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AND MORE
The Complex and Often Contradictory State and Federal Mandates and Workers’ Compensation

Workers’ compensation programs strike a balance between employers and employees that helps make employment relationships successful. The programs recognize that compensable injuries may and actually do occur, but they also recognize that litigation of those injuries is often counterproductive and always disruptive and expensive. The workers’ compensation balance recognizes the imperatives for both employers and employees, and employers in all 50 states and the District of Columbia are required to provide workers’ compensation benefits; that is, they are required to provide, among other things, “healthcare coverage for employees who experience work-related illnesses and injuries” in return for the employees’ waiving their rights to bring negligence claims and suits against covered employers. 2 Health L. Prac. Guide §25:6 (2016).

Among the benefits traditionally provided by workers’ compensation programs are healthcare, rehabilitation, disability, and survivors’ benefits. A number of states offer employers an opt out—New Jersey, Oklahoma, South Carolina, Texas—often substituting a requirement that employers that opt out build their own plans. Also, a number of states allow common law claims based in negligence. States vary in how the plans are structured and administered, in-

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cluding whether coverage is provided by private carriers or by state programs, and whether self-insured plans are an option (or a combination of the three). While state coverages and requirements differ, most include some level of mandated benefits. The programs also generally exclude or provide special provisions for the following employees: business owners, domestic employees (in home), farm workers, independent contractors, casual workers, maritime workers (Division of Longshore and Harbor Workers Compensation Act (DLHWC), 33 U.S.C. §901 et seq.), railroad employees (Federal Employees Liability Act (FELA), 45 U.S.C. §51 et seq.), and federal government employees (Federal Government Compensation Act, 5 U.S.C. §8101 et seq.).

While compensation programs vary in terms of carriers and benefits, with very narrow exceptions, they arise from state law as opposed to federal law.

Then again, as with so much that is alleged to be strictly state or strictly federal, the two are intertwined, tangled, knotted together, so that an employer must remain vigilant of an employee's state and federal rights in addition to compensation but affecting compensation, even while remaining vigilant of its own state and federal rights. Among the interwoven threads are workers' compensation and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) in the instances of damage determinations (determining the percentage of whole-body impairment). Also complex can be adverse employment actions involving at-will, injured employees in light of antidiscrimination provisions, both at the state and federal levels. This complexity grows exponentially with injured employees who return to work in light duty positions and fail to recover their ability to perform the essential job functions with or without accommodation. Nonetheless, workplace realities mean that employers will face these conundrums and will find themselves betwixt and between business imperatives and the tangle that is state and federal law. As a result, we practitioners are called upon to clarify the commensurate rights and responsibilities.

To that end, we suggest as follows.

**Workers' Compensation Damages**

When an employee suffers a compensable, on-the-job injury, several different and sometimes competing interests arise for both the employee and the employer. For both, a primary interest is the health of the employee. This is followed by whether the employee can return to previous employment, and finally, by the compensation of the employee for the injury. In this section, we will focus on the competing interests that affect the determination of appropriate compensation for injured employees.

Initially, and continuing through the nineteenth century, injured workers were denied any benefits if they fell afoul of the so-called "unholy trinity." Recovery was prohibited if the worker was found (1) to have been contributorily negligent to the accident, or (2) to have been injured as a result of the actions of a fellow worker ("the fellow servant" rule); or (3) to have known of the dangers of the work but chose to work anyway ("assumption of the risk").

However, in the early twentieth century, society began a more enlightened period of evaluating injured workers. For example, the publication of Upton Sinclair's *The Jungle* and its harrowing look at the slaughterhouse has been cited as a reason that states began enacting modern "no-fault" compensation laws under which an injured worker agrees to forgo filing negligence suits invoking common law in exchange for compensation for work-related injuries no matter how they occurred. (The states' adoption began in 1911 with Wisconsin but was not fully implemented until 1948 when Mississippi promulgated its act.) However, by doing so, the acts magnified the issue of compensation, and it then became necessary to implement some type of mechanism for determining the severity of injury and the manner of compensation. Ultimately, the decision was made to compensate injured employees for wage loss (for lost time) and with some type of permanent award or settlement.

This, while an important step in compensation, created inconsistencies. Individual states and the federal government could promulgate different schedules for similar injuries, which led to situations in which states competed with each other as to the paucity of their compensation. Then, the system evolved again, with the introduction of a neutral third party—the American Medical Association (AMA)—which had for several years attempted to segregate the various injuries suffered by persons into discrete categories.

The AMA began the process of systematizing compensation through its *Guides to the Evaluation of Permanent Impairment*. First published in 1971, the AMA *Guides*—now in its sixth edition—was drafted, as stated in the "Forward" section to the fourth edition, "to bring greater

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objectivity to estimating the degree of long-standing or "permanent" impairments." By 2010, the federal government and 31 states had expressly adopted the AMA *Guides* (either the fourth, fifth, or sixth edition), while another 15 state high courts had ruled that the AMA *Guides* could be used by examining physicians in determining impairment.

Unfortunately, although having the worthwhile goal of bringing "objectivity" to the compensation process, the AMA *Guides* seemingly run afoul of the protections afforded to all persons under HIPAA, which has data privacy and security provisions for safeguarding medical information. To demonstrate the conundrum, we must revisit exactly why the AMA decided to draft the *Guides*.

As noted in the AMA *Guides* fourth edition, the AMA, in drafting the *Guides*, focused on the idea of the person as a whole. That is why the term used by the AMA in determining rating percentages is "whole-person impairment" or "WPI." In other words, injuries must be looked at in "terms of how they affect the [whole of the] patient's daily activities." Moreover, the AMA *Guides* emphasize that a person's occupation is only one part of his or her daily activities, and thus when using the
AMA Guides, the practitioner must evaluate the specific injury in relation to the broad array of a person’s human endeavors. Thus, one injury may be seen as insignificant to one individual but wholly disabling to another, as shown in the famous example of the concert pianist who has lost a finger compared to the office worker experiencing the same loss.

States and the federal government continue to use the AMA Guides as the starting—and often the final—focus for the evaluation of work-related injuries to specific body parts despite the cautions of the AMA. While the authors are certainly not privy to why each state or the federal government would agree to adopt the Guides, it is easy to speculate that this was done (1) due to the ease of accessing a text created by a well-respected medical organization that had already completed the gargantuan task of assessing injuries to all body parts, and (2) to move away from contentious decisions away from governmental entities and to a “neutral” third party.

From understanding how the AMA Guides are to be used, why and how it conflicts with certain HIPAA requirements becomes apparent. As an example, a worker sustains a fractured forearm at work. Under a standard Guides evaluation, the physician would review the medical records of the claimant and then perform what is known as an independent medical examination (IME). After completing the IME, the reviewing physician would consult the Guides and issue a recommendation that the injured worker receive an injury award pegged to the WIPI sustained by the worker. The administrator of the act would then either accept or reject the WIPI recommendation. Then the claimant would either receive the award or file a protest, and if the claimant filed a protest, litigation would commence over the WIPI recommendation.

Even in this instance of the rather straightforward injury, HIPAA raises questions. Here, for example, in coming to his or her recommendation, to complete the medical evaluation, the evaluating physician is required to look at the injured employee as a whole. Thus, he or she may look at medical records that may not seem on a superficial level to be at all relevant to the injury but that demonstrate that the injured employee had previous injuries to his or her arm or leg, which would be relevant to the evaluating physician in coming to a recommendation.

This becomes even more problematic with other injuries. For example, should the physician be able to look at psychiatric records when he or she evaluates a broken foot? Should the physician be able to review decades-old fractures of other body parts that are potentially irrelevant and perhaps embarrassing to the patient, reviewing these records simply because the worker suffered an injury on the job?

Alert readers may be saying that the injured worker, by filling a claim, is acquiescing to a full examination by the evaluating physician and thus that any record is fair game for review. The authors caution against this broad reading for two reasons. First, jurisdictions that award disability do so upon a “body-part” basis, that is, awarding a certain percentage for each injury, and they may have a fixed award schedule for some injuries such as a missing limb or finger. Thus, the authors do not find it persuasive that a competent court would believe that a claimant who merely seeks to exercise a statutory or regulatory right is necessarily agreeing to a full review of all his or her historical medical records. We believe that such a reading could be assailable as against public policy. Second, even though the employee that files a claim does agree to the review of pertinent medical records, he or she does not waive his or her privacy rights as part of the process.

In the same vein as common law privacy rights, under Title II of HIPAA all “covered entities,” which include physicians, must comply with the HIPAA requirements to protect the privacy and security of health information, and they must provide individuals with certain rights with respect to their health information.

The “privacy rule” involves what is termed under HIPAA “protected health information” or “PHI.” PHI is defined as any information about health status, provision of health care, or payment for health care that is created or collected by a covered entity linked to a specific individual. This is interpreted rather broadly and includes any part of a patient’s medical records or payment history.

As Shakespeare famously observed in Hamlet, act 3, scene 1, “Aye, there’s the rub.” We now have this situation: the evaluating physician, who is supposed to be looking at the entirety of the person, and thoroughly reviewing all medical records in an effort to evaluate whole-person impairment, cannot do so if the injured worker chooses to designate portions of the medical record as private under Title II of HIPAA.

Turning back to our example of the broken forearm, the AMA Guides would ask that the evaluating physician look at both forearms to assess a percentage. But in our example, the second forearm is clearly
not a body part affected by this particular injury, so HIPAA could be used to prohibit the evaluating physician from being able to assess the WPI of the injured employee fully.

The authors believe that this situation can only be avoided by obtaining actual consent on a HIPAA-compliant consent form. Actual consent, as opposed to implied consent, obtained because one simply files a compensation claim, does appear to defeat any privacy concerns of the claimant. *Gard v. Harris, M.D., et al.*, 2010 WL 844810 (Tenn. Ct. App. Mar. 11 2010). Nonetheless, our review does not establish any rule or regulation that would require an injured worker to sign a HIPAA-compliant form. The laws and regulations simply presume access to the medical records of the claimants when they file workers’ compensation claims. That presumption may leave employers at risk to additional claims related to the workers’ HIPAA privacy rights provided to each individual by Title II of HIPAA and made actionable in several jurisdictions. See, e.g., *RK v. St. Mary’s Med. Ctr., Inc.*, 229 W. Va. 712, 735 S.E.2d 715 (W. Va. 2012).

**At-Will Employee Status**

Every state recognizes the concept of “at-will employment,” some in very limited circumstances, such as Montana’s Wrongful Discharge from Employment Act, Mont. Code Ann. §39-2-901. Indeed, many have state law limitations in addition to federal law limitations. With the exception of Alabama, Florida, Georgia, Louisiana, Nebraska, New York, and Rhode Island, virtually all states recognize a public policy exemption, which provides that at-will employees may be terminated for any reason or for no reason, as long as they are not terminated for reasons that violate public policy. A plaintiff may choose to prove discrimination by the direct method (“evidence that can be interpreted as an acknowledgement of discriminatory intent by the defendants”), or by the indirect or inferential method, which arises from the burden-shifting test. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801–02 (1973); *Glover-Dorsey v. University of Texas Medical Branch*, 147 F. Supp. 2d 656, 662 (S.D. Tex. 2001). As part of the tripartite *McDonnell Douglas* test, a plaintiff establishes a prima facie case of discrimination, after which the employer is called upon to articulate a legitimate, nondiscriminatory reason or reasons for the adverse employment action. Then the burden shifts back to the plaintiff to show that the employer’s stated reason is “mere pretext.” While this is termed a burden-shifting process, courts using the mechanism have stressed that the burden of proof remains squarely with the plaintiff throughout. See, e.g., *Glover-Dorsey*, 147 F. Supp. 2d at 663.

Because of the vagaries of the proof pattern, the employer’s actions may be subject to scrutiny, while the plaintiff, the court, or the jury, or all three, weighs whether the employer had legitimate, nondiscriminatory reasons for the adverse action, or whether employer’s explanations are merely a pretext. Terminations of employees who are injured, who are receiving workers’ compensation or who are back to work in a limited capacity, may complicate the employer’s explanations for any adverse employment action. Most states have antidiscrimination statutes or common law prohibiting discriminating against persons for filing for workers’ compensation, including West Virginia, Montana, Missouri, Minnesota, Michigan, Massachusetts, Maryland, Maine, Louisiana, Kentucky. Common law prohibitions apply, for example, in Colorado, Wyoming, Idaho, Indiana, Iowa, Kansas, Pennsylvania, Tennessee, Utah, New Hampshire, Nevada, and Nebraska. In discharging an injured worker, the employer will need to have evidence that the discharge was for a neutral cause, unrelated to any disability, to any workers’ compensation filing, or to any other impermissible reason that violates law or public policy. Neither common law nor statutory provisions are available in Georgia, Mississippi, and Rhode Island.

As employers, our clients will want to learn to be good record keepers. We need to remind our clients that Congress has mandated that the Equal Employment Opportunity Commission (EEOC), in implementing the Americans with Disabilities Act Amendment Act of 2008 (ADAAA), must construe its provisions broadly to maximize the scope and the effect of the act. Specifically, "the EEOC regulations implement the ADAAA—in particular, Congress's mandate that the definition of disability be construed broadly. Following the ADAAA, the regulations keep the ADA's definition of the term 'disability' as a physical or mental impairment that substantially limits one or more major life activities; a record (or past history) of such an impairment; or being regarded as having a disability. But the regula-

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ment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. In keeping with Congress’s direction that the primary focus of the ADA is on whether discrimination occurred, the determination of disability should not require extensive analysis.

Id. (emphasis altered from original).

Given that employers are responsible for both direct and indirect discrimination in the workplace, and given a plaintiff’s interest in proving rational employment decisions to be nothing more than pretext to cover discriminatory animus, employers will want to maintain detailed, expansive, and contemporaneously made records to support any and all employment decisions.

The amendments to the ADA arose in part because of decisions such as Sutton v. United Airlines, 527 U.S. 471 (1999), overturned due to legislative action, including the Americans with Disabilities Act Amendments of 2008. See also Leading and Advising in the Era of the Differently Abled, 7 DRI Diversity Insider 2 (2015). At issue were pilots Karen Sutton and Kimberly Hinton, “severely myopic twin sisters,” (as the Supreme Court described them), with uncorrected vision of 20/200 and with corrected vision that allowed them to perform similarly to persons without vision issues. Sutton, 527 U.S. at 471. When the sisters applied to United Airlines for positions as pilots, they were rejected based upon United’s policy of hiring only pilots with uncorrected vision of 20/100 or better. The sisters filed an EEOC complaint, and later, they filed suit, after which the district court held that the pilots were not actually disabled because their visual impairments could be corrected. Further, the district court found that United had not regarded the pilots as disabled, but rather had only regarded the pilots as “unable to satisfy the requirements of that particular job — commercial airline pilot.” Id. Finally, the district court found that the pilots’ allegations fell short of demonstrating that they were regarded as substantially limited in the major life activity of working. The court of appeals (Tenth Circuit) affirmed upon the same basis. The sisters appealed the decision.

The United States Supreme Court found that the EEOC’s guidelines ran counter both to the letter and spirit of the ADA and would lead inescapably to unacceptable situations — such as characterizing an insulin-dependent diabetic person as disabled without regard to his or her abilities or impairments with insulin onboard. Id. at 502, 484 (stating further that considering mitigation measures also allows for consideration of complications or issues raised by the mitigating measures themselves). Finally, the Court found that Congress’s having identified only 43 million Americans as “disabled” must reflect Congress’s intent to include only persons who remain disabled even with accommodations in place; otherwise the number would be closer to 160 million. The Supreme Court found that mitigating measures should be considered in determining “disability” and that the fact that the pilots could correct their vision to 20/20 meant that they were not disabled after all, and therefore, they were not entitled to the protections provided by the ADA to disabled persons. The ADA by its terms, found the Court, “allows employers to prefer some attributes over others,” including physical characteristics (height, build, singing voice), as long as the employer does not make decisions relying upon impairments (real or imagined) that substantially limit a major life activity. Id. at 490.

As referenced above, it is reasoning such as that employed by the Supreme Court in Sutton that literally was referenced by Congress in revising the ADA into the ADAAA. See Pub. L. No.110-325, §2(a) (4) (2008), https://www.eeoc.gov/laws/statutes/adaaa.htm. The philosophy of the ADAAA is espoused in cases such as Christina Lynn Jacobs v. North Carolina Administrative Office of the Courts, 780 F.3d 562 (4th Cir. 2015), in which the Fourth Circuit considered the case of a deputy clerk at the courthouse who had a long-standing history of social anxiety disorder and who had been diagnosed with a severe situational performance anxiety. Ms. Jacobs requested an accommodation from her employer because of the anxiety she experienced providing customer service; she sought a position with less social interaction. The employer delayed three weeks before responding and then terminated Ms. Jacobs. The district court granted a summary judgment to the employer, but the court of appeals found that the lower court impermissibly resolved factual disputes in favor of the employer in finding that Ms. Jacobs was not disabled and that the employer had not learned of the request for accommodation at the time of termination. The Fourth Circuit, after an extensive analysis of social anxiety disorder and Ms. Jacobs’s history of it, held that the lower court’s construction of the facts was not only improper under the law, it also was incorrect: “In this case, ... the district court erred by failing to consider all of the evidence in the record. The district court’s opinion also states the facts in the light most favorable to the OAC—not Jacobs, the nonmovant.” Id. at 569. For instance, cited the court, Ms. Jacobs’s condition was a recognized mental illness under the DSM-IV guidelines, and Ms. Jacobs had repeatedly reported her adverse reactions to the job assignment to her employer.

The Fourth Circuit held that the district court improperly granted summary judgment to the employer upon Ms. Jacobs’s failure to accommodate claim. As for that substantive issue, the Fourth Circuit summarized the state of the law as follows:

The ADA imposes upon employers a good-faith duty “to engage [with their employees] in an interactive process to identify a reasonable accommodation.”
This duty is triggered when an employee communicates her disability and desire for an accommodation—even if the employee fails to identify a specific, reasonable accommodation. *Id.* However, an employer will not be liable for failure to engage in the interactive process if the employee ultimately fails to demonstrate the existence of a reasonable accommodation that would allow her to perform the essential functions of the position. *Id.* at 581 (internal citations omitted). Further, the Fourth Circuit also cited the 2008 amendments to the ADA and the legislative history: "The ADA Amendments Act (ADAAA) was intended to make it 'easier for people with disabilities to obtain protection under the ADA.' 29 C.F.R. §1630.1(c)(4)." *Id.* at 572.

Employers are called upon to accommodate the disabilities of which they have knowledge and those of which they should have knowledge, as reasonable employers. Given that employers are responsible for both direct and indirect discrimination in the workplace, and given a plaintiff's interest in proving rational employment decisions to be nothing more than pretext to cover discriminatory animus, employers will want to maintain detailed, expansive, and contemporaneously made records to support any and all employment decisions. This admonition becomes especially important in the instance of injured workers returning to work. In the *Jacobs* era, during which social anxiety from dealing with the public is a disability that requires accommodation, employers will want to tread lightly before they terminate employees with more obvious and readily documented injuries.

**Return to Work—Light Duty and Reasonable Accommodation**

After an injury occurs, "some temporary modification of duties can be made for an employee that would allow them to return to work in a limited capacity, subject to his/her medical restrictions. Such temporary modifications are called 'light duty, limited duty, or modified duty' assignments." See Robert Hall, "Light Duty, Limited Duty or Modified Duty Assignments: What the ADA and Workers Comp Requires," *Workforce* (Apr. 1, 2000). The ADA and its progeny require employers to accommodate "qualified individuals" who are disabled or who become disabled and who are able to perform the essential job functions with or without reasonable accommodation. *Williams v. Eastside Lumberyard and Supply Co., Inc.*, 190 F. Supp. 2d 1104, 1111–12 (S.D. Ill. 2001) (quoting 42 U.S.C. §12111(8)); *Cochrane v. Old Ben Coal Co.*, 102 F.3d 908, 911 (7th Cir. 1996). See also *Petersen v. Ray Mabus, Sec., Dep’t of the Navy*, 112 F. Supp. 3d 733, 741 (N.D. Ill. 2015) (quoting *Brunsfield v. City of Chicago*, 735 F.3d 619, 631 (7th Cir. 2013)). The worker bears the burden of proving that he or she is a qualified individual with a disability, "defined in relevant part as 'an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.'" *Williams*, 190 F. Supp. 2d at 1112 (quoting 42 U.S.C. §12111(8)); *Cochrane*, 102 F.3d at 911.

While an employer needs to offer reasonable accommodations as indicated after the interactive process of identifying the job's essential functions and the worker's abilities, the reasonable accommodations need not and should not include eliminating essential functions from the job or offering permanent light duty. 190 F. Supp. 2d at 1112. See also *Peterson*, 112 F. Supp. 3d at 742 (citing, in part, Rehabilitation Act of 1973 §501, 29 U.S.C. §791).

In *Williams v. Eastside Lumberyard*, injured worker Ed Williams brought suit against his employer Eastside Lumberyard, alleging that Eastside failed to accommodate him when, first, it denied his request for permanent light duty, and subsequently, when it terminated his employment. 190 F. Supp. 2d at 1107. Mr. Williams also raised state compensation claims, alleging retaliatory discharge. Eastside supplies building materials to more than a hundred lumberyards, packing and shipping hundreds of orders a day—with only 10 to 12 employees. Mr. Williams worked as a driver and warehouseman and was called upon to lift up to 80 pounds several times a day in filling orders, loading and unloading trucks, and assisting customers. Persons employed as drivers and warehousemen at Eastside must be able to twist, bend, squat, and move, and they must be able to drive 200 to 400 miles a day. After working his job for two and a half years, Mr. Williams herniated two disks in his back unloading vinyl siding. After surgery, Mr. Williams was returned to work in a light-duty assignment and was released to full duty approximately eight months after the injury. After three days of full duty, however, Mr. Williams requested a return to light duty. Eastside, believing it to be a temporary setback, gave Mr. Williams light-duty assignments once again, which still involved deliveries to customers in instances involving no manual lifting. Throughout this return to light duty, Mr. Williams continued treatments on his back as well. The situation continued for two years, at which time Eastside received word from Mr. Williams’ rehabilitation counselor that Mr. Williams’ activity was being restricted further: he was no longer allowed to drive. The day that Eastside learned of the additional restriction, Mr. Williams was placed on inactive status, and a little over six months later (approximately six years after hire), he was “terminated because he could not perform
the essential functions of his job." *Id.* at 1110, 1107–08.

In prosecuting his claim, Mr. Williams argued that he was denied the "reasonable accommodation" of permanent light duty. He admitted that he could not perform the duties of his original position, so he requested that his employer permanently place him in the fill-in job created for him—delivering drywall—which involved no manual lifting. Eastside countered that there was no such position, and many days there was no drywall to deliver at all, and it was just one small piece of the larger job that Mr. Williams could no longer accomplish, especially since he now was unable to drive. No job openings—whether labor or clerical—existed at that time.

In considering these issues, the district court found that Eastside had a duty to accommodate qualified individuals with a disability, but Mr. Williams had the duty of proving that he was a "qualified individual." *Id.* at 1112. Under the ADA, a "qualified individual" is defined, in pertinent part, as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. §12111(8). Whereas Mr. Williams admitted that he could not perform the duties of the driver and warehouseman position, he countered that he was able to perform the duties of the reasonable accommodation that he sought: permanent light duty. The court found that permanent light duty is not reasonable. 190 F. Supp. 2d at 1113 (citing *Malabarba v. Chicago Tribune Co.*, 149 F.3d 690, 699 (7th Cir.1998) ("Nor is an employer obligated to create a 'new' position for the disabled employee."); *Jay v. Internet Wagner Inc.*, 233 F.3d 1014, 1017 (7th Cir.2000) (holding that "an employer is not required to provide the particular accommodation that an employee requests"). Further, Eastside had created this light-duty job for Mr. Williams on a temporary basis. The ADA does not require employers to create new jobs for qualified individuals. If the light-duty job were another job regularly available there, vacant at that time, and Mr. Williams were able to perform the essential functions with or without accommodation, then it would be reasonable to assign him that position. Such was not the case.

Interestingly enough, the district court speculated on the result if Mr. Williams had argued that the employer made the light-duty position permanent by allowing him to stay in that position for nearly two years. The court found, however, that even if Mr. Williams had made that argument, the test would have become whether the employer intended the light-duty position to "last forever." If the employer had intended the position to be permanent, then it would have had its own essential functions; the test would then become whether Mr. Williams was a qualified individual relative to that position. Further, found the court, the evidence actually mitigated against a finding that Eastside intended the light-duty position to be permanent. For instance, no evidence was adduced that Mr. Williams's limitations were permanent at the time that he was given light duty. The evidence was clear that in the normal course of events, Eastside has no light-duty jobs and that Eastside's (and Mr. Williams's) expectations were that the situation was temporary. *Id.* In making this determination, the district court found the following evidence compelling:

While Eastside does allow temporarily-injured employees to hold temporary light-duty positions, Eastside has a "policy" of not creating permanent light-duty positions (Reis Dep. at p. 106). The only evidence here shows that, when Williams came back to work, he came back to work "on a temporary basis" (Reis Dep. at p. 106) and, as Williams admits, "on the assumption his condition would be temporary" (Joint Statement of Facts, ¶ 51). Also, Williams constantly refers to himself as being allowed to work on light-duty doing Driver/Warehousemen tasks, *not having* a permanent light-duty position. (Doc. 23, ¶¶ 86, 89, "While he was on light duty ... he was given the task of delivering drywall" which "is just one task a truck driver may be called upon to perform."). There are numerous other examples (Doc. 23, ¶ 56, "Despite being on light duty"; ¶ 59, "while on light duty"; ¶ 95, "while on light duty").

Williams admits he "worked for East Side as a truck driver and warehouseman" (Doc. 23, ¶ 5). He hurt his back in October, 1995, while loading some vinyl siding (Doc. 23, ¶ 45) and had back surgery in December, 1995. Between December, 1995 and July, 1996, Williams was "given lifting restrictions" and put on "light duty" as a result his back surgery (Doc. 23, ¶¶ 47–49). In July, 1996, Williams was released from light duty and went back to "full duty." After working a short time on "full duty" he asked to be "returned to light duty" with the lifting restrictions (Joint Statement of Facts, ¶ 49; Williams Dep. at p. 127, admitting "working 20 to 30 hours a week since [he'd been] returned to light duty in ’96"). The only logical inference, therefore, is that, in July, 1996, when he "returned to the light-duty assignments he was doing between December, 1995 and July, 1996, he was not returning to permanent light-duty work because the pre-July, 1996, light-duty assignments were temporary as Williams admits he ultimately "returned to full duty" work afterward (Doc. 23, ¶¶ 48–49). While enumerating the "duties" he had after July, 1996 (Doc. 24, at p. 7, ¶ 5), he admits elsewhere that these were simply available "tasks" that Eastside had given him after he had "returned to light duty" in July, 1996 (Doc. 23, ¶¶ 49, 50). Williams himself admits that he was returned to light-duty work after July, 1996 "on the assumption his condition would be temporary" (Joint Statement of Facts, ¶ 51). Williams therefore "returned to doing the same temporary light-duty assignments that he was doing prior to July, 1996 (Doc. 23, ¶¶ 48, 49).

The Williams court distinguished Eastside's situation from that in *Hendricks-Robinson v. Excel Corp.*, in which Excel's practice of laying off and terminating employees with permanent medical restrictions was found to violate the ADA. 190 F. Supp. 2d at 1117 (citing *Hendricks-Robinson*, 154 F.3d 685 (7th Cir. 1998)). In that Seventh Circuit decision, relative to the duration of light-duty assignments, the appeals court found that Excel's practice of pre-designating light-duty positions (and referencing them in the collective bargaining agreement) without designating them as "permanent" or "temporary" created a factual issue: had Excel placed the injured employee in a temporary light-duty position, or had it placed the employee in "a vacant, permanent job," *Id.* at 1117–18. The
Williams court also identified numerous decisions in which courts had weighed this distinction between makeshift positions, truly temporary, created only to accommodate a particular injured worker, and those positions that were not temporary at all.

The Williams court also rejected Mr. Williams’s argument that Eastside had violated the ADA by failing to engage in the interactive process to determine what, if any, accommodation could and should have been made. See also EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, https://www.eeoc. gov/policy/docs/accommodation.html (discussing the interactive process, reasonable accommodation, and defenses including undue hardship); EEOC, Procedures for Providing Reasonable Accommodation for Individuals With Disabilities, https://www.eeoc.gov/ eeoc/internal/reasonable_accommodation.cfm#C (setting out specific procedures for reasonable accommodation). The court found that only if an accommodation was available and only if that accommodation was reasonable would the employer’s failure to provide that accommodation be scrutinized to determine whether there was a breakdown in the interactive process.

While the district court rejected Mr. Williams’s ADA claims, it nonetheless found that if he had the factual predicates, Mr. Williams could assert a viable retaliation claim even without a viable disability claim when experiencing an adverse employment action while engaged in a protected activity as long as there was a causal connection between the two; that is, discrimination and retaliation are two different, albeit overlapping, determinations. Williams, 190 F. Supp. 2d at 1119.

Employers cannot discriminate in employment practices against any individual because that individual has opposed any act or practice made unlawful by the ADA Title I, 42 U.S.C. §12111–12117, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing to enforce any provision of Title I or its implementing regulations (29 C.F.R. Part 1630). See 42 U.S.C. §12203(a); 29 C.F.R. §1630.12(a). A prima facie case of retaliation under the ADA requires the plaintiff to show that: (1) he was engaged in activity protected by the ADA; (2) he suffered an adverse employment action; and (3) there exists a causal connection between the protected activity and the adverse employment action. See Contreras v. Suncast Corp., 237 F.3d 756, 765 (7th Cir.2001).

Id.

The Williams decision also discusses a split in authorities about whether the act of requesting an accommodation is a protected activity, but finally, the court determined that in its circuit, it is a statutorily protected activity. Id. at 1120 (citing by jurisdiction ADA-protected activity of employees versus unprotected activity).

Returning to the facts before it, the district court found that Mr. Williams’s only actual request for accommodation, which he made after the initial back injury, resulted in an accommodation. The court further found that Eastside was unaware of Mr. Williams’s subsequent physical issues until it finally learned that he was and would remain unable to perform the essential functions of his light-duty temporary placement, namely, drive a truck. Therefore, upon receiving that notice, Eastside had placed him on the inactive list and then discharged Mr. Williams when it was clear that his condition, far from improving, was getting worse. When Eastside learned that Mr. Williams would never be able to perform the essential function of driving a truck, it had a legitimate, nondiscriminatory reason for the adverse employment actions that it took. Id. at 1124. Once the Williams court disposed of the federal claims, it found that it no longer had jurisdiction to consider Mr. Williams’s state law retaliatory discharge claims and declined to exercise jurisdiction over them.

The rule to take home from Williams and its progeny, then, is that “reasonable accommodation” does not include an employer’s eliminating an essential function of the job so that the employee can then perform the remaining job functions.

The rule to take home from Williams and its progeny, then, is that “reasonable accommodation” does not include an employer’s eliminating an essential function of the job so that the employee can then perform the remaining job functions. be found to be a reasonable accommodation, it is not the default finding in the case of an injured employee who returns to work performing light duty and is unable, finally, to perform essential job functions with or without reasonable accommodation. Williams, 190 F. Supp. 2d at 1116–17. As other courts have found, light duty “is a temporary measure. There is no guarantee of any specific limited duty position.” See, e.g., Coleman v. Pennsylvania State Police, 2013 WL3776928, at *8 (W.D. Penn. July 17, 2013).

Williams and similar decisions consider the employer’s options once an injury has occurred and the employee is engaged in light duty. Each position must have an essential function analysis, and employers will want to make sure that new hires are advised of those functions and of the fact that light duty, to the extent that it exists in that
workplace, is never a permanent placement. Beyond that, if the existing case law is any indication, employers have continuing and prevailing interests in structuring claims and outcomes pre-injury even further.

**Waivers and Contractual Workarounds**

Over the years since the passage of the various antidiscrimination workplace legislation—the ADA, the ADAAA, the Age Discrimination in Employment Act (ADEA) of 1967, and the Older Workers Benefit Protection Act of 1990 (OWBPA)—employers have made an effort to embrace and understand the commensurate rights and duties in the workplace. In an effort to lend predictability to outcomes, employers have relied upon a variety of devices, including contracts and prospective waivers, in an effort to limit the nature and type of claims that can result. The regulatory agencies and courts have considered and often rejected those efforts as violating public policy, further instructing employees to be vigilant in maintaining their rights. *See, e.g.*, EEOC, *Understanding Waivers of Discrimination Claims in Employee Severance Agreements* (Rev. Apr. 2010), https://www.eeoc.gov/policy/docs/qanda_severance-agreements.html. Indeed, waivers—whether prospective by contract or retrospective by release—of discrimination claims are complicated by the fact that the EEOC sees itself as acting “to vindicate the public interest in preventing employment discrimination.” *See Adams v. Philip Morris, Inc.*, 67 F.3d 580, 584 (6th Cir.1995) (finding that “an employee may not prospectively waive his or her rights under either Title VII or the ADEA.”). *See also Thompson v. Plante & Moran*, 99 F.3d 1140 (6th Cir. 1996); *Cosmair*, 821 F.2d at 1090.

While courts have held repeatedly that claimant plaintiffs may waive their own discrimination claims retrospectively if they do so knowingly and voluntarily (as tested by contract defenses), those waivers do not and may not limit the regulatory action that may well follow. *See Reid v. IBM Corp.*, 1997 WL 357969, 74 Fair Empl. Prac. Cas. (BNA) 332 (S.D.N.Y. 1997):

> Every Circuit, with one exception, has held that releases of discrimination claims, other than releases of ADEA claims which violate the OWBPA, will stand if the employees [sic] ratifies that release and fails to tender back the consideration. The one Circuit Court that held ratification inapplicable to such claims based its holding on *Hogue v. Southern Ry. Co.*, 390 U.S. 516, 88 S.Ct. 1150, 20 L.Ed.2d 73 (1968), a case involving the Federal Employers’ Liability Act (“FELA”), 45 U.S.C. §51 et seq. *See also PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), finding that general prohibitions of specific clauses of Title III of the ADA cannot be avoided by means of contract. *Id.* at *13.*

In *Reid v. IBM Corporation*, the court approved of a covenant not to sue when the employee received additional consideration for signing the release, had seven days to revoke the release, had no contractual defenses to void the acceptance (no duress, incapacity, undue influence, intoxication), and ratified the release. Considering the “totality of circumstances,” the court found that the release was voluntary and knowing. Indeed, an employee may release his or her claims with his or her employer and then file a complaint with the EEOC without violating the release, as long as the employee does not personally profit from the enforcement action (assuming that the release limits the employee’s ability to receive more remuneration). *See Equal Employment Opportunity Commission v. Cosmair, Inc.*, 821 F.2d 1085, 1091 (5th Cir. 1987). The Fifth Circuit has elaborated:

A private, unsupervised waiver of an ADEA cause of action by an employee is valid as long as it is voluntary and knowing,... we add two clarifying notes. First, although an employee cannot waive the right to file a charge with the EEOC, the employee can waive not only the right to recover in his or her own lawsuit but also the right to recover in a suit brought by the EEOC on the employee’s behalf. Second, the fact that a waiver of the right to file a charge is void does not invalidate a waiver of a cause of action with which it is conjoined.

*Id.* at 1091 (internal citations omitted).

While these waivers arise after an event of alleged discrimination and allow the alleged victim to resolve his or her claim and to waive any remedy that a governmental inquiry might garner for the employee personally, repeatedly courts have held that public policy precludes any effort to preempt or to eliminate the government’s regulatory right to inquire into alleged discriminatory behavior. *See Scott v. Guardsmark Security*, 874 F. Supp. 117 (D. S.C. 1995) (finding impermissible employer’s shortening statute of limitations on ADA claims upon the basis that private contract to change federal law is against public policy).

In *Scott v. Guradmark*, the employer hired the plaintiff to serve as a security guard, entering an employment contract, which, among other things, required the plaintiff to raise any cause of action relative to that employment within six months of the time that the cause of action arose. 874 F. Supp. at 119. After 10 weeks of work, the defendant fired the plaintiff, and the plaintiff alleged that he was fired because he had to wear an ostomy bag. *Id.* The plaintiff filed a claim with the EEOC on the day that he was discharged and filed suit within a week of receiving his right to sue letter. *Id.* The defendant filed a motion to dismiss for failure to state a claim, alleging that the plaintiff’s claim was barred by the contract provision that limits the statute of limitations. *Id.* at 121. The district court would "not allow the Defendant to frustrate Congressional intent through a cleverly-drawn [sic] unilateral contract.
The Defendant’s contract would shorten a time limit established by federal mandate. This is abhorrent to public policy and defeats federally-protected [sic] rights of workers.” Id. Courts have upheld portions of releases that limit the employee’s recourse and have stricken the portion that would limit any governmental enforcement action. See Equal Employment Opportunity Commission v. SunDance Rehabilitation Corp., 466 F.3d 490, 501 (6th Cir. 2006).

Perhaps the best known case on this subject is PGA Tour, Inc., v. Martin. See Equal Employment Opportunity Commission v. SunDance Rehabilitation Corp., 466 F.3d 490, 501 (6th Cir. 2006). In Casey Martin’s case, professional golfer Martin sought leave to use a golf cart despite the preexisting walking requirement that applied to tours sponsored by non-profit professional golf association. Given the framework, the question was whether Martin waived his right to use a cart by agreeing to compete within the PGA, according to the PGA’s rules.

The evidence before the Supreme Court was that Martin was “a talented golfer afflicted with a degenerative circulatory disorder that prevents him from walking golf courses... [and] constitutes a disability under the Americans with Disabilities Act of 1990 (ADA).” Martin, 532 U.S. at 661. Golfer Martin had requested relief from the no-golf-cart rule and had provided medical records to support his need. The PGA Tour denied his request, and Martin filed this action under Title III of the ADA, which among other things, “requires an entity operating ‘public accommodations’ to make ‘reasonable modifications’ in its policies ‘when... necessary to afford such accommodations to individual with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such... accommodations.” (emphasis in original).

In considering Martin’s claims, the United States Supreme Court found that Title III, by its plain terms, prohibited the PGA from denying Martin equal access to its tours due to his disability. Further, the Court found that even considering the PGA’s walking requirement, allowing Martin to use a cart was not a modification that “fundamentally altered the nature” of the tour. The Court considered other modifications that would indeed change the fundamental nature—such as allowing Martin to shoot toward larger diameter golf holes—and found that the cart had only a peripheral effect upon the enterprise. The Court characterized the essence of golf as “shot making,” and any variance introduced by the cart (for example, less fatigue) was no different than any other variable. Id. at 683–84 (quoting, in part, the PGA Rules of Golf “The Game of Golf consists in playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the rules.”). The Court found, “it is impossible to guarantee that all golfers will play under exactly the same conditions or that an individual’s ability will be the sole determinant of the outcome.” Id. at 686.

Finally, the Supreme Court found that even if the cart did create an advantage, and even if it fundamentally changed the game for Martin, the larger and more important consideration was that the ADA existed for just these situations, specifically “to allow Martin the chance to qualify for, and compete in, the athletic events that the PGA Tour offers to those members of the public who have the skill and desire to enter.” Id. at 690. The Court recognized that its ruling imposed burdens on operators of public places but found more importantly that its holding would ensure that entities such as the PGA would not only give individualized attention to the handful of requests that it might receive from talented but disabled athletes for a modification or waiver of a rule to allow them access to the competition, but also carefully weigh the purpose, as well as the letter, of the rule before determining that no accommodation would be tolerable.

**What Is to Be Done?**

Truth be told, state and federal mandates place employers betwixt and between on most issues. Given that workers’ compensation is almost universally a creature governed by state law, it may be particularly surprising to employers to learn how many of their interactions with injured workers are governed by federal law. So what is to be done?

First and foremost, educate your clients. Broaden their worldview. Train them to see the employee with, for example, the back injury as potentially a qualified individual with a disability, or as a person within a protected class, or as a person with a complex medical history that may or may not be available to the employer to resolve the claim.

Further, encourage your clients to plan ahead. Consider the instance of an injured worker who was slated for discharge or suspension even before becoming injured, based upon the employer’s assessment of the worker as a poor employee who could not be counseled or trained into excellence. Without pre-injury, contemporaneously made documentation, the employer should expect to face allegations of pretext if the employer initiates an adverse employment action after the injury. Document problems, counseling sessions, and improvement periods.

Also, encourage your clients to be forthcoming. Regardless of whether an employer uses a handbook or posts EEOC and other mandated information in the workplace, interviewees and new hires should receive uniform information. Any discussion of benefits should include information on coverage for workplace injuries and return to work issues including the duration of light-duty assignments.

And maintain lines of communication. Depending upon a client’s sophistication and ease with such situations, rely upon your issue-spotting acumen to try to avoid problems before or at least as they develop. Both workers’ compensation and civil rights are fluid areas of the law. Help your clients learn to swim before the wave catches them unaware.

**Conclusion**

At the risk of sounding chippier, every problem is also an opportunity, and hopefully this analysis has made you more vigilant to the interplay between rights and duties betwixt and between otherwise largely unrelated bodies of law.

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