



# HRM UPdate

An SMC Human Resources Services Publication

January 2013

## INSIDE

### Legal Update, Policy, & Practice

- New Pennsylvania Child Labor Act Provides Clarity For Employers
- Accommodation Doesn't Mean 'Satisfaction Of An Employee's Every Desire'
- EEOC Will Focus In 2013 On Hiring, Pay, Harassment

### Compensation, Benefits, & Rewards

- Self-Employment: Does It Impact Your Unemployment Compensation Benefits?

### Safety & Health

- 10 Costly Return-To-Work Mistakes Revisited

### HR Helpline

*"What technology issues should an employer consider when terminating an employee?"*



## HAPPY NEW YEAR!

FROM OUR FAMILY @  
SMC/SMCIA TO YOUR FAMILY.

## Legal Update, Policy, & Practice

### New Pennsylvania Child Labor Act Provides Clarity For Employers

On October 24, 2012, Pennsylvania Governor Tom Corbett signed into law House Bill No. 1548, which repealed the Pennsylvania Child Labor Law ("CLL"), enacted in 1915, and which replaced it with updated legislation referred to as the Pennsylvania Child Labor Act ("CLA" or "Act"). The CLL had been amended several times since being enacted in 1915, but had become increasingly difficult to comprehend. The bipartisan bill which Governor Corbett signed was meant to update the state's antiquated child labor laws, particularly in the entertainment industry, and to create clear guidelines for the employment of minors.

The Act lays out age limits, permissible working hours and permitting requirements, and makes Pennsylvania law consistent with federal child labor laws. While, as a whole, few substantive changes were made in the Act other than revisions to the child actor provisions, the legislation included several updates of which SMC members should take note. This article outlines the CLA provisions that are most likely to affect SMC members when the law goes into effect in late January 2013, and highlights the changes made from the previous legislation.

#### General Limitations

The Child Labor Act prohibits Pennsylvania employers from allowing individuals under the age of 18 from working more than six consecutive days, and from working more than five consecutive hours in a day without a 30-minute break. The law, with certain exceptions, prohibits employers from employing children under the age of 14. The law also prohibits Pennsylvania employers from allowing minors age 14 or 15 from working before 7:00 a.m. or past 7:00 p.m. during the school year. Additionally, minors age 14 or 15 may not work more than three hours on a school day, down from four hours under the CLL, and may not work more than eight hours on a day when there is no school. Minors age 14 or 15 may not work more than 18 hours per week during the school year. During school vacation, minors age 14 or 15 may work until 9:00 p.m. and may work up to 40 hours per week. The CLA permits the Pennsylvania Department of Labor and Industry to establish, through regulation, a process for Pennsylvania employers to allow minors who are age 14 or 15 to work until 10:00 p.m., if the employers can demonstrate they are not subject to the federal Fair Labor Standards Act.

The Act permits individuals who are age 16 or 17 and who are attending school to work up to eight hours per day and 28 hours per week during the school year. Sixteen and seventeen-year old students may not work before 6:00 a.m. or after midnight, except on Fridays or Saturdays (or on days preceding a vacation day), when the minor may work until 1:00

a.m. During school vacation, a minor age 16 or 17 may work up to ten hours in a single day and 48 hours per week, an increase from the CLL which allowed a minor age 16 or 17 to work no more than eight hours per day and 44 hours per week. The CLA eliminates any hourly work limitations for high school graduates and other individuals who are not legally enrolled in school.

The CLA continues the prohibition, set forth in the CLL, on minors working in specific occupations deemed to be hazardous to their health or safety. The CLA also makes Pennsylvania child labor laws consistent with federal law by prohibiting the employment of minors in "occupations designated as hazardous and otherwise prohibited under the Fair Labor Standards Act and its regulations." The Act allows minors to be employed in "career exploration, apprenticeship and school-to-work programs" to the extent that employment of this nature is permitted under federal law.

The CLA prohibits "youth peddling" for minors under the age of 16. Specifically, minors under the age of 16 are not permitted to engage in the sale of goods and services, or to hold signs or merchandise in order to attract potential customers, unless the minors are stationed directly in front of the employer's place of business. This exclusion, however, does not prohibit minors under the age of 16 from selling goods and services as volunteers for qualifying non-profit organizations.

### Work Permits

The CLA streamlines the work permit process by establishing one basic work permit for minors, as opposed to three different types under the previous law. In order for a minor to obtain a work permit, the minor's parents or guardian must sign an application for the permit. The issuing officer is required to issue the permit unless he or she reasonably believes that the minor cannot maintain adequate academic achievement during the time of his employment.

Upon obtaining a work permit, the minor must provide the employer with the permit. The minor must also provide the employer with a statement from the minor's parent or guardian acknowledging the duties and hours required by the employment, and granting the parent's or guardian's permission for the minor to engage in that employment. The employer must then verify this information and keep it on file. In addition, within five days of the employer's receipt of the work permit, the employer must notify the issuing officer of the duties and hours of the minor's employment. When a minor's employment is terminated, the

**The Headwinds of Change:**  
*Finding Skilled Talent in a Recovering Economy*

Wednesday, February 13, 2013  
 Four Points Sheraton Pittsburgh North  
 12:00-5:00 p.m. program / 5:30 p.m. reception

**Challenged with recruiting and retaining skilled workers?**

**YES  NO**

**PANEL 1**  
 ■ Hear from peers who have solved the problem

**PANEL 2**  
 ■ Find what resources are available to you  
 ■ Explore what you can do today to address your hiring challenges

**KEYNOTE SPEAKER: BILL FLANAGAN, VP ACCD / STATE OF THE REGION**

For information, call Kim at 412.342.1608.

**REGISTER TODAY!**  
 Visit us at <http://www.smc.org/event-headwinds>

**SMC**  
 BUSINESS COUNCILS  
 Where PA Businesses Go to Grow

employer must notify the issuing officer within five days of termination.

### Penalties

The CLA imposes criminal penalties on Pennsylvania employers for intentional violations of the Act, interfering with the functions of enforcement officers, compelling minors to violate the act, failing to produce records, and falsifying records. An employer's first violation is a summary offense and carries a \$500 fine for each offense. An employer that commits a second violation is subject to a \$1,500 fine for each offense, or to no more than ten days in prison, or both.

In addition to criminal penalties, the Act also creates a new potential administrative penalty that may be imposed if no criminal penalty is imposed. The administrative penalty is a fine of no more than \$5,000 for each violation. Under the CLA, a Pennsylvania employer that has received a penalty for the violation under the Fair Labor Standards Act may not be penalized under state law.

For SMC members, Pennsylvania's new child labor legislation does not contain many substantive

changes. It does, however, lend clarity to what was an outdated and inarticulate law. The CLA should make it easier for SMC members to ensure that they are in compliance with Pennsylvania child labor laws and to understand the parameters for employing minors in the state.

*Source: Sarah J. Miley, Associate, Labor & Employment Law Practice Group, Thorp Reed & Armstrong LLP. Ms. Miley may be reached at 412.394.2561 or emailed at smiley@thorpreed.com.*

## Accommodation Doesn't Mean 'Satisfaction Of An Employee's Every Desire'

We often read court decisions where employers get hammered for failing to properly handle an employee request for an accommodation of some type. Nice to see one case where common sense carries the day.

A recent case out of Chicago concerned one Latice Porter, a data entry specialist in the Field Services Section of the city police department.

Porter was a committed Christian, and after she returned to her job after a nine-month medical leave, she was unhappy to learn that her days off would be Friday and Saturday. That meant she couldn't attend church on Sunday.

She asked to be reassigned to the work group that took Sunday and Monday off. Because the department was trying to "balance the workforce" — there were more employees in the Sunday/Monday group than in the Friday/Saturday group — she was told she'd be reassigned when an opening came up in the Sunday/Monday group.

### Didn't want to change shifts

Her supervisors also suggested that she work the 3 to 11 p.m. shift, which would allow her to attend church services. But Porter never followed up on that suggestion.

Instead, in a four month period, she was absent from work on 16 Sundays. When she was called on the carpet for her pattern of taking Sundays off, she filed a religious discrimination complaint with the EEOC.

The case eventually landed in federal appeals court, where the judge confirmed the lower court's rulings: The city had made a reasonable attempt at accommodation when it offered to change her work shift.

"Had changing watch groups affected Porter's pay or other benefits, a much more rigorous inquiry would be required," the judge wrote. "That is not the case before us, however.

"Porter simply did not want to work the later watch, but that does not make the proposed accommodation unreasonable."

The judge also made a comment that should warm the heart of every employer:

*"[I]t is well settled that [federal bias law] ... requires only reasonable accommodation, not satisfaction of an employee's every desire."*

The case is [Porter v. City of Chicago](#).

Source: [HRMorning.com](#). [Tim Gould](#), December 7, 2012

## EEOC Will Focus In 2013 On Hiring, Pay, Harassment

The U.S. Equal Employment Opportunity Commission (EEOC) put all its cards on the table in its new [strategic enforcement plan](#), which the commission approved Dec. 17, 2012. The plan noted that the commission will focus enforcement efforts on hiring, pay and harassment.

So there shouldn't be much guesswork among employers in prioritizing their EEO compliance efforts for 2013 or, theoretically, for the next four years covered by the plan.

The plan also identified three other enforcement priorities—protecting immigrant, migrant and other vulnerable workers; addressing emerging and developing issues; and preserving access to the legal system. But these are more nebulous than the priorities on pay, hiring and harassment, which Barry Hartstein, an attorney at Littler Mendelson in Chicago, called a "triple play" that "employers need to not ignore."

### Hiring

The EEOC didn't say which of its six priorities is the most important, or claim to list them in order of priority. But Hartstein thought there might be some significance to the fact that eliminating barriers in recruitment and hiring was listed first.

Though the guidance mentions background checks only once, Hartstein said it's important to read between the lines and take into consideration what the plan says in light of recent EEOC initiatives. And its most significant guidance last year undoubtedly was the much-publicized

**enforcement guidance on individualized assessment of criminal conduct in background screening.**

Hartstein said the agency is focusing on background screening because it can play a pivotal role championing lawsuits in this area. Few lawyers in private practice will touch these cases because of the time and expense required to litigate them. He expects test cases in early 2013.

The guidance on background checks discourages employers from using blanket exclusions of individuals who have been convicted of crimes, which employers are struggling with, Hartstein said. "The guidance is clear as mud about what employers are expected to do," he remarked, saying more guidance from the EEOC and courts is needed.

But employers should at least be consistent, he suggested. For example, employers should consider whether they are ignoring drug convictions against young white job candidates, writing them off as youthful experimentation, but jumping to the conclusion that the drug convictions of young black job candidates suggest something more sinister, like drug dealing.

**Pay**

The one surprise in the strategic enforcement plan was its inclusion of enforcing equal pay laws to target practices that discriminate based on gender—a priority that didn't appear in the agency's draft plan, Hartstein noted.

But it isn't much of a surprise, he added, in light of the emphasis President Obama has placed on unequal pay, such as signing the **Lilly Ledbetter Fair Pay Act** early in his presidency.

How quickly enforcement will come in this area is anyone's guess, Hartstein said, noting that the EEOC has filed only two Equal Pay Act lawsuits in the last two fiscal years.

But employers should pay attention, he cautioned. This is one area where the EEOC can show up at an employer's door without a complaining party through directed investigations and commissioner charges, which the strategic enforcement plan specifically encourages to fight pay discrimination.

Hartstein urged employers to conduct **pay audits** protected by the attorney-client privilege, noting that fighting pay discrimination also is a priority with the Office of Federal Contract Compliance Programs.

**Harassment**

The last priority mentioned by the commission isn't exactly new: preventing harassment through

systemic enforcement and targeted outreach. In the last four years, a third of the agency's systemic discrimination suits challenged workplace harassment.

But settlements of harassment suits of all stripes continue to pile up, Hartstein noted, highlighting the following EEOC settlements of sexual and race harassment:

**Sex**

\$8 million—Alleged sexual harassment claims involved 82 female workers with payments ranging from \$30,000 to \$70,000 (**EEOC v. International Profit Associates**, No. 01-CV-4427 (N.D. Ill. 2011)).

\$2 million—Alleged sexual harassment by a fast food restaurant, including teenagers, involving comments, innuendo and touching (**EEOC v. Sonic Drive-In**, No. 09-CV-953 (D. N.M. 2011)).  
\$1 million—Compensatory damages awarded to 10 former McDonald's employees, plus outside monitor and hotline (**EEOC v. Missoula Mac Inc.**, No. 3:10-cv-00267-bbc (W.D. Wis. 2012)).

**Race**

\$11 million—Alleged hangman's nooses, racial graffiti, comments, harsher discipline and discriminatory work assignments involving black workers by a freight hauling company (*Brown v. Yellow Transportation Inc.*, No. 08 CV 5908, and **EEOC v. Yellow Transportation Inc.**, No. 09 CV 7693 (N.D. Ill. 2012)).

Harassment is being targeted partly because it is "one of the most frequent complaints raised in the workplace," the strategic enforcement plan noted. "Harassment claims based on race, ethnicity, religion, age and disability combined significantly outnumber even sexual harassment claims in the private and public sectors."

Another reason the commission may be making the fight against harassment a priority is that this stand isn't controversial.

The strategic enforcement plan showed the agency is taking steps to not inadvertently stir up controversy in coming years by directing its general counsel to get the full commission's approval before litigating cases likely to be controversial, such as recently adopted commission policies.

The plan isn't devoid of controversy though. For example, one of the emerging issues it identifies is the coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions.

Though important, the EEOC's national priorities aren't the be-all and end-all in EEO enforcement. The strategic enforcement plan itself notes that "local challenges demand attention as well" and directed its district offices and regional attorneys to develop a district complement plan identifying local priorities and how the offices will implement the plan's priorities.

Source: SHRM, Allen Smith, J.D., is manager, workplace law content. December 21, 2012.

**Real Health Insurance  
Choices for  
Business Owners**

Call the  
**SMC Insurance  
Agency at  
412.242.7840**

**SMC**  
BUSINESS COUNCILS

Where PA  
Businesses  
Go to Grow

<p><b>Need FREE Answers To Your Human Resources Questions?</b></p>	<p><b>Call SMC's HR Helpline!</b></p> <p>Get quick, reliable answers to your human resources questions.</p> <p>Questions about harassment, discipline, terminations, family/medical leave, pay, benefits and more, will be answered by SMC's Human Resources staff members.</p> <p>Call the HR HELPLINE today! <b>412.371.1500</b> HRHelpline@smc.org</p>
--	---

## Compensation, Benefits, & Rewards

### Self-Employment: Does It Impact Your Unemployment Compensation Benefits?

So you've been laid off from your job and want to make a little extra side money selling jewelry or mowing lawns. Can you do it without jeopardizing your unemployment compensation benefits? What if you only make \$100 a week or work only a few hours doing the side activity? While those side jobs may seem innocuous to you since they pay only a few bills, they may very well put your benefits in jeopardy.

Under Pennsylvania law, when an individual is receiving unemployment compensation benefits, they are permitted to become employed by a company, and subject to the eligibility requirements and income generated, the amounts made in that employment will be used to offset amounts received in benefits. In that scenario, "employment" is the key word. When it comes to starting your own business or accepting an independent contractor job, however, the law treats that situation very differently.

In fact, attempts to obtain alternative side-income through self-employment or independent contractor status while receiving unemployment compensation have generally been met with a critical eye by the Pennsylvania Department of Labor and Industry. Section 402(h) of the Pennsylvania unemployment compensation law mandates that individuals who are self-employed are not eligible for unemployment compensation, and when initially enacted, decisions rendered by referees universally rejected unemployment compensation claims for individuals engaged in any type of self-employment, regardless of whether any money was made.

Apparently recognizing some inequity in that position, a recent line of Pennsylvania appellate cases suggests that some side jobs undertaken, while the claimant is engaged in seeking full-time employment, will not automatically render the claimant ineligible for benefits.

The confusion comes from the fact that "self-employment" is not a defined term in Pennsylvania unemployment compensation law, so

courts have to look elsewhere to determine what the phrase means. Universally, they look to the unemployment compensation law definition of "employment" which describes a person as being employed **unless**: (1) the individual is free from control or direction of an employer, **and** (2) the individual is providing services and they are "customarily engaged in an independently established trade, occupation, profession or business."

The recent court decisions have placed emphasis on the second prong -- whether the individual is "customarily engaged" in a business. Basically, the common theme through the cases is that if the job and/or income is sporadic or temporary, such as a few hours a week or on nights or weekends, courts are more inclined to rule that the individual is not customarily engaged in business, so that they can continue receiving benefits. This is especially true when the self-employment was undertaken while the individual was actively engaged in searching for full time employment. If, however, the individual is trying to make a living with the recently started business, instead of simply using it as a side activity, then the courts take a much harsher view, regardless of whether the individual has generated any income or no income at all. In this scenario, benefits will likely be denied.

The bottom line is that individuals receiving unemployment compensation should first determine whether the random side job or self-employment activity will render them ineligible for benefits before undertaking that activity. Seeking the assistance of counsel is a wise move before accepting any job that may jeopardize your valuable unemployment compensation benefits.

Source: Beth Slagle, Attorney @ Meyer, Unkovic & Scott, LLP. Ms. Slagle may be contacted at 412.456.2890 or emailed at [bas@muslaw.com](mailto:bas@muslaw.com).

## Safety & Health

### 10 Costly Return-To-Work Mistakes Revisited

One of our most popular articles, *Ten Costly Return-to-Work Mistakes*, was written in 2009 in the depth of the recession and shortly after the passage of the American with Disabilities Act Amendments Act (ADAAA). Now that the economy is chugging toward recovery, legislation has taken root and the Patient Protection and Affordable Care Act (PPACA) emerges, it seems appropriate to revisit and update the article.

By lowering the length and duration of time away from work due to injuries and illnesses on or off the job, Return-to-Work (RTW) programs have reduced Workers' Compensation, disability and medical insurance costs as well as strengthened morale and productivity. More recently RTW programs have helped protect employers from lawsuits regarding regulatory non-compliance, particularly related to the ADAAA.

Traditionally, employers focused on helping employees who were injured at work get back to work early with RTW. Recognizing the value of a healthy workforce, the commonalities of recovering from on and off the job injuries, the efficiencies of coordinating RTW efforts, and the greater risk exposure to discrimination claims when workers are treated differently depending on the reason for their absence, some employers are moving toward integrating occupational and non-occupational cases to reduce absences and lower claims costs.

Whether the program is an integrated occupational/non-occupation RTW or a traditional RTW, the economic and legislative landscape poses challenging issues for employers. Here are ten common mistakes:

#### 1. Failure to effectively manage the increase in number of employees covered by the ADAAA

There is now little doubt that the expanded definition of disability under the ADAAA has significantly increased the number of employees who are entitled to accommodations. The definition of disability is so broad that some labor and employment attorneys advise not to fight whether the employee is disabled but to engage in a dialogue to find out the limitations and discuss accommodation possibilities.

The ADAAA requires covered employers (those who have 15 or more employees) to assess accommodations for any worker who might need them *regardless of whether the disability arose from a work or personal injury or illness*. The Equal Employment Opportunity Commission (EEOC) has taken the position that employers with inflexible leave policies violate the ADA by failing to accommodate employees covered by the Act.

High profile cases include a Sears Roebuck & Co. \$6.2 million settlement involving Sears' automatic termination of employees whose leave expired under the company's policy on Workers' Compensation absences. Last month, the nationwide truckload carrier, Interstate Distributor Co. was ordered to pay \$4.85 million to settle a disability discrimination lawsuit. The EEOC found that the com-

pany's maximum 12 weeks of leave, consistent with FMLA, and its "no restrictions" policy, requiring employees be 100% healed and able to perform 100% of their job duties before they could return to work, violated the ADA.

The linchpin of an employer's obligation to a qualified individual with a disability under the ADA is the interactive process for reasonable accommodation. While the ADA doesn't prohibit employers from having a maximum leave policy, exceptions to the policy must be made on a case-by-case basis to reasonably accommodate people with disabilities.

Also, a program that limits the availability of transitional jobs to a certain class of workers—those who are injured on the job—risks violating the ADA unless there is a legitimate business reason for doing so. The EEOC found Jewel-Osco violated the ADA by prohibiting disabled employees from participating in the company's 90-day light duty program if they were not injured on the job.

As a federal law, the ADA supersedes state Workers' Compensation laws, and therefore, its directives provide the floor level protection for disabled individuals. State Workers' Compensation laws can provide more protection, but not less.

Properly structured, RTW programs can decrease the ADA exposure.

## **2. Insist employees be released to "full duty" before returning to work**

Considerable evidence exists about the value of RTW programs that provide a means for employees to transition back into their full duty jobs with responsibilities and tasks modified for short periods of time. Insisting on a return to "full duty" increases Workers' Comp costs and heightens the possibility that the injured employee will fall prey to a "disability syndrome" - the failure to return to work when it is medically possible. An individual's sense of self-worth and motivation often comes from the ability to be productive. When that is taken away, depression can set in or an unfounded belief in the seriousness of the injury can extend the absence and drive up costs.

The EEOC has also spoken on this issue. In 2011, Supervalu Inc., American Drug Stores and Jewel Food Stores Inc. were found to have violated the ADA with inflexible leave policies that prohibited employees on one-year paid disability leave from returning to work unless they could return without any accommodation to full service and had no physical or mental restrictions. If a worker still has medical restrictions at the point of maximum medical improvement, the employer needs to

compare the worker's abilities with the essential functions of the job, not with some arbitrary standard of 100 percent fitness for work.

## **3. Do not account for co-morbidities**

Co-morbidities are health issues that can complicate or delay an employee's recovery, such as diabetes, obesity, hypertension, depression, and so on. It is well documented that the presence of co-morbidities significantly increases the cost of Workers' Comp claims.

There are valuable disability guidelines that predict how long it "normally" takes for a worker to return to work. While it's important to ensure that the duration of modified job assignments is not indefinite, inflexible adherence to the guidelines can lead to problems and potential discrimination suits, particularly when there are co-morbidities involved.

In order to get claimants back to functionality, Workers' Comp has shouldered much of the cost for treating co-morbidities, particularly for claimants who do not have health insurance. Although the cost may shift under the PPACA, it will take time and it's too early to determine the overall impact on the bottom line.

Since chronic conditions are major drivers of Workers' Comp, health and disability costs, proactive employers are expanding preventive services and wellness initiatives to make the workforce healthier.

## **4. Fail to commit the budget or resources**

While the RTW has not escaped the pressure to cut costs during the sputtering economic recovery, the direct and indirect costs of absences as well as the exposure of non compliance with federal and state regulatory and statutory requirements is likely to be far more costly than implementing a RTW process. And the longer an employee is out of work, the less likely they are to return.

Some employers bring workers back to work as early as possible to reduce claim costs but are not committed to a RTW program. Without a planned transition back to full productivity, employees will not build up the tolerance to resume full job duties. Also, the plan needs to deal with potential failures; not every injured worker will return to the pre-injury occupation.

The costs to implement a program will vary depending upon industry, company size and injury history. The good news is that there are ample resources from insurance carriers, insurance agents, and governmental agencies to guide the process.

**5. Be deterred from setting up transitional assignments because the employee "may get hurt again"**

Employer and employee fear of re-injury often hampers RTW efforts. This of course is a risk, but an even greater risk is having the employee stay at home and develop a "disability attitude" that extends the absence and drives up costs. The right timeline and transitional process for an employee to return to work is best done on a case-by-case basis. Guided by the goal of safely returning the employee to their pre-injury job, employers who work and stay in touch with the employee, the treating physician, and supervisor are most successful.

**6. Don't distinguish "light duty" from "transitional work" from "reasonable accommodation"**

The definition of these terms is complicated and confusing. Occupational RTW assignments are best described as transitional tasks. Limited in duration such tasks help the injured worker return to full productivity by being progressively adjusted in line with medically documented changes in the employee's ability. Under the ADA, it is permissible for an employer to reserve less physically demanding or "light-duty" jobs for those with work-related disabilities and these jobs should be distinct from transitional tasks.

"Reasonable accommodations" involves changes to a job so that a person with a disability can perform the essential functions of the job. It can take many forms and the EEOC expects an individualized analysis and justification for every employee with a physical or mental impairment that qualifies for coverage under the ADA. Failing to explore all options, including extended leaves or temporary positions, have landed a number of employers in trouble with the EEOC. Case law, consent decrees and EEOC guidance on best practices help to execute the interactive process appropriately.

**7. Rely on the physician to guide the RTW process**

While many employers have recognized that they need to take the lead role with both the treating physician and injured worker, others still rely on the physician. While physicians are medical experts, they do not have essential information about workplace policies, job demands and the availability of transitional work. Moreover, if a physician's training is not specifically in the treatment of occupational injuries, they may not adhere to evidence-based guidelines.

**8. Don't understand how laws overlap and conflict**

The overlapping and often conflicting requirements of ADA, FMLA, Workers' Comp and a plethora of

state laws are an administrative nightmare. There are differences in eligibility, leave lengths, job reinstatement requirements, access to medical information, fit-for-duty certifications and so on. More than one law can affect the same situation and each must be considered. For this reason, a "silo" structure in which separate areas manage Workers' Compensation, disability and health can be problematic, inefficient and duplicitous. Yet, at the same time, this quagmire adds to the challenge of integrating occupational and non-occupational RTW. Ultimately, the entire organization is responsible for the knowledge possessed by any part of the organization and an employer needs to determine the best process for its needs and circumstances.

**9. Don't stay focused on the goal and establish consequences**

The ultimate goal of RTW is to transition workers back to their pre-injury job. Whether it's a result of a poorly managed program, lack of knowledge or fear of violating a law, some employees remain in a reduced-productivity position too long, or indefinitely. An Integrated Benefits Institute survey revealed a RTW focus on the employee's own job, modified as necessary, ranked as the most important factor in successful RTW. Requiring mandatory participation was the second most important program feature affecting RTW success.

While employees cannot be required to accept transitional assignments when on FMLA leave, in most cases, the Workers' Compensation indemnity payments may discontinue with the refusal to return to work. Even under the ADA, "indefinite" leave is not considered a reasonable accommodation and such leave must make it reasonably likely that the employee will be able to return to work and perform the essential functions of his or her job.

**10. Believe Workers' Compensation settlements resolve other liabilities**

One size does not fit all. Obligations under the various laws are reconciled separately. During settlement negotiations, close coordination is necessary between the company's legal, risk management, and HR departments to ensure that each office is able to accomplish its mandate without compromising the employee's rights.

*Source: Workers' Comp Advisory, David Leng, December 2012.*



## From the HR Helpline...

**Q: What technology issues should an employer consider when terminating an employee?**

A. With the growing use of personal electronic devices such as smart phones, tablets and laptops, employers must be more diligent in implementing policies to protect company data and systems. Almost 60 percent of terminated employees said they retained sensitive company information after they left their employers, and 25 percent continued to have access to their former employer's computer systems following their termination, according to a 2008 Ponemon Institute survey.

The best time to begin thinking about termination-related data issues is at the time of hire. During the employee's orientation, employers should document the assignment of any company property such as cell phones, laptops, tablets, portable drives and remote access codes for company routers or VPN access.

Many employers have the new hire sign mandatory noncompete and confidentiality agreements. In addition, employers may ask employees to provide written acknowledgment of the receipt of policies related to the return of company electronics and data on the devices. Some employers recently have included authorizations allowing the employer to complete a "remote wipe" of company or personal cell phones or computing devices. These authorizations permit the employer to send a message to a cell phone or computing device that connects to the company e-mail, which essentially deletes all company data residing on the device. This is generally done as a last resort when company data are at risk.

Employers should have clear processes in place to advise departmental leaders of pending terminations. Advising the information technology department of a pending termination can ensure that access is disabled and company data are protected from retaliatory actions. During the termination meeting, employees should be reminded of noncompete and confidentiality agreements and that company property must be returned at the time of separation.

Despite an employer's best efforts to protect company data and systems or to recover company property, some contentious separations may make this difficult. In such circumstances, the employer may decide, as a last resort, to wipe data remotely from devices remaining in the

## SMC HRM Update

**January 2013  
Vol. 47, No. 1**

### **Editor**

Rosann Linza  
rosann@smc.org

### **Contributing Editor**

Eileen Petrone  
eileenpetrone@smc.org

HRM Update is published online monthly as a service to our members by:

### **SMC Human Resources Management**

1382 Beulah Rd, Bldg 801  
Pittsburgh, PA 15235  
Phone 412.371.1500  
Fax: 412.371.0460

### **Central Region Office**

1017 Mumma Rd, Suite 204  
Wormleysburg, PA 17043  
Phone: 717.761.1660  
Fax: 717.761.2550

---

**The HRM Update is published for the purpose of informing SMC members and friends about developments and trends in the practice of Human Resources. The information provided should not be construed as imparting legal advice on any matter.**

---

employee's possession. If terminated employees delete data without authorization, they may be subject to prosecution under the federal Computer Fraud and Abuse Act. The law specifically prohibits employees from intentionally accessing a protected computer without authorization and recklessly causing damage. However, by taking proactive steps beginning at the time of hire through the time of termination, an employer may prevent costly network damage and data losses.

Source: SHRM, August 31, 2012.