Annual Safety Breakfast Briefing

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

SPEAKERS

- Lauri Cochran - Comprehensive Risk Management, LLC
- Catherine Gambill - 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 19, 2018

Administrative Updates – BWC and OSHA

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Updates and Reminders

- Billion (and a half) Back!!!
- Better You, Better Ohio
- Policy Activity Program
- Rating/Premium Changes
- OSHA Electronic Reporting
- House Bill 207 (Motor Vehicle Accidents)

- Billion (and a half) Back!
  - BWC again has a surplus of cash
  - Employers will start receiving refunds in July
    - Non group-retro participants
    - Refund is 85% of premiums paid for policy year 7/1/16 to 6/30/17
    - Rebates begin processing on June 27
    - Checks should all be out by end of July
    - Group Retro Employers
      - Refunds to be mailed in October

- Better You, Better Ohio
  - Wellness program offered through the BWC
  - BWC has partnered with Active Health for this program (BWC does not administer)
  - Requirements:
    - 50 or fewer employees
    - No current wellness program
    - Company is in a certain industry

- Better You, Better Ohio (cont'd)
  - Approved Industries:
    - Agriculture
    - Construction
    - Health Care
    - Public Employers
    - Restaurant/Food
    - Trash Collection
    - Auto Repair and Service
    - Firefighters
    - Manufacturing
    - Police/Public Safety
    - Transportation/Trucking
    - Wholesale/Retail

- Better You, Better Ohio
  - Employer responsibilities:
    - NONE!!!!
    - Not an “all or nothing” program
  - Employee responsibilities:
    - Must register (go.activehealth.com/betteryoubetterohio)
    - System would tell employee if they are eligible (based on size of company/industry)
    - Health Assessment and Biometric Screening

- Better You, Better Ohio
  - Employee Responsibilities
    - Health Assessment online
    - Biometric Screening has 3 options:
      - Go to Quest Diagnostics
      - Home kit can be mailed and sent back
      - Own physician (doctor may charge a fee)
    - Employees receive $75 gift card for assessment and screening
    - There may be other services to complete
      - $50 for other screening-recommended services

- Better You, Better Ohio
  - Results are confidential
    - BWC and employers **<u>are not provided</u>** with any health info
  - Wellness program provides health coaching and advice line along with lifestyle and disease management
  - Some injured workers are being referred by the MCO handling claim

- Policy Activity Rebate
  - Not compatible with Group Rating, Retro Rating, Individual Retro, EM Capping, One Claim Program
  - Application Deadline January 31, 2019
  - Must have $350 in billed premium for 7/1/18 policy year
  - Experience modifier must be 1.00 or higher
  - 50% rebate up to $2,000

- Policy Activity Rebate
  - To qualify, perform various “activities” to accumulate 11 credits
    - Complete online BWC classes
    - Bring an injured worker back to light/modified duty
    - Attend an Industrial Commission hearing
    - Transitional work place (develop or provided proof)
    - Complete payroll true up by July 15

- Policy Activity Rebate
  - Create/maintain e-account
  - Conduct drug and alcohol testing
  - Have a wellness program (or have two or more employees in BWC’s wellness program)
  - Pay all premiums on time
  - Participate in online monthly webinars
  - There are other activities on BWC site

- Rating/Premium Changes
  - You will notice changes on your group rating quotes this year
  - Experience Mod Adjustments
    - If calculated mod is .90 or lower, you will receive an additional 5% decrease
    - If calculated mod is 2.00 or higher, you will have a 5% increase

- Rating/Premium Changes
  - Premium Size Factor to be applied
    - First $5,000 of premium is paid at 100%
    - Next $95,000 is reduced by 15%
      - ($5,001 to $100,000)
    - Next $400,000 is reduced by 20%
      - $100,000 to $500,000
    - Amount of $500,000 or over is reduced by 25%

- Rating/Premium Changes
  - Example of Premium Size Factor
    - Initial Premium $200,000
      - $5,000 paid in full
      - Next $95,000 reduced to $80,750
      - Next $100,000 reduced to $80,000
      - Total new premium: $165,750
  - Standard Group Rated employers will not receive Premium Size Factor adjustment
  - Group Retro Employers will – but this will reduce retro refund

- OSHA Electronic Reporting
  - Due by 7/1/18
  - 250 or more employees
    - ***7/1/18*** – Submit 2017 300A only
    - May be 300A, 300 and 301 for next submission
    - 2019 and after – all info to be submitted by March 2
  - 20-249 employees (high risk industry)
    - ***7/1/18*** – submit 2017 Form 300A
    - 2019 and after – submit 300A by March 2

MVAs – Subrogation

- **Subrogation**
  - The BWC has a right of subrogation when a third party is the cause of an injury to a claimant
  - A third party is someone other than the employer or employee that caused an injury
  - Some examples would be:
    - Home health care worker is injured at a patient's home
    - Trades person is bit by a dog
    - An employee, while "on the clock" is involved in a motor vehicle accident
  - Today we are here to talk specifically about MVAs

MVAs – Subrogation

- **Subrogation**
  - Pre July 1, 2017
  - Employee involved in MVA caused by third party
  - Employee sues third party
  - BWC asserts its right to subrogate against "at fault" 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

MVAs – Subrogation

- **Subrogation**
  - Employer could been 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
  - What's the impact on an Employer?

Premium Impact of MVA

SUBRO V MVA SUPRLUS STATUTE

POLICY MAXIMUM VALUE:			$ 87,500				PROJECTED RATES/PREMIUM FOR POLICY PERIOD:				7/1/18-6/30/19
DATE OF INJURY:			7/1/2017							Total Cost of Claim:	$ 24,711.00
NO. OF REMAINING CHARGEABLE YEARS:			4							Subro Collected:	$ 10,000.00
CURRENT CLAIM LOSSES AS OF:			12/31/2017							% Reduction from Subro:	0.41
CLAIM NO	CLAIMANT	COMP	MEDICAL	RESERVE	UNLIMITED TOTAL COST	LIMITED TOTAL COST		IF PPD, % AWARD			IF PPD, NO OF WKS
17-111111	Doe, J	$ 8,815	$ 2,440	$ 13,456	$ 24,711	$ 24,711.00	SCENARIO 1 -- Old Rules - Impact Prior to Subrogation				
		$ 5,201	$ 1,440	$ 7,939	$ 14,580	$ 14,580.00	SCENARIO 2 -- Old Rules, After Subro $10k Collected				
TOTAL MODIFIED LOSSES:			$ -	COSTS WITH ABOVE CLAIM NOT INCLUDED IN EXPERIENCE (NEW STATUTE)							
TOTAL MODIFIED LOSSES (UNLIMITED):			$ -								

Premium Costs with Claim being Charged to Surplus Fund

INDIVIDUAL RATE CALCULATION								GROUP ELIGIBLE:	*YES*
TML*	TLL	DIFF/TLL	RATIO	CRED%	EMR	TEL	DIFF/TEL	RATIO	PROJD GROUP DISC
-	11368	(11,368)	-1	0.22	0.78	41,400	(41,400.00)	-1	53%

BASED ON CURRENT CLAIM LOSSES

MANUAL	BASE RATE	EMR	MOD RATE	ADMIN	DWRF	DWRFII	TOTAL RATE	PAYROLL	EST PREMIUM
5190	2.6	0.47	1.22	0.1629	0	0	1.3829	1500000	$ 20,743.50

TOTAL ESTIMATED PREMIUM: $ 20,743.50

SCENARIO 1 -- Old Rules - Impact Prior to Subrogation

INDIVIDUAL RATE CALCULATION								GROUP ELIGIBLE:	*YES*
TML**	TLL	DIFF/TLL	RATIO	CRED%	EMR	TEL	DIFF/TEL	RATIO	PROJD GROUP DISC
24,711	11368	13,343	1.174	0.22	1.26	41,400	(16,689.00)	-0.403	25%

MANUAL	BASE RATE	EMR	MOD RATE	ADMIN	DWRF	DWRFII	TOTAL RATE	PAYROLL	EST PREMIUM
5190	2.6	0.75	1.95	0.2603	0	0	2.2103	1500000	$ 33,154.50

TOTAL ESTIMATED PREMIUM:	$ 33,154.50
PREMIUM INCREASE (DECREASE):	$ 12,411.00
TOTAL INCREASE (DECREASE) FOR CHARGEABLE LIFE:	$ 49,644.00

Premium Impact of MVA

Premium Costs with Claim being Charged to Surplus Fund

INDIVIDUAL RATE CALCULATION						GROUP ELIGIBLE:			YES
TML*	TLL	DIFF/TLL	RATIO	CRED%	EMR	TEL	DIFF/TEL	RATIO	PROJD GROUP DISC
-	11368	(11,368)	-1	0.22	0.78	41,400	(41,400.00)	-1	53%

BASED ON CURRENT CLAIM LOSSES

MANUAL	BASE RATE	EMR	MOD RATE	ADMIN	DWRF	DWRFII	TOTAL RATE	PAYROLL	EST PREMIUM
5190	2.6	0.47	1.22	0.1629	0	0	1.3829	1500000	$ 20,743.50

TOTAL ESTIMATED PREMIUM: $ 20,743.50

SCENARIO 2 -- Old Rules, After Subro $10k Collected

INDIVIDUAL RATE CALCULATION						GROUP ELIGIBLE:			YES
TML**	TLL	DIFF/TLL	RATIO	CRED%	EMR	TEL	DIFF/TEL	RATIO	PROJD GROUP DISC
#REF!	11368	#REF!	#REF!	0.22	#REF!	41,400	(26,820.00)	-0.648	40%

MANUAL	BASE RATE	EMR	MOD RATE	ADMIN	DWRF	DWRFII	TOTAL RATE	PAYROLL	EST PREMIUM
5190	2.6	0.6	1.56	0.2083	0	0	1.7683	1500000	$ 26,524.50

TOTAL ESTIMATED PREMIUM:	$ 26,524.50
PREMIUM INCREASE (DECREASE):	$ 5,781.00
TOTAL INCREASE (DECREASE) FOR CHARGEABLE LIFE:	$ 23,124.00

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

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
      - Proof of third party insurance (ID Card, Dec Page, other proof)

House Bill 207

- **Not-at-fault MVAs**
  - Biggest problem –
    - "Proof that insurer accepts liability"
    - Or uninsured or underinsured motorist coverage 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

New Premium Impact

Premium Costs with Claim being Charged to Surplus Fund

INDIVIDUAL RATE CALCULATION								GROUP ELIGIBLE:	YES
TML*	TLL	DIFF/TLL	RATIO	CRED%	EMR	TEL	DIFF/TEL	RATIO	PROJD GROUP DISC
-	11368	(11,368)	-1	0.22	0.78	41,400	(41,400.00)	-1	53%

BASED ON CURRENT CLAIM LOSSES

MANUAL	BASE RATE	EMR	MOD RATE	ADMIN	DWRF	DWRFII	TOTAL RATE	PAYROLL	EST PREMIUM
5190	2.6	0.47	1.22	0.1629	0	0	1.3829	1500000	$ 20,743.50

TOTAL ESTIMATED PREMIUM: $ 20,743.50

House Bill 207

- Questions or Comments?

Workers' Compensation Legal Update

House Bill 27 Updates

Effective September 29, 2017

Presented by:
Catherine Gambill
Ross, Brittain & Schonberg

Statute of Limitations

- Ohio Revised Code § 4123.84 has been modified to shorten the timeframe an injured worker has to file a claim for an injury or death.
  - Reduced from two years to **one year**.
  - Only applicable for claims occurring on or after September 29, 2017.

Statute of Limitations

- Ohio Revised Code § 4123.84 has been modified to shorten the timeframe an injured worker has to file a claim for an injury or death.
  - Statute of limitations did not change for occupational disease claims or claims for alleged violation of specific safety requirement ("VSSR"), which are still **two** years.

Waiver of 90-Day Examination

- If an injured worker is on temporary total disability (TTD) benefits, the Bureau typically schedules a "90-day exam" to check in on the injured worker's medical progress and to determine if injured worker is at maximum medical improvement (MMI).

Waiver of 90-Day Examination

- A new "waiver" process was established with the changes to HB 27:
  - The Bureau may "waive" the 90-day examination for good cause.
    - I.e. if injured worker has pending surgery.
  - Employer will receive written notice of BWC's waiver of 90-day exam and can object. The Bureau must schedule the exam upon the Employer's objection.

Notice of Intent to Settle Claim – § R.C. 4123.512

- Once a party exhausts its administrative remedies and the Ohio Industrial Commission refuses the claimant's/ employer's appeal, the appealing party has **60 days** to appeal the refusal to an Ohio Court of Common Pleas.

Notice of Intent to Settle Claim – § R.C. 4123.512

- Court appeals are often used as a tactic to push settlement.
- R.C. 4123.512 was amended to allow a "notice of an intent to settle the claim."
  - Appealing party has 30 days to file this notice of intent to settle with the BWC.
  - Opposing party has 14 days to object, if opposing party is not interested or disagrees with settlement potential.

Notice of Intent to Settle Claim – § R.C. 4123.512

- If the opposing party does not object, the appealing party has an extended **150 days** to file an appeal into Court.
  - Allows additional time for parties to amicably resolve claims without the costs of a court appeal.
  - This only applies to new injury or occupational disease claims occurring on or after September 29, 2017.

Statutory Attorneys' Fees

- If an Employer appeals an Ohio Industrial Commission's decision to Court, and Claimant prevails on one or all issues, the Employer is required to pay Claimant's attorneys' fees, as capped by R.C. § 4125.512.
  - Raised from $4,200 to $5,000.

Permanent Partial Disability

- If a Claimant files a permanent partial disability (PPD) application, but does not attend the Bureau's examination, the Bureau will dismiss Claimant's PPD application without prejudice.
- The dismissal of the application does **not** toll the statute of limitations on the claim, and the clock keeps running.

Drug Testing – Workers' Comp

- Ohio Revised Code § 4123.54 has been amended to include all controlled substances.
  - If the Employer believes the presence of alcohol or controlled substances was the proximate cause of the work-related injury, it is typically the Employer's burden to prove the influence was the proximate cause of the injury, to take it out of the "course and scope" of employment.

Drug Testing – Workers' Comp

- However, a positive test for alcohol or controlled substances, or refusal to submit to such test, as outlined in Ohio Revised Code § 4123.54, creates the "rebuttable presumption" that the proximate cause of the workplace injury was the presence of alcohol or controlled substances, which the Claimant has to overcome.

Drug Testing – Workers' Comp

- For an Employer to raise the "rebuttable presumption" defense:
  - A written, drug-free policy that states the Employer intends to seek disallowance of a workers' compensation claim documented by positive drug or alcohol test, or the employee's refusal to test.
  - Obtain a "qualifying chemical test," pursuant to Ohio Revised Code § 4123.54.

Drug Testing – Workers' Comp

- R.C. § 4123.54 was recently amended to change the threshold limits for controlled substances, to comply with the Code of Federal Regulations.
- The statutory change is limited to the amounts and types of controlled substances.

"Firefighters' Cancer Statute"

- Ohio Revised Code § 4123.68(X) was amended to include a presumption that cancer contracted by a firefighter, who was assigned at least six years of hazardous duty as a firefighter, is presumed to have been contracted within the course and scope of his or her employment as a firefighter.

"Firefighters' Cancer Statute"

- The presumption can be rebutted with:
  - Evidence of the firefighters' exposure to cigarettes or tobacco products;
  - Evidence that exposure to the type of carcinogen alleged could not have caused the cancer alleged;
  - Evidence the firefighter was not exposure to Group 1 or 2A carcinogen;
  - Evidence the firefighter incurred cancer before joining fire department;
  - If the firefighter is seventy years or older.

"Firefighters' Cancer Statute"

- The presumption that the firefighters' cancer incurred in the course and scope of his or her employment as a firefighter is not applicable if it has been more than 15 years since the firefighter was last assigned to hazardous duty as a firefighter.

Payment for Lumbar Fusion Surgery

- Ohio Administrative Code 4123-6-32 provides new guidelines for lumbar fusion surgery, effective January 1, 2018.
  - Requires a 60-day conservative care requirement to emphasize physical reconditioning and avoidance of opioids.
  - The operating surgeon must evaluate the injured worker at least twice before requesting authorization for the fusion.
  - Following surgery, the physician of record and the surgeon must treat the injured worker at least every two months.

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Case Law Update

Ferguson v. State, 151 Ohio St.3d 265, 2017-Ohio-7844

- Regardless of whether the Claimant or Employer appeal into Court, the Claimant remains the "Plaintiff," and the Employer remains the "Defendant," even if it is the Employer's Notice of Appeal.
- The Court is to hear the issue *de novo*.
- Regardless of which party appeals, it is still Plaintiff/Claimant's burden to prove his or her case before the Court.

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Case Law Update

Ferguson v. State, 151 Ohio St.3d 265, 2017-Ohio-7844

- If it is the Employer's court appeal, the injured worker can still obtain treatment and benefits under their workers' compensation claim during the appeal.
- In 2006, the Ohio Legislature required a "consent provision," requiring the Plaintiff to obtain the Employer's consent before dismissing a lawsuit.

Case Law Update

Ferguson v. State, 151 Ohio St.3d 265, 2017-Ohio-7844

- The Eighth District Court of Appeals found this consent provision to be unconstitutional. The Court said the consent provision in R.C. 4123.512(D) conflicted with Ohio Rule of Civil Procedure 41(A).

Case Law Update

Ferguson v. State, 151 Ohio St.3d 265, 2017-Ohio-7844

- The Supreme Court of Ohio reversed and upheld the consent provision as constitutional.
  - "The purpose of the consent provision is obvious: to thwart the ability of claimants to voluntarily dismiss an employer's appeal without the employer's consent."
  - Claimants/Plaintiffs can no longer voluntarily dismiss an Employer's appeal without the Employer's consent.

Case Law Update

- *State ex rel Demellweek v. Industrial Commission*, 2018-Ohio-714
  - In *Demellweek*, the Tenth District took the *Louisiana Pacific* standard one step further, by looking to the specific facts of the termination to see if a voluntary abandonment defense is valid.

Case Law Update

- *State ex rel Demellweek v. Industrial Commission*, 2018-Ohio-714
  - Mr. Demellweek was terminated when he was operating an order picker while not following safety guidelines. He failed to wear the required harness and tether.
  - Employer's handbook documents certain violations as Class A, Class B, or Class C violations. Class A violations are described as leading to immediate termination.

Case Law Update

- *State ex rel Demellweek v. Industrial Commission*, 2018-Ohio-714
  - The Ohio Industrial Commission found Mr. Demellweek voluntarily abandoned his employment:
    - The Employer had a specific, written rule outlining that an employee's failure to wear a safety belt or harness, while operating an order picker, is a Class A violation.
    - Class A violations are distinctly described as subject to immediate termination.

Case Law Update

- *State ex rel Demellweek v. Industrial Commission*, 2018-Ohio-714
  - Mr. Demellweek stated the voluntary abandonment defense did not apply:
    - He was observed operating the order picker just a few inches off the ground.
    - It was not a Class A violation because the safety equipment would not have prevented his injury.
    - He had never been disciplined for this behavior before, nor did he have a pattern of not wearing the required safety equipment.

Case Law Update

- *State ex rel Demellweek v. Industrial Commission*, 2018-Ohio-714
  - The Tenth District Court of Appeals reversed the Industrial Commission's finding that Mr. Demellweek voluntarily abandoned his employment, evaluating the specific facts and details of Mr. Demellweek's termination.

Case Law Update

- *State ex rel Demellweek v. Industrial Commission*, 2018-Ohio-714
  - The Court interpreted the facts of the termination to conclude his behavior did not amount to a Class A violation.
  - The Court held voluntary abandonment "bars receipt of TTD compensation when an employee has to be on notice that his or her conduct can expected to get him or her fired and then the employee chooses to engage in the conduct anyway."

Case Law Update

- *State ex rel Demellweek v. Industrial Commission*, 2018-Ohio-714

"Voluntary abandonment of employment is not meant to be a vehicle which allows a self-insured employer to rid itself of injured workers for a minor violation of a work rule, written or not."

Case Law Update

- *State ex rel Demellweek v. Industrial Commission*, 2018-Ohio-714
  - Lesson learned: Voluntary abandonment defense will be scrutinized in detail.
    - The Tenth District took "detail" even one step further in the *Demellweek* case, looking at the seriousness of the infraction, the injured worker's disciplinary history, and applied those to the Employer's policies to determine whether or not the behavior really amounted to a "Class A violation."

Annual Safety Breakfast Briefing

Presented by:
Lynn Schonberg
Ross, Brittain & Schonberg
July 19, 2018

Introduction

- Lawful Treatment of Injured Workers
  - Most perplexing issue
- Medical Marijuana Law Implementation
- Wellness Programs and the EEOC
- OSHA Drug Testing
- Arbitration Agreements

Avoiding ADA Claims

- *Kassay v. Niederst Mgmt*.
  - On May 24, 2018, the 8th Appellate District affirmed a jury award of over $800,000 + a to be determined attorneys' fee award in favor of a former employee, John Kassay, and against his former employer, Niederst Mgt. company
  - The facts of this case demonstrate how *NOT* to treat employees who are suspected of an injury

Avoiding ADA Claims

- Facts in *Kassay v. Niederst Mgmt*.
  - The Employer, Niederst Mgmt, owns apartment buildings
  - John Kassay employed as a pest control tech. exterminating beg bugs
    - Essential job functions require heavy lifting of various equipment and objects and ability to carry heavy equipment up and down stairs
    - John was a good employee with no performance issues

Avoiding ADA Claims

- Facts in *Kassay v. Niederst Mgmt*.
  - One day John's supervisor, Lisa, saw John wearing a brace on left wrist
    - Lisa had learned from other employees that John had been wearing the brace off and on for the past year or so
  - Lisa calls HR for direction
    - HR instructs Lisa to send John home with FMLA paperwork and remind him of the handbook policy that requires all employees to be able to work without restrictions

Avoiding ADA Claims

- Facts in *Kassay v. Niederst Mgmt*.
  - Lisa meets with John
    - Tells him to complete the FMLA paperwork and reminds him of the 100% RTW policy
    - Cannot answer John's questions as to why he needs to complete the FMLA paperwork
    - Lisa texts John and says he's being taken off the schedule until he completed the FMLA paperwork and received 100% RTW release

Avoiding ADA Claims

- Facts in *Kassay v. Niederst Mgmt*.
  - While off of work, John attempted to contact HR at least every other day without success to question need for FMLA
  - About a week later, John called Lisa to tell her his dr. refuses to complete FMLA paperwork since it would be "fraud" but he did obtain a full RTW release
  - Lisa told John to contact HR

Avoiding ADA Claims

- Facts in *Kassay v. Niederst Mgmt*.
  - HR informed John he lost his job because he violated the 2 day no show/no call policy
    - At trial, Lisa testified that employees on suspension do not need to call in
  - John sues claiming FMLA violation, ADA violation and emotional distress damages

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Avoiding ADA Claims

- Facts in *Kassay v. Niederst Mgmt*.
  - FMLA Legal Argument
    - John never asked for nor did the Employer have any evidence on which to send John home in order to obtain FMLA paperwork
      - John argued that he was forced to take FMLA leave when he didn't need it
    - However, under applicable court precedent, John could not state a claim for FMLA violation because such a claim "ripens" only when the employee would ask for future FMLA leave and then be denied

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Avoiding ADA Claims

- Facts in *Kassay v. Niederst Mgmt*.
  - ADA Legal Argument – Elements to prove:
    - John was disabled or, if not, perceived to be disabled by the Employer;
    - The Employer failed to engage in the interactive process or to provide a reasonable accommodation to John; and
    - The Employer took an adverse action against John because of his disability or perceived disability and/or because he complained about disability discrimination

Avoiding ADA Claims

- John was disabled or, if not, perceived to be disabled by the Employer:
  - Jury found John was *NOT* disabled
    - "Physical or mental condition that substantially limits one or more major life activity"
    - While John had a former wrist injury, it did not prevent him from working
    - Simply wearing a brace does not equate to having a disability
    - John submitted a full RTW release

Avoiding ADA Claims

- John was disabled or, if not, perceived to be disabled by the Employer:
  - Jury found John was *perceived* as a disabled individual
    - ADAAA dropped requirement that plaintiff must prove the employer perceived his impairment to limit a major life activity
    - John able to prove that HR and Lisa perceived him to be disabled due to the brace
    - Significant that neither HR nor Lisa ever asked him about the brace!

Avoiding ADA Claims

- The Employer failed to engage in the interactive process or to provide a reasonable accommodation to John
  - ADA requires that both employers and employees engage in a good faith, interactive process to determine whether or not a reasonable accommodation is necessary and if so, what is it
  - Key requirement of the ADA

Avoiding ADA Claims

- The Employer failed to engage in the interactive process or to provide a reasonable accommodation to John
  - Jury correctly found that neither Lisa nor HR sat down with John and/or responded to his questions about why he was suspended and why the FMLA paperwork
    - Failing to institute the interactive process prior to an adverse action is per se disability discrimination under these circumstances

Avoiding ADA Claims

- The Employer failed to engage in the interactive process or to provide a reasonable accommodation to John
  - Reasonable accommodation, like the interactive process, is cornerstone of the ADA
  - Because "disability" broad, sitting down with employees to discuss whether a RA is needed and if so what is an essential action to take

Avoiding ADA Claims

- The Employer took an adverse action against John because of his disability or perceived disability and/or because he complained about disability discrimination
  - "Adverse action" is something of consequence
  - Termination is definitely of consequence

Avoiding ADA Claims

- Lessons Learned
  - Never assume facts
    - If question one's ability to perform job, key in on *job-related* facts
    - No evidence that John was having a hard time performing job duties
    - No evidence John complained of pain or unable to perform job duties
    - Had Lisa simply asked John if he's ok, John would have said yes and it's over until *evidence* exists of difficulty

Avoiding ADA Claims

- Lessons Learned
  - Never simply hand out unrequested FMLA paperwork unless essential facts exist:
    - Absence of 3+ consecutive days
    - Obtain knowledge of impending surgery, pregnancy, etc. requiring lengthy absence
  - FMLA only used where impending *absence* in existence
    - Never to be used as a tool/subterfuge to obtain medical information to which employer is not otherwise entitled

Avoiding ADA Claims

- Lessons Learned
  - Never promulgate a policy that all employees must be able to work without restrictions
    - Definition of disability discrimination is *not* providing reasonable accommodation
    - RA means providing any change to one's non-essential job duties to enable employee to continue working
    - Refusing to consider restrictions that may not affect ability to perform job illegal

Handling Substance Abuse

- *Izzo v. Genesco*
  - Izzo was manager of retail store in Boston
    - Had transferred to MA store after being victim of robbery and girlfriend's sexual assault
  - Clark, Izzo's manager, noted decreasing store revenues over a 3 month period and failure to meet sales goals
  - Izzo and Clark sat down to discuss dwindling store revenues

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Handling Substance Abuse

- *Izzo v. Genesco*
  - According to Izzo:
    - Clark accused Izzo of having a problem with drugs or alcohol
    - Told him he needs to admit to substance abuse or he's not allowed back in the store
    - Izzo refused to admit to substance abuse because he did not have a problem
    - Clark fired him

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Handling Substance Abuse

- *Izzo v. Genesco*
  - According to Clark:
    - Izzo was remaining unresponsive and uncooperative in the discussion of how to improve the store's performance
    - Clark concerned about Izzo's lack of communication and reminded him of the EAP and that it offered assistance with drug or alcohol problems
    - After Izzo remained unresponsive, Clark said he's contacting HR and Izzo quit

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Handling Substance Abuse

- *Izzo v. Genesco*
  - After Izzo left, Clark called HR and log stated:
    - Clark spoke with Izzo of how he's changed over the past year, company here to help and if he has a problem, can have LOA and EAP help. Izzo resigned but thanked Clark for talking to him
  - Izzo sued Genesco for disability discrimination under the ADA

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Handling Substance Abuse

- *Izzo v. Genesco*
  - The Court reviewed Izzo's case on a summary judgment motion
    - If motion is granted, case is over
    - If motion denied, a jury hears case
  - ADA and Substance Abuse
    - The ADA does not protect current drug users
    - But it does protect *recovering* addicts and those *erroneously* regarded as engaging in illegal drug use

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Handling Substance Abuse

- *Izzo v. Genesco*
  - Whether or not Izzo is a disabled individual
    - The court held that the evidence was split
    - Izzo claiming he was not engaging in illegal drug use and Clark claiming he never accused him of drug use
    - Court held that a jury needs to determine who is telling the truth

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Handling Substance Abuse

- *Izzo v. Genesco*
  - Whether or not Genesco offered Izzo a reasonable accommodation and/or entered into the interactive process
    - According to Izzo, when he refused to admit to drug abuse, he was fired
    - According to Clark, he offered Izzo a LOA and assistance under the EAP but Izzo quit instead
    - A jury needs to determine who is telling the truth

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Handling Substance Abuse

- *Izzo v. Genesco*
  - Whether or not Izzo suffered an adverse employment action
    - If Izzo quit, there was no adverse action
    - However, if Izzo was fired, then an adverse action was in existence
    - Court held that due to the disputed evidence, a jury must determine this and all other issues

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Handling Substance Abuse

- *Izzo v. Genesco*
  - Genesco argued that even if Izzo is a disabled individual who suffered from an adverse action, Genesco had a legitimate business reason for firing him
    - Court agreed based on undisputed evidence of dwindling store revenue and failure to meet expectations
  - But, Izzo successfully argued that a jury could believe Genesco was lying

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Handling Substance Abuse

- Lessons Learned
  - Whenever possible, have a witness
  - Never accuse any employee of abusing drugs or alcohol
    - If suspect but do not have "evidence," simply ask if there's something occurring in his/her life that is impacting their performance at work
    - If denied, simply document and discipline as appropriate

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Handling Substance Abuse

- Lessons Learned
  - If employee admits, follow drug policy and enter into conditional employment agreement
  - If evidence exists, i.e. seen drinking, smell alcohol, caught with illegal drugs, apply drug policy and send for testing
  - Upon learning of potential dispute, consider middle ground
    - Offer re-employment on certain grounds

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Handling Substance Abuse

- Be Prepared for Medical Marijuana
  - In Sept. 2018, stores should be opened and certificates readily available
    - Certificates already being issued
  - Determine if your drug policy covers medical marijuana and if your business wants to prohibit it
    - If yes, then update policy to specify that it is also prohibited

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Handling Substance Abuse

- Be Prepared for Medical Marijuana
  - Ensure supervisors are educated on the ADA aspects of employees with Cards
    - Even though ADA does not cover active drug users, it probably does cover underlying medical condition
    - Interactive process may be appropriate to initiate upon discovery that employee has a medical marijuana card and whether or not reasonable accommodation needed

Wellness Programs

- Designed to reduce health care costs to employers
- Wellness programs typically provide incentives/inducements to employees to increase participation
  - Free health club memberships, free smoking cessation classes, etc.

Wellness Programs

- Wellness programs typically provide incentives/inducements to employees to increase participation
  - Many also include a discount on the employee's cost of health insurance
  - But, requires very detailed questionnaire, blood tests, report weight and blood pressure and other biometrics and otherwise disclose very private health information

Wellness Programs

- The ADA and GINA Laws
  - Both laws protect employees against an employer's obtaining and/or requiring employees to disclose health and genetic-related information.
  - However, both laws contain an exception permitting the collection of such information as part of employer wellness plans, as long as an employee provides such information *voluntarily*

Wellness Programs

- The ADA and GINA Govern
  - However, neither law defines what "voluntary" means
- On May 16, 2016, EEOC issued rules defining "voluntary" as:
  - The "use of a penalty or incentive of up to 30% of the cost of self-only coverage"
  - If meet this requirement, then an employer may lawfully direct employees to disclose ADA and GINA protected medical or genetic info.

Wellness Programs

- Last year, AARP filed suit seeking a holding that the regulations were invalid
  - AARP argues that the 30% incentive (or penalty) rendered an employee's disclosure of ADA and GINA protected information *involuntary*
  - Employees who could not afford to pay such amounts would effectively be forced to provide the information.

Wellness Programs

- In 12/17, Court agreed with AARP
  - 30% figure arbitrary
  - EEOC to come up with a "reasoned explanation" for deeming workplace wellness programs voluntary even if the programs impose steep penalties on workers who opt out.
    - The 30% rule will remain in effect until 1/1/19
    - EEOC must issue new regulations that better define voluntary based on non-arbitrary factors.

Update on OSHA Post-Accident Drug Rules

- Beginning 12/16, OSHA requires
  - Reasonable procedure for employees to report work-related injuries and illnesses
  - A procedure is not "reasonable" if it deters or discourages a reasonable employee from accurately reporting a workplace injury or illness
  - Eliminates "blanket" post-accident drug testing

Update on OSHA Post-Accident Drug Rules

- OSHA believes "blanket" drug testing
  - Deters proper reporting
  - Should only be conducted where
    - Drug use is likely to have contributed to the incident and
    - Where the drug test can accurately identify impairment caused by drug use
      - Virtually impossible at present
  - Does not otherwise affect general drug testing policies

Update on OSHA Post-Accident Drug Rules

- 3 Factors Weighed in determining reasonableness of test:
  - Is there a reasonable basis for concluding drug use could have been a contributing factor
    - Medical marijuana card?????
  - Were all employees involved in incident were also tested
  - Does a "heightened interest" exist due to safety-sensitive nature of work

Update on OSHA Post-Accident Drug Rules

- Examples
  - Claim of carpel tunnel
    - No drug test should occur
  - Forklift driver injures another but the driver uninjured
    - Drug test should occur for *both* employees
    - Reasonable that drug use caused the driver to hit the other employee
    - Reasonable that drug use delayed injured employee's reflexes, judgment, etc.

Update on OSHA Post-Accident Drug Rules

- Other OSHA Changes
  - Accident Reporting Procedures
    - Must be reasonable and not unduly burdensome
    - No discipline for failure to immediately report
    - Report w/in reasonable timeframe and manner after employee realizes s/he suffered injury
  - Employee Incentive Programs
    - Prohibited if they take adverse action simply because a work-related incident reported

Update on OSHA Post-Accident Drug Rules

- What Your Policies Should Contain
  - No blanket testing unless DOT, etc.
  - Include in policy elements of "reasonable basis" to perform test
  - Ensure supervisors have received training in reasonable basis and adequately document
  - Ensure accident reporting policy and procedure compliant with OSHA's rules

Update on OSHA Post-Accident Drug Rules

- Future of OSHA Drug Rules
  - Still being litigated
  - Many are awaiting a change by the new administration to more "employer friendly" rules
  - How reasonable is it to only test in certain situations and not others?
    - Creates discrimination claims
    - Too much subjective decisions

Arbitration Agreements

- What Is Arbitration?
  - An alternative dispute resolution process where a dispute is resolved privately as opposed to being resolved in the court system
- What Is An Arbitration Agreement?
  - A written agreement that an employee knowingly and voluntarily enters into

Arbitration Agreements

- *Epic Systems Corp. v. Lewis,* 5/21/18
  - U.S. Supreme Court ruled that arbitration agreements requiring only individualized proceedings are enforceable under the FAA
  - Overturned NLRB rulings
- Extremely useful in avoiding costly class and/or collective action employment suits

Arbitration Agreements

- If have arbitration agreement in place:
  - Ensure it includes language requiring only one-on-one arbitration
  - Must not contain unreasonably short time limits or unreasonable limitations
    - Reasonable discovery limitations forum location
  - Consider paying full costs of arbitration
  - Provide damages and attorneys' fees consistent with the underlying statute

Arbitration Agreements

- If decide against arbitration agreement
  - Consider Jury Waiver
    - Avoids costs of private arbitration while also minimizing costs and uncertainties created by a jury trial
- If decide to adopt arbitration agreement
  - Decide if current employees required to sign
  - Definitely have all new employees sign

2018 Safety Breakfast Briefing

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