

what's

[inside]

*Worker's Compensation:*  
*Recent Workers' Compensation Changes*..... 1, 2

*Employment:*  
*The Next Wave Of Employment Regulation: Breakthroughs In Medicine* ....3

*Firm News* .....4

*Worker's Compensation:*  
*2009 Timeline*.....insert

*Employment:*  
*ADA Amendments Passed*.....insert

*Guest Column:*  
*Interviewing 101* .....insert

**Attorneys**  
Alan G. Ross  
Brian K. Brittain\*  
Evelyn P. Schonberg\*\*  
Anthony A. Baucio  
Scott Coghlan  
Chad A. Fine  
Scott W. Gedeon  
Tricia L. Hurst  
Ryan T. Neumeyer  
Nick A. Nykulak  
Carol D. Strassman\*

**Paralegals**  
Renee Mezera  
Toni A. Fedrowiz  
Lorraine J. Geiger  
Arlene M. Golias  
Carla E. Kihorany  
Elizabeth A. Krusinski  
Rosanne M. Slivka  
Lori A. Williamson

**Firm Administrator**  
Mary Ann Kuilder

\*OSBA Certified Specialist Workers' Compensation  
\*\*OSBA Certified Specialist Labor & Employment

6480 Rockside Woods Blvd. South, Suite 350  
Cleveland, Ohio 44131  
Phone: [216] 447-1551 • Fax: [216] 447-1554  
www.rbslaw.com

Ross, Brittain & Schonberg is "going green!" This newsletter will be the last issue printed and mailed to our clients. All future newsletters will be available online at our website, [www.rbslaw.com](http://www.rbslaw.com). Please make sure to visit our website and register under the section entitled "Sign-up for Informative Updates and Newsletters" to make sure your company will be kept up-to-date on all future legal challenges facing employers in Ohio.

**WORKERS' COMPENSATION:  
RECENT WORKERS' COMPENSATION CHANGES**

By Lauri Cochran of Comprehensive Risk Management

**R**ecent Reform at the Bureau of Workers' Compensation. Almost two years ago, the newly-appointed Bureau of Workers' Compensation (BWC) Board of Directors instructed the BWC administration to reform certain aspects of the workers' compensation system. To date, most of this reform has centered on the inequity that has traditionally existed between group rated and non-group rated employers.

In the past, many group rated employers received discounts up to 95%. Actuarial studies then determined that non-group rated employers were paying higher premiums as a result. A few years ago, we started seeing a slow decline in group discounts, which decreased from a high of 95%, to 93% and finally to 90%. In 2008, the BWC took a larger step towards equalizing the imbalance by reducing the maximum group discount to 85%. Unfortunately, the reductions are continuing. In July, 2008, the BWC proposed a plan to the Board of Directors to reduce the maximum group discount to 77% for the 2009 rate year, which will begin on July 1, 2009 for private employers. This proposal was ultimately approved by the Board. The same proposal also made an initial recommendation to lower the group discount even further, to 65%, for the 2010 rate year. However, the BWC advised the Board that before moving forward with the 2010 changes, they want to review the impact of the prior changes to the maximum rate and the changes that occur as a result of the new reserving system (MIRA 2) to determine the effect those changes have had on balancing the inequity.

To offset the premium impact to employers for the reduction in the group discounts for the 2009 rate year, the BWC has made a

few capping proposals to the Board. These proposals put a cap on the reduction of Experience Modifier Rates (EMR). One of the recommendations is an EMR cap of 1.30. This means that a group that had an EMR of .15 for 2008 will have an "effective rate" of .20 (.15 X 1.30 = .195, or .20 rounded). Even though the maximum group discounted rate is 77%, this cap will make the effective rate .20 or an 80% discount. This cap only applies to a few of the very top rated groups. Another proposed cap is a 100% EMR increase. What this means is that employers that were in a group for 2008 but will not be in a group for 2009 as a result of claims experience will only see a swing of 100%. As an example, if an employer is currently in a top tier group at an 85% discount (EMR of .15), and is being rejected from group rating, the employer's rate for 2009 will be capped at a 70% discount (EMR of .30). This could very well mean that a small percentage of employers may end up being better off financially if they leave group for the 2009 policy year. In the scenario above, if the employer currently enrolled in an 85% discount group was eligible for a 40% discount in 2009, from a premium standpoint, it would make more sense for the employer to opt out of group and take the 100% EMR cap at a 70% discount. It is important to note that this 100% EMR cap does not apply to companies that are merging another business into an existing policy. Please note that these proposed caps will not be voted on by the Board until a December meeting. If anything changes, we will send out a notification.

Further, in that same proposal, the BWC recommended moving to a new experience rating system in 2012. The current system

*continued on next page*

This Publication is intended to inform clients and friends about labor and employment matters of current interest. The matters included were not given exhaustive treatments due to space limitations. This abridged information should not be construed as legal advice and is not a substitute for legal counsel. This publication is not intended to create, and receipt of it does not constitute, an attorney relationship.

can severely penalize an employer for having only one significant claim. A costly claim can cause an employer to be removed from a group rating program, thereby causing large swings in premium, sometimes as much as 1,200%. The BWC is reviewing a new system that will assess employers higher rates based on claim frequency (number of claims) as opposed to claim severity (one "high dollar" claim). That system is currently under review and further discussions will begin in 2009 between the BWC and various stakeholders, including Third Party Administrators and Employer Associations.

There has also been a recent change regarding payroll reporting in the construction industry. The BWC has adjusted the construction industry reporting limitation to \$1,151 per week for reportable payroll to a construction industry classification for the 2009 calendar year.

When an employee's actual reportable payroll exceeds \$1,151, any amount over is not reportable to the Ohio BWC. If an employee earns under \$1,056 in any week, actual wages need to be reported to the BWC. Corporate officer payroll reportable under a construction manual code is subject to the corporate officer cap limits. Clerical employee payroll of a construction industry employer is fully reportable, even if the weekly wages exceed \$1,056.

### **Proposed New Programs for Ohio Employers**

The BWC is also looking into implementing additional premium savings programs for Ohio employers, similar to programs offered in other states. One program under consideration is a "deductible program" where an employer can choose a level of risk per claim that it would like to pay out of pocket, in exchange for a premium discount. Another proposed program is the "safety incentive program." This is a program whereby an employer would pay its premium at its individual experience modifier rate. The BWC would review the losses incurred by that employer at certain intervals after the conclusion of the rate year, and if the losses were better than anticipated, the employer would receive a refund of premium paid. The third program under consideration is a "group retrospective rating program." Under this program, employers would

group together, similar to the current group program, and pay premiums at a slightly modified rate. Again, the BWC would review the losses after the program year ended. If the combined losses of the group were better than anticipated, the group would receive a refund to be distributed to the group members based upon each individual member's performance.

Those programs are currently being analyzed by the BWC along with various stakeholders, including the actuarial department at Comprehensive Risk Management. Implementation for the new programs is scheduled to begin as early as July 2009. We will continue to keep you advised of any developments on this topic.

### **A New Reserving System Has Been Implemented**

Since the implementation of the MIRA (Micro Insurance Reserve Analysis) Reserving System in 2002, many employers have seen significant premium swings due to the roller coaster changes made on claim reserves. The BWC started reviewing the MIRA System in 2005 for possible changes and/or updates. This review was in a holding pattern until House Bill 100 mandated the BWC to change the MIRA System to a new, updated and more transparent system, effective July 1, 2008. It took the BWC (along with stakeholders including Comprehensive Risk Management), just under a year to make modifications to the MIRA System, creating the new "MIRA 2" system. The new system was just released on September 8, 2008, and so far we have seen much needed changes in claim reserves.

The former MIRA system was using claim payment data that was twenty years old in the prediction of reserves. In recent years, changes in medical treatment, an increase in safety awareness and the development of various programs such as transitional duty work have significantly lowered the costs of most claims. Simply put, the twenty-year-old claim payment data was outdated and not a good predictor of future claim costs. Our initial review has confirmed that claims still carrying reserves under the MIRA 2 system have much lower reserves than the former MIRA reserves.

MIRA 2 also works to "shut off" a reserve after six months with no claim activity. Under the old system, the wait period was 13 months. This change alone has caused us to

see a significant decrease in the number of claims carrying a reserve.

Another important change involves permanent partial disability (PPD) awards. Under the former MIRA system, a claim could be assessed with a reserve because the system looked at the actual date the PPD award was granted. MIRA 2 looks at the actual payment dates of the PPD award. When the BWC issues a PPD award, the payment date of the award goes back to the return to work date (if lost time was involved) or the injury date (if the claim was medical only). The payment of the award starts on either the return to work date or the date of injury and then runs for the number of weeks consistent with the award. That means that most PPD awards are over six months old at the time the PPD is granted. Therefore, due to this change in the MIRA 2 system, the reserves in most claims will not be impacted by recent PPD awards.

Comprehensive Risk Management recently compared the reserves that were set in March, June and September of 2008 for all the claims that we manage on behalf of our clients. We did see a small increase in claim reserves in June compared to the March reserves. However, when the September MIRA 2 reserves were analyzed, the overall reserve reduction was about 47%. This is a change employers wanted and needed to see.

With regard to "transparency" of the system, the BWC now has many new screens on its online system that now track reserves, showing the old reserve history, the new reserve changes and the reasons for change. The system also provides information on the breakdown of the reserve, such as the value of the medical reserve and the appropriation of the indemnity reserve between the various types of indemnity awards paid on a claim. This will be a helpful tool in the future as we may be able to better predict a value for the award of a certain type of indemnity benefit.

***As always, Comprehensive Risk Management and the attorneys at Ross, Brittain & Schonberg will continue to keep you updated as to any and all BWC reforms as they occur. In the meantime, please do not hesitate to contact us with questions or concerns about the reserve system, new programs or group rating.***

# EMPLOYMENT: THE NEXT WAVE OF EMPLOYMENT REGULATION: HOW BREAKTHROUGHS IN MEDICINE HAVE AFFECTED THE LEGAL LANDSCAPE OF THE WORKPLACE

By Ryan T. Neumeyer

On May 21, 2008, President Bush signed the Genetic Information Non-Discrimination Act (GINA) into law. GINA will take effect in November 2009, or 18 months following its enactment.

GINA allows healthcare professionals to perform genetic testing and decoding of the personal genome, which will pave the way for personalized medicine. This will most likely lead to a revolution in how we are treated as patients, as physicians will be able to truly treat us in a preventative manner. Furthermore, physicians will be able to detect cancers and other diseases at more treatable stages. While this law is a great thing for medical science, it is yet another law that employers will have to be cognizant of.

While “genetic information” as defined by GINA has been available to medical science for some time, there was an unfounded fear that insurers and employers would discriminate against people on the basis of their health risks and susceptibility to diseases. Thus, such genetic testing has been slow to materialize for everyday medical use. GINA attempts to curb this fear with its anti-discrimination provisions.

GINA imposes privacy and record-keeping restrictions on employers and insurers. As to insurers, the statute generally prohibits insurance companies from discriminating against an applicant on the basis of an applicant’s genetic information and also prohibits insurance companies from requesting that applicants for health coverage plans be genetically tested.

For employers, more importantly, GINA prohibits an employer, employment agency, labor organization, or joint labor management committee from discriminating against an employee, individual, or member because of genetic information. Specifically, an employer cannot fail to hire a potential employee, discharge an employee, or otherwise discriminate against an employee

with respect to the compensation, terms, conditions, or privileges of employment on the basis of “genetic information.”

“Genetic information” is defined as (1) an individual’s genetic tests; (2) the genetic tests of family members of such individual; and (3) the manifestation of disease or disorder in family members of such individual. The term genetic test means “an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes.” GINA defines a “family member” very broadly as any dependent, and any first, second, third, or fourth degree relative.

GINA also prohibits an employer from requesting, requiring, or purchasing an employee’s genetic information, except where: (1) such information is requested or required to comply with certification requirements of the FMLA; (2) the information involved is to be used for genetic monitoring of the biological effects of toxic substances in the workplace; (3) health or genetic services are offered by the employer, including such services offered as part of a wellness program; (4) the employee gives prior authorization; and (5) an employer purchases documents that are commercially and publicly available (including newspapers, magazines, periodicals, and books, but not including medical databases or court records) that include family medical history.

GINA also requires employers who possess genetic information about an employee to maintain such information in separate files and treat such information as a confidential medical record. Moreover, GINA prohibits an employer from disclosing genetic information, except (1) to the employee upon request; (2) to an occupational or other health researcher; (3) in response to a court order; (4) to a government official investigating compliance with GINA; (5) in connection with the certification provisions of the FMLA or (6) to a public health agency.

Violators of GINA will be exposed to penalties of up to \$300,000 per offense, as well as punitive damages, attorney fees and administrative remedies. In response to GINA, employers should review their policies for dealing with medical information. For instance, when requesting medical information under the ADA or FMLA, an employer could put a disclaimer on the document requests to health care professionals, stating: “Please do not provide any genetic information in response to this request other than the name of a genetic disease, if applicable.” Also, make sure on any pre-hire investigations the companies’ investigators are aware of GINA and do not seek genetic information.

One of the biggest questions under GINA is what employers should do with “genetic information” that is produced either inadvertently or purposefully pursuant to one of GINA’s exceptions. As of now, it is unclear how inadvertent disclosures under GINA will be dealt. Many causal disclosures about an employee’s family history could constitute genetic information under the law. Thus, the EEOC rulemaking to clarify GINA will be very important to explain how to deal with inadvertent disclosure of “genetic information” and the purposeful disclosure under GINA’s exceptions. However, it is clear that employers must keep “genetic information” sealed in a separate place from all other employment-related information.

***The employment attorneys at Ross, Brittain & Schonberg will be sure to update you when the EEOC finalizes its rules concerning GINA and advise you accordingly. Please do not hesitate to contact Lynn Schonberg or Ryan Neumeyer with any questions concerning GINA or any other questions you may have regarding employment law.***

*firm*

[ news ]

## NEW ATTORNEYS: WE ARE PLEASED TO ANNOUNCE THE ADDITION OF TWO NEW ATTORNEYS TO ROSS, BRITTAIN & SCHONBERG!

### **Scott W. Gedeon**

University of Akron School of Law, J.D., 2004  
Cleveland State University, M.A., 1998  
Ohio University, B.A., 1996

Scott has represented employers in all phases of the workers' compensation process. Scott specializes in defending both self-insured and state-funded employers in workers' compensation appeals to the Court of Common Pleas involving allegations of occupational injury and disease. Scott has prosecuted and defended numerous mandamus proceedings in the Ohio Court of Appeals on behalf of employers.

Scott is also experienced in handling matters before all levels of the Industrial Commission of Ohio and the Bureau of Workers' Compensation's Adjudicating Committee. Scott has defended several businesses involved in commercial litigation and bankruptcy proceedings.

### **Chad A. Fine**

Cleveland-Marshall College of Law, J.D., 2000  
John Carroll University, B.A., 1997

Chad is an associate who focuses his practice on the administrative defense of both state-funded and self-insured employers in workers' compensation matters. Prior to joining the firm, Chad represented claimants and employers both administratively and in appeals to Courts of Common Pleas. Chad also managed workers' compensation claims as the operations manager for a local steel transportation trucking firm. His background also includes representing plaintiffs and defendants in general legal matters.

— 4 —

ROSS,  
BRITTAIN  
&  
SCHONBERG  
CO., L.P.A.

6480 Rockside Woods Blvd. South  
Suite 350  
Cleveland, Ohio 44131

# WORKERS' COMPENSATION: WORKERS' COMPENSATION 2009 TIMELINE

By Lauri Cochran of Comprehensive Risk Management

Through 1/09	Group rating quotes are mailed
Through 2/09	Group rating enrollment documents are due
12/31/08	BWC premium reporting form should be received from the BWC
1/31/09	Notifications of group ineligibility will be mailed
2/28/09	BWC premium payments due for payroll incurred from 7/1/08 through 12/31/08; Filing deadline for group rating application(s)
5/1/09	Second half of premium payment due if 50/50 payment option was selected
7/1/09	2009 rate year begins
8/31/09	BWC premium payments due for payroll incurred from 1/1/09 through 6/30/09
11/1/09	Second half of premium payment due if 50/50 payment option was selected
11/09	Group rating renewal process resumes

## EMPLOYMENT: ADA AMENDMENTS PASSED AND SIGNED INTO LAW, EFFECTIVE JANUARY 1, 2009

By Ryan T. Neumeyer

On September 25, 2008, President Bush signed the ADA Amendments Act (ADAAA) into law. The ADAAA opens the door for more employees (who formerly would not have been considered disabled under the applicable case law) to assert rights under the ADA.

Generally, the ADAAA does the following:

- provides that the term "disability" shall be construed in favor of broad coverage for individuals;
- prohibits the consideration of "mitigating measures," such as medication, medical supplies, prosthetics, hearing aids, mobility devices and assistive technology, in determining whether an individual has a disability;
- allows plaintiffs to make a claim under the "regarded as" provision regardless of whether the impairment substantially limits a major life activity. However, the ADAAA does provide that "transitory and minor" impairments cannot be the basis of a "regarded as" claim. Transitory impairments are defined as impairments with an actual or expected duration of six months or less. There is no definition as to what constitutes a "minor" impairment;
- provides that there is still no obligation to accommodate an individual who is "regarded as" disabled;
- clarifies that an impairment that substantially limits one major life activity

need not limit other major life activities in order to be a disability;

- states that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- clarifies that an individual who is not disabled under the ADAAA cannot bring a claim for reverse discrimination because they were treated worse than a person with a disability; and,
- provides a non-exhaustive list of what constitutes a major life activity, including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.

The ADAAA overturns the U.S. Supreme Court case, *Sutton v. United Air Lines, Inc.*, in which the Court held that the determination of whether an individual has a "substantial impairment" must be made while taking into account the use of any medications, corrective lenses, hearing aids or other corrective measures. Now, the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary

eyeglasses or contact lenses), prosthetics including limbs and devices, or hearing aids and other cochlear implants.

The ADAAA also overturns the U.S. Supreme Court case of *Toyota v. Williams*, in which the Court construed the term "substantially limits" to mean "considerable" or "to a large degree," thereby precluding impairments that interfere in only a minor way with performing tasks from being covered by the ADA. The ADAAA now provides that the standard set out by the Supreme Court in *Toyota* was too restrictive and that a broader, more inclusive, meaning was meant by Congress when the ADA was passed.

***As the result of the ADAAA, many employees who were not previously protected under the ADA will be. Accordingly, there will likely be an increased number of requests for accommodations made to employers. These requests must be considered in light of the ADAAA. Therefore, employers should revisit their existing handbook policies and procedures in order to avoid potential lawsuits based on improperly denied accommodations. Please do not hesitate to contact Lynn Schonberg or Ryan Neumeyer with any questions concerning the ADAAA or for assistance in updating existing handbook policies and procedures.***

# GUEST COLUMN: INTERVIEWING 101

By Nicholas Phillips of Echelon Consulting Group, LLC

As many employers know from past experience, the individual you hire today will inevitably impact your business tomorrow. Therefore, it is important to choose wisely... but how do you pick the best person and what questions should you ask to get from interview to hire? This is the challenge that employers face at each interview. With the knowledge and practice of a few simple tips, your interviewing process can yield a productive new employee rather than the next statistical figure in your company's turnover report

## ***Tip #1: Set a formal business tone for the interview right from the beginning and avoid inappropriate personal questioning.***

Many employers feel that breaking the ice with a little light personal talk can make the rest of the interview a bit easier, but there is a problem with this. Beginning in this way may not only detract from the formal and business nature of the visit, but it also may open the employer up to potential liability. Asking if a candidate is married or if he is planning to start a family are two questions, for instance, that are simply not appropriate for a job interview. It is acceptable to be cordial and make an effort to make the job candidate comfortable in order to facilitate an easy flow of conversation, but maintaining the formal nature of the interview is important. This is not a social call. It is the first in a series of evaluations in order to determine whether or not this person will benefit your organization if you decide to extend an offer of employment. Set the stage professionally and know what questions you can and cannot ask. If you are unsure as to what is appropriate and what is not, be sure to enlist the help of a human resources professional.

## ***Tip #2: Ask the job candidate about his/her past successes with other companies in real and specific terms. Past performance is the best indicator of future success.***

Try using "give me an example of a time" questions such as:

- "Give me an example of a time when you were given a time-sensitive task and how you got the job done."
- "Give me an example of a time when you were assigned to manage a project outside of your area of expertise, and what steps you took to ensure its success."
- "Give me an example of a time when you were confronted by a fellow employee on a matter of differing opinion. How did you react and what steps did you take to reach resolution."

These types of questions can often prove to be extremely helpful in identifying the best candidate for the job. Rather than relying on education and job history alone, evaluating a job candidate by examining real examples from his past can help you to see whether or not it is reasonable to believe that he would meet your performance expectations and handle such situations appropriately at your company.

## ***Tip #3: Take the time to fully disclose the role and responsibilities of the position, as well as to explain in detail the culture and expectations of the organization.***

Here are some steps to follow in preparing to do this adequately:

1. Bring a copy of the job description to the interview and allow the job candidate to read and think about it, as well as ask questions.
2. Give real examples of some of the tasks that the job candidate would be performing.
3. Be prepared to discuss the company's core values and approach to business.

Like much of what you deal with in operating a successful business, interviewing takes careful planning and an understanding of various techniques and tactics used to sort through the mounting pile of resumes. This is one reason why a growing number of companies are choosing to outsource some human resource functions such as pre-screening and first-line interviewing. Other companies try to at least provide interviewing skills training to their managers and human resource employees. A single inappropriate question can turn opportunity into liability for the company. Take time to prepare well for the interview process, as it is just that – a process. Keep the interview formal and focused, pre-plan what types of questions you will ask, and be ready to show job candidates why they should want to work for you. Following these basic tips will give you some foundation for building your interviewing acumen, upon which the future of your workforce will be decided.

***Please contact Nicholas Phillips at Echelon Consulting Group, LLC at (216) 520-1010 or at NPhillips@Echelon-CG.com for more information. You can also obtain additional information at [www.Echelon-CG.com](http://www.Echelon-CG.com).***



## THANKS

Thanks for your support of "Team Legally Cured" in the 2008 Komen Northeast Ohio Race for the Cure®! We raised \$5,306.45 through the combined efforts of employees, clients, family and friends of Ross, Brittain & Schonberg, Comprehensive Risk Management, Case Management Network, and Echelon Consulting Group. We are grateful to all that partnered with us to exceed our \$5,000 fund raising goal!