

# Annual Safety Breakfast Briefing



## **SPEAKERS**

- Lauri Cochran - Comprehensive Risk Management, LLC
- Brian Brittain - Ross, Brittain & Schonberg Co., LPA
- Lynn Schonberg - Ross, Brittain & Schonberg Co., LPA

## **TOPICS**

Administrative, Legal and Related Employment Matters in the Workers' Compensation Arena

**July 11, 2019**

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## Administrative Updates – BWC and OSHA

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## Updates and Reminders

- Billion Back – Continued – Again
- True Up
- BWC Webinars
- OSHA Electronic Reporting
- House Bill 207 (Motor Vehicle Accidents)
- General Reminders

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**● \$1.5 Billion Back**

- BWC again has too much in surplus
- New Administrator
- Refunds will start processing in September
  - Non group-retro participants
  - 88% of premiums paid for policy year 7/1/17 to 6/30/18
  - Checks should all be out by mid October
  - Group Retro Employers
    - Refunds mailed after retro review

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**● True Up**

- State fund employers
- True up by August 15
  - Payroll Period 7/1/18 to 6/30/19
- NEW THIS YEAR –
  - Opt in for paperless billing
  - This will be the only way to receive Go Green Discount
  - The option to opt in will be available during True Up

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**● July 1, 2019 Estimated Installment Plans**

- Received in May
- If you did not receive, let me know
- Check payroll estimate carefully
  - Updates can be made to payroll figures
- BWC makes random changes after true up

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**BWC Webinars**

- Twice monthly webinars
- Schedule for July
  - Two days ago (July 9)
  - Thursday, July 25 – 11:30 AM
- You can find the link to attend at:
  - [www.bwc.ohio.gov](http://www.bwc.ohio.gov)
  - Under Menu (upper right corner) select EMPLOYER and then select MAINTAINING A POLICY

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**BWC Safety**

- BWC Learning Center
- BWC website – go to the menu
  - Click on SAFETY
  - From there you can navigate to in-person or online classes
  - Online classes may be helpful for anyone new to your company or workers' comp

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**OSHA Electronic Reporting**

- Last Phase just completed
- Reporting now done every year on March 2
- 250 or more employees
  - Submit 2019 300A only
  - No news on when more info may be needed for the upload
- 20-249 employees (high risk industry)
  - Submit 2019 300A only

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## MVAs – Subrogation

### ● Subrogation

- The BWC has a right of subrogation when a third party is the cause of an injury to a claimant
- House Bill 207 resulted in a change in the rules of subrogation for MVAs only
- Effective 7/1/17

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## MVAs – Subrogation

### ● Subrogation

- Pre July 1, 2017
- Employee involved in MVA caused by third party
- BWC asserts its right to subrogate against the third party
- Years go by and the case settles and BWC receives a sum of money
- That money is applied to the claim costs paid by the BWC which are being charged against Employer

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## MVAs – Subrogation

### ● Subrogation

- Employer could be charged for years on the losses paid as a result of MVA
- Claim could have negative impact on Employer premiums
  - May lose eligibility in a program
  - May lose bids as a result of a high EMR
- Employer or BWC not in control of settlement timeline

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## House Bill 207

- Passage of HB 207
  - July 1, 2017
  - **Not-at fault** MVAs now charged to surplus fund
  - Is this for all accidents?
    - Only applies to motor vehicle accidents
    - Third party has to be the cause of the accident
    - A *citation needs to be issued to third party for causing the accident* – This is now changed

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## House Bill 207

- Not-at-fault MVAs
  - Accident occurred; now what?
    - Employer responsibility
      - Employer has to file request to charge claim to surplus fund
    - Form AC28
    - Supporting documents
      - Copy of police report of MVA
      - Copy of citation issued to third party (**REVISED**)
      - Proof of third party insurance (ID Card, Dec Page, other proof)

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## House Bill 207

- Not-at-fault MVAs
  - Biggest problem –
    - “Proof that insurer accepts liability”
    - Or uninsured or underinsured motorist coverage exists
  - Form AC28 with supporting documents must be filed with BWC
  - BWC has 180 days to make decision
    - If denied, Employer has right to appeal
  - If no determination by BWC after 180 days, claim automatically charged to surplus fund

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## House Bill 207

- September 2018
- Copy of citation no longer needed
  - BWC will base decision on accident report and insurer's acceptance of liability
- Suggestions
  - Advise employees of this change
  - Make sure they are prepared in the event of a MVA

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## ● General Reminders

- DFSP
  - Annual online safety review needs to be done by July 31
  - Accident analysis training (at the Learning Center) also by July 31 (or within 60 days if you bring on someone new with supervisory duties)
  - Advanced level only – Safety action plan by end of August

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## ● Safety Grants

- Take advantage of these!
- BWC gives \$3 for every \$1 an employer spends on safety up to \$40,000
- BWC publishes an annual list of awarded safety grants (public info)
  - If you'd like a copy, let me know

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## Service Animals, Comfort Animals and the ADA

Presented by:  
**Lynn Schonberg, Esq.**  
Ross, Brittain & Schonberg Co., L.P.A.  
July 11, 2019

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## Introduction

- New Legal Issues with comfort/service animals
  - More employees are requesting to bring support animals into the workplace and public places
  - In analyzing the request, the disabilities law applies
    - The reasonable accommodation and interactive process obligations come into play

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## Introduction

- New Legal Issues with comfort/service animals
  - We all know how to analyze whether or not a reasonable accommodation exists and how to deal with injured workers
  - But it's a whole new analysis when the proposed "accommodation" walks on four legs, flies or slithers

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## Americans with Disabilities Law

- The ADA is the federal law passed in 1990
  - Intended to make it easier for people with disabilities to go about their daily lives and to remain productive at work
- The ADA has 3 Parts:
  - Title I: Applicable to Employers
  - Title II: Applicable to public employers
  - Title III: Applicable to public places

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## Americans with Disabilities Law

- Title I of the ADA: Employment Protections
  - Covers all employers with 15+ employees
  - Ohio's disabilities law covers 4+ employees
  - Ohio's public policy broadens coverage to any employer
  - Nothing in Title I mentions or references service animals

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## Americans with Disabilities Law

- Title I: Employment Protections
  - Makes it unlawful to discriminate in employment against a "qualified individual with a disability"
  - "Disability" = mental or physical impairment that substantially limits 1 or more major life activity
    - Seeing, hearing, listening, walking, caring for oneself, working, communicating, etc.

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## Americans with Disabilities Law

- Title I: Employment Protections
  - Makes it unlawful to discriminate in employment against a “qualified individual with a disability”
    - “Qualified” = be able to perform essential duties of job with or without a reasonable accommodation
    - Factors to consider = whether position exists is to perform that function; how many others perform it; can it be distributed, etc.

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## Americans with Disabilities Law

- Title III: Public Accommodations
  - Prohibits discrimination on the basis of disability in the activities of places of public accommodations
    - Businesses that are generally open to the public
    - Places of lodging; restaurants/bars; entertainment venues; sales and retail establishments; schools; day care centers; recreation facilities

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## Americans with Disabilities Law

- Titles I and III: Require employers to provide reasonable accommodations to
  - Qualified Individuals with disabilities
  - Who are employees, applicants or patrons
- Unless
  - Doing so would cause an undue hardship or
  - Directly threaten the health or safety of the employee or others

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## Americans with Disabilities Law

- Reasonable Accommodations
  - Assistance or changes to a position or workplace that will enable an employee to perform the essential functions of her job
    - Examples include: job restructuring; reduced work schedule; reassignment to vacant position
    - Does not include: elimination of essential job function; lower production standards; provide personal use items

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## Americans with Disabilities Law

- Reasonable Accommodations
  - All qualified disabled employees entitled to reasonable accommodation regardless of whether they are part-time, probationary, etc.
  - Generally, the individual must inform employer that an accommodation is needed

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## Americans with Disabilities Law

- What is Reasonable?
  - Is it feasible and effective in meeting the needs of the individual?
  - Does it enable the individual to perform the essential functions of his or her position?
  - Does it allow the individual to fully participate and be considered for the job?

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## Americans with Disabilities Law

- Requests for Accommodations
  - Must be requested
    - But need not mention ADA or any specific word
    - Family, friend, doctor may request
    - Need not be in writing
  - Upon receipt, Employer must commence the "Interactive Process" with the employee to identify possible reasonable accommodations

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## Americans with Disabilities Law

- The Interactive Process
  - Employer permitted to obtain clarifying information about disability and appropriate form of accommodation
    - Where impairment at issue, should require documentation from health care provider
  - May agree to "trial period"
  - Required to provide a reasonable accommodation but not the one desired or requested by employee

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## Americans with Disabilities Law

- The Interactive Process
  - A two-way street
    - Both the employer and employee must interact in good faith
    - Everything on the table
    - Both employer and employee required to communicate and offer suggestions, etc.
  - Always document the process and have at least 2 members of management

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## Americans with Disabilities Law

- Duty of Employee to Accept Reasonable Accommodation
  - Employee is not required to accept an accommodation
    - However, if reject and cannot perform the essential functions of job, she will no longer be a qualified individual with a disability
  - Employee cannot demand one accommodation if another reasonable accommodation is provided

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## Service Animals

- Title III Defines "Service Animals"
  - A dog that is individually **trained** to do work or perform tasks for a person with a disability
    - Miniature horses added in 2010
  - Generally, entities must permit service animals to accompany people with disabilities in all areas where members of the public are allowed to go

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## Service Animals

- Examples of Service Animals
  - Seeing-Eye Dogs
  - Dogs that alert deaf people or pull a wheelchair
  - Alerting and protecting a person who is having a seizure
  - Reminding a person to take prescribed medications
  - Calming a person with PTSD during an anxiety attack

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## Service Animals

- Service Animals are not Pets
  - Service animals are working animals
    - The work or task a dog has been trained to provide must be directly related to the person's disability
  - Dogs whose sole function is to provide comfort or emotional support do not qualify as service animals under the ADA
  - Note: FAA has different regulations

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## Service Animals

- Where Service Animals Allowed
  - Must accompany people with disabilities in all areas of the facility where the public is normally allowed to go
    - In hospital areas such as patient rooms, clinics, cafeterias, or examination rooms
    - Inappropriate to permit in operating rooms or burn units where the animal's presence may compromise a sterile environment

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## Service Animals

- Maintain Control of Service Animals
  - Service animals must be harnessed, leashed, or tethered, unless these devices interfere with the service animal's work or the individual's disability prevents using these devices
    - If so, the individual must maintain control of the animal through voice, signal, or other effective controls

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## Animal Assistants In General

- Ohio Revised Code § 955.011
  - Defines "assistant dogs" as those who have been trained to assist
    - Visually Impaired individuals
    - Hearing Impaired individuals
    - Mobility Impaired individuals
  - Psychiatric service animals, or comfort animals do not qualify

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## Animal Assistants In General

- Ohio Revised Code § 955.011
  - Assistant dogs are allowed to accompany people with disabilities into public accommodations
  - Assistant dogs who have been trained are exempt from paying general registration fee for dogs
    - Receive tags and certificate that state: "Permanent Registration – Ohio Assistance Dog"

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## Animal Assistants In Employment

- ORC Chapter § 4112 contains Ohio's disabilities law
  - Nowhere is service animals mentioned
- ORC § 4112.01(A)(13)
  - Ohio's definition of disability discrimination
  - "Disability" means a physical or mental impairment that substantially limits one or more major life activities
  - Identical to ADA

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## Animal Assistants In Employment

- OAC § 4112-5-02(C)
  - Defines "animal assistant" as "any animal which aids the disabled"
  - Lists three "specific examples include"
    - A dog that alerts hearing impaired person
    - A dog that guides visually impaired person
    - A monkey that collects/retrieves items for mobility impaired person

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## Animal Assistants In Employment

- Are Comfort/Emotional Support Animals allowed under Ohio Law?
  - Under both ORC § 955.011 and OAC § 4112-5-02(C), the animal must be trained to perform specific tasks for their handlers
  - Animals that provide sense of safety, companionship and comfort are **not** typically trained
    - Rather, are therapeutic in nature

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## Animal Assistants

- Animal Assistants in Employment
  - OCRC Policy Guidance
    - Must reasonably accommodate a disabled individual who needs an animal assistant
    - Accommodations include making changes to rules, policies and practices against having animals on the property
    - Obligation applies only to qualified individuals with disabilities

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## Animal Assistants

- Interactive Process Procedure
  - Employer may inquire into:
    - Nature of disability
    - How animal assistant enables performance of essential job functions
    - Type, size, weight and demeanor of animal
    - Specific training animal has had
    - Whether animal poses undue hardship/safety or health risk

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## Animal Assistants

- Allowing Animal Assistant in Workplace
  - Must be harnessed, leashed, tethered
    - Unless interferes with work of animal
  - Animal assistant must be housebroken
  - Animal must stay in control and handler must take effective action to control
  - Parameters may be put into place for the employee to care for animal and ensure safety and hygiene needs are met

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## Case Studies

- *McDonald v. Dept. of Environmental Quality*, 2009 MT 209:
  - Plaintiff wheelchair-bound and used a service animal, Bess, for various tasks
  - Bess unable to walk on Employer's floors and Employer refused to accommodate Bess by purchasing runners for \$8600.00
  - Held: Employer liable for not accommodating Bess since she is "an assistive device" like a wheelchair

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## Case Studies

- *McDonald v. Dept. of Environmental Quality*, 2009 MT 209:
  - Even though case was a Title I ADA case, the court relied on the Title III regulations
    - Requires modification of facilities for service animals
    - Bess was specially trained to assist employee, and her alleged poor performance does not negate duty to accommodate disabled employee.

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## Case Studies

- *Maubach v. City of Fairfax*, 2018 BL 153619 (E.D. Va):
  - 911 night shift dispatcher prone to panic attacks asked to bring in her emotional support dog, Mr. B. Allowed on trial basis
    - Clumps of fur and dander in small work area caused 2 employees allergic reactions
    - Dispatch left unattended once due to Mr. B needing to be walked

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## Case Studies

- *Maubach v. City of Fairfax*, 2018 BL 153619 (E.D. Va):
  - Mr. B no longer allowed and interactive process begun
    - Plaintiff offered to switch to day shift but refused due to her friend worked on nights
    - Told to bring in non-allergenic dog, but refused because won't be bullied as to type of dog

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## Case Studies

- *Maubach v. City of Fairfax*, 2018 BL 153619 (E.D. Va):
  - Plaintiff went on FMLA leave and as was ending, required to attend FFD exam
    - Found her to be psychologically disqualified
    - She was terminated
  - Court held she did not participate in interactive process and her refusal to obtain a 2d opinion doomed her case

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## Case Studies

- *Ahmad v. Conn. Dept't of Tranp.*, 2015 BL 58043 (Conn. 2015):
  - Airport taxi cab driver with a dog phobia refused a fare because the person had a service animal.
    - When he was ordered to go to the back of the line, he argued with the dispatcher and was fired.
    - He sued claiming his dog phobia was a disability and the employer refused to provide any accommodations.

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## Case Studies

- *Ahmad v. Conn. Dept't of Tranp.*, 2015 BL 58043 (Conn. 2015):
  - The Court dismissed his action
    - State and federal law states that taxi drivers may not refuse service to a patron with a service animal
    - Plaintiff cannot demonstrate that he can perform the essential functions of a taxi cab driver, with or without a reasonable accommodation.

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## Case Studies

- Ahmad v. Conn. Dept't of Tranp., 2015 BL 58043 (Conn. 2015):
  - "An employer should not be forced to violate state and federal laws and regulations, in this case, discrimination laws relevant to one protected class, in order to avoid discriminating against another protected class."

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## Service Animals

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