees.

Permanent Total Disability-Case Example

Sarlo v. ABM Industries Inc., 25 ILWCLB 75 (Ill. W.C. Comm. 2016).

- Accounting manager injured on the job failed to prove she was incapable of employment or that she could not perform any services except those which are so limited in quantity, dependability or quality that there is no reasonably stable labor market for them. She had experience in the sedentary labor market of accounting, thus the Commission found she could perform some form of employment without seriously endangering her health or life. Further, surveillance video revealed her ability to run, squat, bend, carry, and lift. Failed to prove she conducted a diligent and good-faith search for employment. Permanent Total Disability benefits were denied.
- However, the arbitrator conducted the 5 factor analysis for permanent partial disability and found her entitled to permanent disability benefits under Section 8(e) for 20% loss of use of her right leg.

Permanent Total Disability-Case Example

White v. Pleasant Hill CUSD No. 3, 25 ILWCLB 29 (Ill. W.C. Comm. 2017).

- Employer did not offer injured employee work within his restrictions so they provided him with a counselor to provide him with the tools necessary to complete a job search. After the employer discontinued the counselor, the employee performed a diligent and good-faith job search on his own, getting several interviews.
- Employee satisfied his burden of proof that he was within the odd-lot category of permanent total disability 1) by showing diligent but unsuccessful attempts to find work and 2) by showing that because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market.
- Burden then shifted to his employer to show that suitable work was available in the employee's labor market. Employer failed to do so. Commission awarded permanent total disability benefits.

Permanent Total Disability-Case Example

<u>Personnel Staffing Group LLC d/b/a Most Valuable Personnel v IWCC (Alvarado)</u>, 25 ILWCLB 5 (Ill. App. Ct., 1st 2016) .

- Employee satisfied his burden of showing he was within the odd-lot category of permanent total disability. Employee proved that because of his age, skills, training, and work history he would not be regularly employed in a well-known branch of the labor market. Employee's vocational report showed he did not have access to gainful employment due to his lack of secondary education, transferable skills, and English language skills, and his age.
- Employer offered proof that it offered employee several jobs as a restroom monitor, but the Commission found that position did not reflect the employee's long-term employment prospects in a competitive labor market. Commission found that employee was permanently and totally disabled pursuant to Section 8(f) Of the WCA under the odd-lot theory.

Permanent Total Disability-Case Example

Cantwell v. Illinois, State of/University of Illinois, 25 ILWCLB 16 (Ill. W.C. Comm. 2016)

- After a work injury, medical evidence established that the employee was not permanently and totally disabled. She could still function at a medium demand level with limited ambulation activities.
- Employee began a self-directed job search but it was ineffective due to her search methods. Employee applied for jobs outside the scope of her medical restrictions, education and training. She further failed to establish that because of her age, training, education ,experience, and condition, no jobs were available to her.
- Employee's vocational rehabilitation counselor testified that employee could return to gainful employment after vocational rehabilitation in the form of retraining in a local college program. Commission found the recommendation reasonable and persuasive and awarded maintenance benefits during the employee's retraining.

Refusing Vocational Services-Case Example

Johnson v. (Chicago, City of) IWCC, 25 ILWCLB 73 (Ill. W.C. Comm. 2017).

- Employee was found to be noncompliant with vocational rehabilitation. He refused to participate in a diligent and good-faith job search. Evidence showed he was repeatedly late for meetings and computer lab, failed to request time off or submit proper time off sheets, completed only half of the weekly required job searches, was argumentative, refused to dress properly, and made personal calls during his computer labs, and missed appointments.
- The arbitrator denied the claimant any further maintenance and found the employer entitled to a credit for maintenance benefits paid.

Maintenance/Vocational Rehabilitation- Case Example

<u>Murff v. (Chicago, City of), IWCC</u>, 24 ILWCLB 209 (Ill. App. Ct., 1st 2017).

- Arbitrator issued a decision finding employee sustained a 50% loss of use of the person as a whole. Employee later filed a petition pursuant to Section 19(h) and 8(a) alleging a material increase in disability and seeking additional benefits, including maintenance and vocational rehabilitation, based on a reduction in his earning power. The Appellate Court noted that in Petrie v. Industrial Commission, the court held that an increase in economic disability alone is not a proper basis for modification of an award pursuant to 19(h). Employee must present evidence showing that his physical or mental condition has changed. Employee failed to prove his physical or mental condition substantially and materially changed.
- Further, the Court held that Section 8(a) does not authorized the Commission to award maintenance and vocational rehabilitation after a final decision has been entered. In order for an employee to obtain maintenance and vocational rehabilitation benefits after a final award under Section 19(a) they must satisfy the preliminary requirement of showing a substantial and material change in his physical or mental condition (disability).

Wage Differential Benefits- Case Example

Crittenden v. (Chicago, City of) IWCC, 08 IL.W.C. 19505 (Ill.Indus.Com'n), 18 I.W.C.C. 0084, 2018 WL 1416744

- Claimant injured his lower back during the course of his employment with the City of Chicago. After a functional capacity evaluation, the claimant was found to be at MMI and was given strict physical limitations. After seeing two vocational experts, it was established that in his current condition, the claimant would likely earn between $8.25-$13.78 per hour. However, the $13.78 figure was based on the median wage for a school bus driver and the claimant did not possess a valid driver's license. Prior to his injury, the claimant had been making $32.79 per hour.
- At arbitration, the claimant was deemed to have been partially incapacitated from pursuing his usual and customary line of employment. The arbitrator found that the claimant was entitled to wage differential benefits based on a theory that he would now only be able to make $11 per hour. Due to this, the employer was ordered to pay the claimant $581.06 in wage differential benefits per week.
- The City of Chicago appealed the decision, arguing that $11 was not an appropriate valuation of the claimant's earning potential since the vocational expert opined he could make up to $13.78 per hour. The City contended that the claimant's lack of effort in obtaining alternative employment should subject him to a rate of $13.78 per hour. The IWCC agreed with the City and reduced the claimant's award accordingly.
- However, the appellate court disagreed with the IWCC's reduction of wage differential benefits. The court pointed out that the IWCA requires that the "average amount a claimant could reasonably earn" be used when conducting a valuation of alternative employment. Due to this, the court reversed the IWCC's decision and remanded the case to the IWCC to recalculate the wage differential award. Ultimately, the IWCC reinstated the $581.06 weekly wage differential benefits.
- In their *Crittenden* ruling, the court essentially held that when a person doesn't have a job, the job search becomes their job.