The Pandemic-Era and Broader Implications of Employer Decision-Making in Workplace Injury Cases

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Introduction

A pivotal question in workplace injury cases is whether the injury is compensable. Generally, workplace injuries are compensable under the state workers' compensation statute if the accident arises out of and in the course of the employment.[1] In most cases, the answer to the compensability question is straightforward. A more complicated issue arises when an employee claims to have contracted a community-spread disease such as COVID-19. Workplace injury cases, and attendant employer decision-making, carry a broad range of implications, beyond the compensability question. Broad implications and competing interests in the areas of discrimination law, disability law, injury recordkeeping regulations, and general business concerns are lurking. These implications have only grown more complex and pervasive with the onslaught of the pandemic.

One example of competing interests arises between workplace safety and human resources (HR) professionals. An HR manager may be inclined to not accommodate restrictions that a physician places on an employee following a workplace injury, choosing instead to leave the employee out of work and receiving workers' compensation benefits that are less than the employee's typical wages. However, the safety

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1. *See* Mayor & Aldermen of Savannah v. Stevens, 598 S.E.2d 456, 457 (Ga. 2004) ("Generally, an injury is compensable only if it arises out of and in the course of the employment" (citing Ga. Code Ann. § 34-9-1(4)).); Stegman v. Grand River Reg'l Ambulance Dist., 274 S.W.3d 529, 533 (Mo. App. 2008) ("'To be compensable under worker's compensation, an employee's injury must arise out of and in the course of his employment.'" (quoting Custer v. Hartford Ins. Co., 174 S.W.3d 602, 610 (Mo. Ct. App. 2005))); Riley v. Indus. Comm'n, 570 N.E.2d 887, 889 (Ill. App. Ct. 1991) ("An injury is compensable under the Act only if it arises out of and in the course of employment." (citing Panagos v. Indus. Comm'n, 524 N.E.2d 1018, 1020 (Ill. App. Ct. 1988))); Price v. R & A Sales, 773 N.E.2d 873, 875 (Ind. Ct. App. 2002).

manager may wish to accommodate those restrictions in order to lessen the impact on the facility or company's safety record. For example, if a maintenance worker at a refinery sprains his ankle after stepping on a hose and the physician places a restriction requiring him to be sedentary for five days, HR may prefer that the employee simply stay home rather than having to pay the employee's wages while simultaneously paying a replacement who can be productive. On the other hand, the safety manager will be less concerned about cost and productivity, and more concerned with sparing the facility's lost-time accident rate. Clashes in approach following workplace injuries may lead to inconsistencies in accommodation decisions, which in turn might create inferences of discrimination, bringing Title VII[2] and parallel state legislation into play. Also, the Americans with Disabilities Act (ADA)[3] may necessitate accommodation in some instances.

To reach decisions in workplace injury cases without inadvertently basing said decisions on impermissible considerations and/or inviting liability in other areas, employers must consider the full panoply of consequences relating to their decisions, and they must do so within the context of the pandemic's sweeping effect. This article explores the impact of the employer's choices in workplace injury cases on its liability in other areas of the law such as discrimination, disability, injury recordkeeping, and retaliation. It also considers the way in which the onslaught of COVID-19 affects how employers address workplace safety, manage injuries, and may be subject to liability.

I. Competing Workplace Interests of the Pandemic

Workplace safety, risk management, and workers' compensation professionals, along with the rest of society, have been scrambling to deal with the COVID-19 ambush. Previously focused on injury prevention, they have shifted gears to focus on preventing the spread of COVID-19, avoiding related citations, and keeping their workplaces open. It's a no-win situation. As of early January 2021, OSHA had conducted hundreds of inspections and issued citations with proposed penalties exceeding $4 million for violations associated with the coronavirus.[4] OSHA largely targeted healthcare facilities, although it had, as of January 14, 2021, cited at least one meat manufacturing plant.[5]

2. 42 U.S.C. §§ 2000e to e-17.

3. 42 U.S.C. §§ 12101–12213.

4. *See Inspections with COVID-Related Citations*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/enforcement/covid-19-data/inspections-covid-related-citations [https://perma.cc/2D8E-N5PS]; *see also* Harris M. Mufson & Alexandra Rueckle Reynolds, *Biden Directs OSHA to Issue New Workplace Safety Guidance Regarding COVID-19*, NAT'L L. REV. (Jan. 26, 2021), https://www.natlawreview.com/article/biden-directs-osha-to-issue-new-workplace-safety-guidance-regarding-covid-19 [https://perma.cc/2SPG-U9BR].

5. *See Inspections with COVID-related Citations*, *supra* note 4.

About forty-one percent of the citation events involved the recordkeeping standard, while approximately eighty percent involved the respiratory protection standard.[6] About twenty-four of the citation events involved OSHA's standard requiring that employers report work-related cases involving fatalities and hospitalizations.[7] With respect to its focus on healthcare, OSHA's updated emphasis program provides that it will continue such focus but that area offices may add non-healthcare establishments to their inspection lists "based on information from appropriate sources" such as "local knowledge of establishments, commercial directories, referrals from the local health department, or from other federal agencies with joint jurisdictions."[8]

OSHA's recordkeeping standard requires that certain employers "record" work-related injuries that meet prescribed criteria on their log (i.e., Form 300).[9] Injuries that are recorded on an employer's OSHA log affect the employer's Recordable Incident Rate (RIR) and, depending on severity, also affect metrics such as the lost-time accident rate and the Days-Away-Restricted-Transferred-Rate (DART). An injury or illness is recordable if it is (1) work-related, (2) a new case, and (3) meets at least one of the general recording criteria.[10] A case falls within the general recording criteria if it involves "death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness," or if it results in an employee being diagnosed with a "significant injury or illness," even if it does not otherwise meet the aforementioned general recording criteria.[11]

Injury and accident rates are especially important to contractors, as their ability to obtain contracts depends in part on having an acceptable safety record.[12] These rates are also important to employers that

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6. *See id.*

7. *See id.*

8. *See* Occupational Safety & Health Admin. Direction, DIR 2021-03 (CPL 03), Revised National Emphasis Program—Coronavirus Disease 2019 (COVID-19) 7–8 (July 7, 2021), https://www.osha.gov/sites/default/files/enforcement/directives/DIR_2021-03_CPL_03.pdf.

9. 29 C.F.R. § 1904.4(a) (2020) ("Each employer required by this part to keep records of fatalities, injuries, and illnesses must record each fatality, injury and illness . . . ."); Occupational Safety & Health Admin., U.S. Dep't of Lab., OSHA Forms for Recording Work-Related Injuries and Illnesses, https://www.osha.gov/sites/default/files/OSHA-RK-Forms-Package.pdf [https://perma.cc/BGK6-TKQG].

10. 29 C.F.R. § 1904.4(a).

11. *Id.* § 1904.7(a).

12. *See* Steven Polich, Lockton Companies, Do Not Underestimate the Importance of OSHA Incidence Rates 6–7 (2012), https://www.lockton.com/Resource_/PageResource/MKT/Polich_OSHA%20incidence%20rates_Dec%2012%20update.pdf [https://perma.cc/Z4U5-258H] ("Therefore, a single recordable case may cause the rate to jump significantly and have a negative impact on a contractor's ability to secure the contract."); *see also* Conrad Cooper, *What Is the [Total Recordable Incident Rate] and How Does It Affect My ISNETWORLD® Account*, Safety Manual Today, https://safetymanualtoday.com/what-is-a-trir-and-how-does-it-affect-your-isnetworld-account [https://perma.cc/9L7P-DQWP].

are not contractors for a variety of reasons, one of which is the potential for negative attention associated with a bad safety record.[13] Further, injury rates may be personally important for upper-level management, as their compensation may be directly impacted by their company's or facility's safety record.[14]

With respect to recordkeeping and COVID-19, OSHA has shown leniency, or perhaps rationality, in its approach to employers other than healthcare institutions. In a memo dated April 10, 2020, the agency stated that, apart from healthcare organizations, emergency response organizations, and correctional institutions, who were required to "continue to make work-relatedness determinations pursuant" to the regulation, employers would not be required to make work-relatedness determinations except where there was "objective evidence that a COVID-19 case may be work-related," and where "[t]he evidence was reasonably available to the employer."[15] OSHA further provided, as an example of objective evidence, "a number of cases developing among workers who work closely together without an alternative explanation," and described reasonably available evidence as "information given to the employer by employees, as well as information that an employer learns regarding its employees' health and safety in the ordinary course of managing its business."[16]

In May 2020, however, OSHA returned to its general approach that all employers must record confirmed cases of COVID-19 that meet the standard's definition of work-relatedness and meet one or more of the general recording criteria.[17] OSHA reasoned that, by then, "[c]onfirmed cases . . . ha[d] been found in nearly all parts of the country," with "outbreaks among workers in industries other than healthcare . . . ."[18] On January 29, 2021, under the Biden administration, the agency released new guidance that reiterated the duty to record cases meeting OSHA

13. *See* Christopher Leonard, *The Safety Crisis at Koch Industries' Georgia-Pacific*, ALTERNET (Aug. 8, 2019), https://www.alternet.org/2019/08/the-safety-crisis-at-koch-industries-georgia-pacific/ [https://perma.cc/97CZ-Q8T3].

14. Interview with Jeremy Presnal, Vice President of EHS & Workforce Dev., Shermco Indus. (Aug. 4, 2020) (notes on file with author) (Jeremy Presnal has worked as a project safety manager for large contractors and as a corporate safety manager for a large manufacturing company and currently works as an environmental health and safety executive for an industrial services company).

15. OCCUPATIONAL SAFETY & HEALTH ADMIN., ENFORCEMENT GUIDANCE FOR RECORDING CASES OF CORONAVIRUS DISEASE 2019 (COVID-19) (Apr. 10, 2020), https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19 [https://perma.cc/2DM2-YBG8].

16. *Id.*

17. OCCUPATIONAL SAFETY & HEALTH ADMIN., REVISED ENFORCEMENT GUIDANCE FOR RECORDING CASES OF CORONAVIRUS DISEASE 2019 (COVID-19) (May 26, 2020), https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19 [https://perma.cc/63L7-Z6WE].

18. *Id.*

criteria.[19] The guidance did not refer to the old memos, and it seemed to take a hardline approach, when compared with the prior memos, stating, in a matter-of-fact way, the duty of employers to record.[20] Based on this guidance, employers who may have felt some leeway based on OSHA's nearly sole focus on healthcare facilities, no longer have reason to feel such comfort, and healthcare facilities are now subject to a recently issued emergency standard.[21] One encouraging point is that OSHA will not consider an injury or illness recordable if it results from a reaction to an employee receiving the vaccine, at least until May 2022 when it will reevaluate its position.[22]

As employers fret over whether they are doing enough to prevent the spread of the virus, will they also consider competing liabilities? Workplace accidents that maim or kill may receive less attention, leading to greater risk. Additionally, measures designed to prevent the spread of the virus, such as face coverings and physical distancing, may contribute to serious workplace injuries. OSHA has recognized that certain side effects of respirator use, such as "interference with communication," "fatigue," and "resistance to breathing" may be problematic.[23] Medical professionals have also recognized challenges. As Dr. William Shaffner, an infectious disease professor at Vanderbilt University, explains, if one "wears masks correctly, it's true that the work of breathing is a little harder."[24] While Dr. Shaffner rejects the notion that wearing masks is dangerous for healthy people,[25] it is clear that not everyone in the aging American workforce is in the best state of health. Additionally, industrial and construction environments are often subject to extreme heat, increasing the potential for heat-related illnesses in employees. OSHA has also recognized the complications of face coverings where employees work in hot environments.[26]

Lack of effective communication often leads to serious workplace injuries, and face coverings and distancing further contribute to the

19. Occupational Safety & Health Admin., Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace (Jan. 29, 2021), https://www.osha.gov/coronavirus/safework [https://perma.cc/9HN9-6Q95].

20. *See id.*

21. *See* Emergency Temporary Standard, 86 Fed. Reg. 32,376 (June 21, 2021) (codified at 29 C.F.R. pt. 1910 subpt. U).

22. Occupational Safety & Health Admin., *supra* note 19.

23. Respiratory Protection, 59 Fed. Reg. 58,884–58,956 (Nov. 15, 1994) (codified at 29 C.F.R. pts. 1910, 1915, 1926).

24. Meghan Holohan, *Do Face Masks with Vents Work? Experts Discuss Popular Questions*, Today (July 24, 2020, 8:26 AM), https://www.today.com/health/experts-debunk-mask-myths-malarkey-t185344 [https://perma.cc/BP3T-6QCE].

25. *Id.* ("Normal, healthy people can do quite energetic things while wearing the sorts of face coverings that we've been talking about in the context of COVID prevention.").

26. Occupational Safety & Health Admin., COVID-19 Guidance on the Use of Cloth Face Coverings While Working Indoors in Hot and Humid Conditions, https://www.osha.gov/sites/default/files/covid-19-cloth-coverings-indoor-heat.pdf [https://perma.cc/3PQ5-ALEE].

chaos in loud industrial environments where employees already must regularly scream at each other. Additionally, management presence in and oversight over safe work practices in factory and field operations will be potentially limited in order to maintain distancing. Effective training often involves practical, hands-on exercises, and OSHA has recognized that "[t]he issues of hands-on training and trainer availability are particularly important when employers choose to use a computer-based training (CBT) approach for health and safety training."[27] Yet, in the context of the pandemic, the agency recommends, as an option for social distancing, the delivery of services remotely, such as by phone, video, or web.[28] While agency guidance addresses training specifically with respect to COVID-19, it does not address how employers should balance the need for social distancing with the need to provide effective training related to other workplace hazards in accordance with competing agency expectations.

Less effective communication, combined with less effective training and distracted employees, could lead to high workers' compensation costs and potential OSHA citations for employers following serious workplace injuries. The task of balancing the need to protect employees from COVID-19 and comply with OSHA's expectations, along with those of states and local health departments, with the need to continue effective safe work practices in traditional areas such as electrical safe-work practices or fall protection, will not be easy.

The way in which employers manage injuries has also been impacted by the novel coronavirus. Employers take a variety of steps to manage injuries with considerations such as injury rate, cost, reduction of liability, and employee well-being. Following a purportedly work-related injury, the employer will often send someone, such as a safety representative, an HR representative, or the employee's supervisor, along with the employee as the employee seeks treatment away from the workplace.[29] The individual accompanying the injured employee will be focused on particular outcomes and information, such as indications that the injury might be feigned or non-work-related, restrictions or days off recommended by the physician, medical treatment recommended by the physician, and indications that the employee is disgruntled or might be inclined to seek legal counsel, while generally

27. Occupational Safety & Health Admin., Standard Interpretation 1999-10-20-1 (Oct. 20, 1999), https://www.osha.gov/laws-regs/standardinterpretations/1999-10-20-1 [https://perma.cc/93G2-GRKA].

28. OCCUPATIONAL SAFETY & HEALTH ADMIN., *supra* note 19.

29. *See* STATE OF CAL. DEP'T OF PERS. ADMIN. WORKERS' COMP. PROGRAMS, THE EMPLOYER'S ROLE: WHEN YOUR EMPLOYEE IS INJURED ON THE JOB 3 (2011), https://www.calhr.ca.gov/Documents/workers-compensation-employers-role.pdf [https://perma.cc/47BU-ATH4] ("It is the employer's responsibility to arrange safe transportation or accompany the injured employee to this first doctor visit.").

providing support for the injured employee during what may be a very stressful or life-altering situation.

The pandemic has changed this approach. First, many hospitals and clinics severely restricted entry to their facilities for a time, even excluding relatives,[30] let alone a representative of the employer, to accompany the employee. Second, it might be possible for the employer's representative to be exposed to and contract the novel coronavirus while accompanying an employee to the physician's office or emergency room. As a result of this risk, some employers have suspended employer transport of employees following work-related injuries.

Beyond the risk to employer representatives lies the risk of an employee herself being exposed to the coronavirus while being treated for a work-related injury. An employer may be liable in workers' compensation if an employee who is injured on the job later contracts the novel coronavirus while undergoing treatment for the work-related injury, as such a scenario is arguably analogous to an employer's liability in workers' compensation for aggravation of a work-related injury that is due to medical malpractice.[31] Additionally, it would be arguably consistent with the more general principle that the employer may be liable in workers' compensation for aggravation of compensable injuries that results from "ordinary incidents of living."[32]

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30. *See Family and Visitor Guidelines*, WAKE FOREST BAPTIST HEALTH, (Nov. 12, 2020), https://web.archive.org/web/20210116150341if_/https://www.wakehealth.edu/Coronavirus/Visitor-Restrictions.

31. *See* Breen v. Caesars Palace, 715 P.2d 1070, 1072 n.2 (Nev. 1986) ("Jurisdictions which have addressed the issue universally hold that an 'employer is liable in compensation for aggravation of a compensable injury by a physician's negligence'" (quoting 2A ARTHUR LARSON, LAW OF WORKMEN'S COMPENSATION § 72.61(c) (1983)).); Fields v. D & R Tank & Equip. Co., 703 P.2d 918, 921 (N.M. Ct. App. 1985) ("It is generally held, without regard to the question of negligence in the selection of physicians, that an injured employee may recover under the workmen's compensation act for a new injury, or an aggravation of his original injury, resulting from medical or surgical treatment of a compensable injury, if there is no intervening cause to break the chain of causation between the new injury or aggravation and the original injury.") (citation omitted); Crocker v. Eastland Woolen Mill, Inc., 392 A.2d 32, 34 n.3 (Me. 1978) ("And, it is equally well established that an employer is liable for the aggravation of a work-related injury which results from negligent medical treatment" (citing Crosby v. Grandview Nursing Home, 290 A.2d 375, 381 (Me. 1972)).); Richardson v. Robbins Lumber, Inc., 379 A.2d 380, 383 (Me. 1977).

32. *See* McDougle v. Dep't of Lab. & Indus., 393 P.2d 631, 634 (Wash. 1964) ("Aggravation of the claimant's condition caused by the ordinary incidents of living—by work which he could be expected to do; by sports or activities in which he could be expected to participate—is compensable because it is attributable to the condition caused by the original injury" (citing Head Drilling Co. v. Indus. Accident Comm'n, 170 P. 157 (Cal. 1918) (arising from dining room table).; Eide v. Whirlpool Seeger Corp., 109 N.W.2d 47 (Minn. 1961) (playing badminton); Hartman v. Fed. Shipbuilding & Dry Dock Co., 78 A.2d 846 (N.J. Cnty. Ct. 1951) (condition worsened by subsequent incidental daily occurrences); Kelly v. Fed. Shipbuilding & Dry Dock Co., 64 A.2d 92 (N.J. 1949) (fell at wedding reception trying to prevent child from falling on a step); Dickerson v. Essex Cnty., 2 A.D.2d 516 (N.Y. 1956) (claimant fell down a flight of stairs while on crutches as a result of prior injury); Makoff Co. v. Indus. Comm'n, 368 P.2d 70 (Utah 1962) (reached for a pair of pants while at home); Harnischfeger Corp. v. Indus. Comm'n, 34 N.W.2d 678

What about employees who simply contract COVID-19 while at work? Historically, employees who contract "community-spread illnesses like a cold or the flu" have struggled to obtain workers' compensation coverage, even if contracted while at work, due to the difficulty in connecting the illness to the workplace.[33] Nonetheless, the novel coronavirus has changed everything, and many states have acted to provide special protections to workers in essential industries, healthcare workers, and/or first responders. For example, the Illinois Workers' Compensation Commission acted early in the pandemic, approving "an emergency rule to help essential workers."[34] The rule created "an automatic presumption that [essential] employees diagnosed with Covid-19 contracted the virus at work."[35] Many other states have since taken action, and, as of December 9, 2020, seventeen states and Puerto Rico had extended workers' compensation coverage for COVID-19.[36] Of those jurisdictions, nine created "a presumption of coverage for various types of workers."[37] New Jersey and Vermont joined Illinois in covering essential workers, "while California and Wyoming cover all workers."[38] Additionally, four states have taken action through the executive branch with respect to first responders and healthcare workers, while the executives of other states acted to extend coverage to "other essential workers like grocery store employees."[39]

In litigating the compensability of COVID where presumptions and special protections have not been created, causation issues will be significant, and, correspondingly, questions relating to whether the employee was put at an increased risk of contracting COVID-19 due to the employment, a general prerequisite to compensation in some states.[40] *Vickers v. Missouri Department of Public Safety*, a Missouri

(Wis. 1948) (walking)); *see also* Crosby v. Grandview Nursing Home, 290 A.2d 375, 382 (Me. 1972) ("Aggravation of claimant's condition caused by ordinary incident's of living is compensable as attributable to the condition caused by the original injury" (citing *McDougle*, 393 P.2d 631).).

33. Josh Cunningham, *Covid-19: Workers' Compensation*, NAT'L CONF. OF STATE LEGISLATURES (NCSL) (Dec. 9, 2020), https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx [https://perma.cc/NGV6-M59D].

34. Mike Miletich, *Illinois Essential Employees Guaranteed Workers' Compensation During COVID-19 Pandemic*, NEWS 3 WSIL (Apr. 14, 2020, 7:28 PM) https://wsiltv.com/2020/04/14/illinois-essential-employees-guaranteed-workers-compensation-during-covid-19-pandemic [https://perma.cc/2JHB-AL28].

35. *Id.*

36. Cunningham, *supra* note 33.

37. *Id.*

38. *Id.*

39. *Id.*

40. *See* Metro. Water Reclamation Dist. of Greater Chicago v. Ill. Workers' Comp. Comm'n, 944 N.E.2d 800, 804 (Ill. App. Ct. 2011) ("Injuries resulting from a neutral risk generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public." (citing Ill. Inst. of Tech. Rsch. Inst. v. Indus. Comm'n, 731 N.E.2d 795, 807 (Ill. App. Ct. 2000)); *see also* Wuesthoff Mem'l Hosp. v. Hurlbert, 548 So.2d 771, 773 (Fla. Dist. Ct.

case, is illustrative of attendant causation issues.[41] In *Vickers*, the employee sought workers' compensation benefits after contracting a contagious bacterium known as *clostridium difficile* (C diff) while cleaning laundry in a veterans' home.[42] *C diff* is "known to colonize in and infect the bowels and colon" and resulted in the employee having part of the colon removed, which necessitated the use of "an external pouch . . . to collect intestinal waste."[43] The ALJ found that the employee failed to demonstrate causation, a decision that was affirmed by the commission, although the commission recognized errors in the ALJ's reasoning.[44] The court of appeals however reversed, finding that the employee had established causation.[45]

In Missouri, "'[o]rdinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease,'" which includes, *inter alia*, communicable diseases.[46] The employee must show that the communicable disease arose out of and in the course of employment, and "the injury must be a natural and reasonable incident

App. 1989) ("The issue of causation presented in this case is really a question of whether the injury is one 'arising out of' the employment. This phrase has been given several interpretations, but most courts have interpreted 'arising out of' to require a showing that the injury was caused by an increased risk to which the claimant, as distinct from the general public, was subjected by his employment. Risks distinctly associated with the employment include 'occupational diseases' which are produced by the particular substances or conditions inherent in the environment of the employment. Such risks fall readily within the increased-risk test and are considered work-connected in all jurisdictions" (citing ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 7).); Newsom v. Ballinger Indep. Sch. Dist., No. 03-07-00022-CV, 2007 WL 2066185, at *2 (Tex. Ct. App. July 17, 2007) (mem.) ("Generally, an employee is not acting in the course and scope of employment while traveling to and from work. This rule is based on the premise that an injury occurring while traveling to and from work is caused by risks and hazards incident to driving on public streets, which has nothing to do with the risks and hazards emanating from a person's employment, and the employer has not increased the employee's risk beyond the risk to the general public" (citing Tex. Gen. Indem. Co. v. Bottom, 365 S.W.2d 350, 353 (Tex. 1963).); Longoria v. Texaco, Inc., 649 S.W.2d 332, 335 (Tex. Ct. App. 1983); London v. Tex. Power & Light Co., 620 S.W.2d 718, 719–20 (Tex. Ct. App.); Am. Nat'l Ins. Co. v. O'Neal, 107 S.W.2d 927, 928 (Tex. Ct. App.); Smith v. Tex. Emp. Ins. Assoc., 105 S.W.2d 192, 193 (Tex. 1937))). *But see* Ducote v. Albert, 521 So.2d 399, 406 n.2 (La. 1988) ("Because a strictly applied 'increased risk' test was obviously too narrow, the courts have also developed other analyses which inquire whether the risk is one associated with the particular employment or whether an award of compensation, regardless of the nature of the risk which caused the injury, is justified because the conditions and obligations of the employment placed the employee in the position where he was injured, such as when the employee is struck by lightning on the job" (citing WES X. MALONE & H. ALSTON JOHNSON, III, WORKER'S COMPENSATION LAW AND PRACTICE, 13 LOUISIANA CIVIL LAW TREATISE § 32, § 149 (2d ed.1980)).).

41. Vickers v. Mo. Dep't of Pub. Safety, 283 S.W.3d 287 (Mo. Ct. App. 2009).
42. *Id.* at 289.
43. *Id*.
44. *Id*. at 290.
45. *Id*. at 295–96.
46. *Id*. at 291 (citing Kent v. Goodyear Tire & Rubber Co., 147 S.W.3d 865, 867 (Mo. Ct. App. 2004); MO. REV. STAT. § 287.067).

of the employment," with "'a causal connection between the nature of the duties or conditions under which the employee is required to perform and the resulting injury.'"[47] Both the ALJ and the commission found that the employee failed to meet her burden of proof on causation as she "failed to demonstrate that she was exposed to and contracted C diff while working at the [h]ome."[48] Arguing at the appellate court, the employee asserted that she had demonstrated that it was "reasonably probable" that she was exposed to and contracted C diff while at work.[49]

The evidence demonstrated that C diff was present at the home (i.e., that "approximately four to six patients" were infected and that the employee collected laundry from all residents at the facility).[50] Additionally, the employee was carrying C diff and exhibited symptoms while working at the home.[51] Often, she laundered items such as "bed pads, bed sheets, pillow cases, blankets, bed spreads, and personal clothing," which were soiled with human excrement.[52] C diff may be contracted when one introduces live C diff bacteria into one's mouth by coming in contact with material that has C-diff–infected feces on it.[53]

The appellate court found that the commission erred when it found C diff to be "an ordinary disease of life to which the general public is exposed outside of employment."[54] Although the ALJ had relied on the employer's medical expert over that of the employee's expert, the ALJ was mistaken about certain facts in the case, which led the court to disregard its credibility findings regarding the employer's expert and, rather, rely on the testimony of the employee's expert that it was probable that she contracted C diff while working.[55]

The novel coronavirus may be a very different animal than C diff, but some causation issues will be analogous. For example,

47. *Id*. (citing Simmons v. Bob Mears Wholesale Florist, 167 S.W.3d 222, 225 (Mo. Ct. App. 2005)).

48. *Id*. at 292.

49. *Id*.

50. *Id*. at 289, 292.

51. *Id*. at 292.

52. *Id*. at 293.

53. *Id*. at 294.

54. *Id*. at 295.

55. *Id*. at 295–96 ("[I]t is important to note that the ALJ discredited Dr. Folk's testimony and explicitly determined that Dr. Fried's testimony was credible. Generally, where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. However, even though the ultimate determination of credibility of witnesses rests with the Commission, the Commission should take into consideration the credibility determination made by the ALJ. Here, the ALJ's credibility determinations were based on erroneous information . . . . Upon evaluating the testimony of the witnesses and medical experts in total, this court finds that the agency's findings, with respect to causation, are contrary to the overwhelming weight of the evidence.") (internal citations and quotation marks omitted).

demonstrating that an employee contracted the novel coronavirus at work will be challenging, but will be less challenging if the employee can show that she spent time in close contact with multiple co-workers who also test positive. Additionally, for jurisdictions in which compensability rests in part on the employment putting the employee at risk that is beyond risk to which the general public is subjected, it may be challenging for the employee. Having said that, where employees from essential industries are required to work outside their home while others stay home, increased risk is arguably present, as some states have recognized. It would behoove employers whose employees can be productive from home to consider this factor in determining whether to mandate the return of employees to the physical work location, especially given the emerging delta variant and lower than desired vaccination rates in some areas of the country.

Generally, an employee who is injured on the job is limited to workers' compensation as an exclusive remedy, at least with respect to the employer.[56] Nonetheless, in some jurisdictions, an employee may be able to successfully sue an employer in tort if the employee can show something beyond ordinary negligence, such as gross negligence. In *Ebaseh-Onofa v. McAllen Hospitals, L.P.*, a Texas case, the employee alleged that she contracted H1N1 while working as a nurse.[57] An autopsy determined that she died of H1N1.[58]

The employee alleged that the hospital employer was grossly negligent in failing to provide the employee with an N95 mask, even though the hospital knew that suspected H1N1-infected patients were in the unit where the employee worked and even though the Centers for Disease Control (CDC) "had issued guidelines recommending that masks be used by healthcare workers caring for such patients."[59] Additionally, the employee alleged that "the [h]ospital failed to comply with CDC guidelines requiring hospitals to monitor healthcare workers caring for such patients for symptoms of respiratory illness."[60]

In defending against the hospital's motion for summary judgment, the employee presented an affidavit from an epidemiologist stating that the employee contracted H1N1 from an infected patient at the

56. *See* TIC Energy & Chem., Inc. v. Martin, 498 S.W.3d 68, 69 (Tex. 2016) ("Recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage . . . against the employer or an . . . employee of the employer." (quoting Tex. Lab. Code § 408.001(a))); *see also Ex parte* Rock Wool Mfg. Co. (Cason v. Miller), 202 So.3d 669, 672, 674–76 (Ala. 2016); Dowis v. Mud Slingers, Inc., 605 S.E.2d 615, 617 (Ga. Ct. App. 2004); Locasto v. City of Chicago, 50 N.E.3d 718, 721 (Ill. App. Ct. 2016); Perez v. Publix Supermarkets, Inc., 673 So. 2d 938, 939–40 (Fla. Dist. Ct. App. 1996).

57. Ebaseh-Onofa v. McAllen Hosps., L.P., No. 13-14-00319-CV, 2015 WL 2452701, at *1 (Tex. Ct. App. May 21, 2015).

58. *Id*.

59. *Id*.

60. *Id*.

hospital, along with medical records of the individual from whom it was alleged that the employee contracted H1N1.[61] The hospital presented an affidavit from an individual who identified the medical records presented by the employee as her own.[62] This individual later testified that she did not have H1N1 while staying in the hospital unit where the employee worked.[63] The hospital asserted that the employee had not presented any evidence that the employee was exposed to H1N1 while working at the hospital, and that, "even assuming the standard of care required her to wear the N95 mask, there [was] no evidence that she did not wear one."[64] The court ultimately accepted the hospital's position and granted it summary judgment, finding that, although the employee's expert testified "that 'it was very likely' that there were unconfirmed cases of H1N1" in the unit where the employee worked, the only evidence that the employee produced to demonstrate causation was the expert's statement that a particular individual was the "source of [the employee's] infection," an assertion that was belied by the individual's statement that she did not have H1N1 at the time that she was in the employee's unit, and that, indeed, she had tested negative for influenza.[65]

Demonstrating causation for purposes of gross negligence is more difficult than it is for purposes of compensability given that the purpose of workers' compensation statutes, which have been called the "great compromise," is to limit an employee's ability to sue in tort in exchange for more liberal coverage for workplace injuries generally.[66] Additionally, in *Ebaseh-Onofa* the case was at the summary judgment

61. *Id*. at *2.
62. *Id*.
63. *Id*.
64. *Id*. at *6.
65. *Id*.
66. *See* Fria v. State Dep't of Lab. & Indus., 105 P.3d 33, 35 (Wash. Ct. App. 2004) ("Washington's Industrial Insurance Act is the result of the 'great compromise' that allows government to restrict an employee's rights to tort recovery for injuries sustained while in the scope of employment in exchange for a system that guarantees compensation for work place injuries regardless of fault."); *see also* Zenith Star Ins. Co. v. Wilkerson, 150 S.W.3d 525, 533 (Tex. Ct. App. 2004) ("'Further, we liberally construe workers' compensation legislation to carry out its evident purpose of compensating injured workers and their dependents'" (quoting Albertson's v. Sinclair, 984 S.W.2d 958, 961 (citing Hines v. Hash, 843 S.W.2d 464, 467 (Tex. 1992)).); Yates v. U.S. Fid. & Guar. Ins. Co., 670 So. 2d 908, 909 (Ala. 1995) ("Alabama's workers' compensation laws are liberally construed by this Court in favor of employees, in order to effectuate the beneficent purposes of the laws" (citing ALA. CODE, § 25-5-11.1 (1975).); Pizza Hut of Am., Inc. v. Hood, 400 S.E.2d 657, 660 (Ga. Ct. App. 1990) (Beasley, J., dissenting) ("This is in keeping with Georgia's policy of liberal construction of workers' compensation coverage" (citing Gulf Am., Etc., Co. v. Taylor, 257 S.E.2d 44 (Ga. Ct. App. 1979).); John v. GDG Servs., Inc., 424 So.2d 114, 115 (Fla. Dist. Ct. App. 1982) ("This interpretation is consistent with the rules requiring liberal construction of the workers' compensation provisions."); Nat'l Lock Hardware v. Indus. Comm'n, 520 N.E.2d 43, 45 (Ill. App. Ct. 1987) ("The Workers' Compensation Act is remedial in nature and should be liberally construed to accomplish its purposes and objectives" (citing Pathfinder Co. v. Indus. Comm'n, 343 N.E.2d 913 (Ill. 1976).).

stage, at which point summary judgment is not warranted under Texas law if the employee is able to produce enough evidence to "support[ ] a finding . . . that would enable reasonable, fair-minded persons to differ in their conclusions," such that "more than a scintilla of evidence exists."[67] In other words, ultimately prevailing by meeting the burden of persuasion would be more challenging in pandemic cases involving claims for gross negligence than the evidentiary burden the employee faced in that case to merely survive summary judgment.

II Workers' Compensation and Injury Rates

A. Restrictions and Lost Time

While the pandemic wreaks havoc, other challenges related to workplace injuries are not going away. Following a workplace injury requiring that the employee receive medical treatment at a local clinic, the treating physician will often impose restrictions on the employee's activities, if the physician allows the employee to return to work at all. For example, the physician might limit the employee to lifting no more than ten pounds. If the employee's job is physical and frequently involves lifting materials, such a restriction could virtually eliminate the value that the employee contributes. From a safety record standpoint, this outcome would not be desirable, as the case would likely be recordable, increasing the employer's recordable incident rate (RIR).

Some companies have recognized the RIR as a lackluster metric given that focusing on preventing injuries such as relatively minor lacerations requiring a stitch, or a foreign body in the eye, for which a physician prescribes a preventative antibiotic, both of which would be recordable, detracts from real opportunities to work toward eliminating hazards that might result in fatalities or life-altering injuries.[68] These companies may also recognize the limitations of lost-time accident and DART rates, given that a physician may restrict an employee's activities or even take an employee out of work for relatively minor injuries. In response to such recognition, companies have created their own internal metrics to drive progress in safety, while continuing to maintain an OSHA log of injuries in accordance with applicable regulations.[69] These metrics may involve consideration of the potential severity of an injury or incident as opposed to simply considering

67. *Ebaseh-Onofa*, 2015 WL 2452701, at *5 (quoting Ciquero v. Lara, 455 S.W.3d 744, 747 (Tex. Ct. App. 2015) (internal quotation marks and citation omitted)).

68. Interview with Jeremy Presnal, *supra* note 14.

69. See *Why the OSHA Recordable Rate Is a Bad Metric*, OH&S Occupational Health & Safety (June 29, 2017), https://ohsonline.com/Blogs/The-OHS-Wire/2017/06/Why-the-OSHA-Recordable-Rate-is-a-Bad-Metric.aspx [perma.cc/DU4G-Z7B4]; Fred Hosier, *Injury Rates No Longer Cut It: What's the New Safety Metric*, Safety NewsAlert (Oct. 11, 2010), https://www.safetynewsalert.com/injury-rates-no-longer-cut-it-whats-the-new-safety-metric [perma.cc/A2A3-FSUU]; *see also* Interview with Jeremy Presnal, *supra* note 14.

whether some harm occurred, or whether the case met OSHA's criteria for recordability. In such companies, a safety manager's case management interests will go beyond the RIR, lost-time accident rate, and DART rate and may include taking steps to avoid certain milestones that implicate the internal metric.

To avoid having to record a case or implicating an internal safety metric, a safety- department representative might approach the physician, advocating that the physician not place any work restrictions on the employee. If the physician agrees, the outcome would be positive with regard to the employer's safety record but could create more complications from a workers' compensation standpoint.

First, in any workers' compensation case involving restrictions, the employer must choose whether to accommodate the restrictions. Put differently, and subject to legal requirements to be discussed later in this article, the employer may choose to accommodate and continue paying the employee her full wages, or the employer may choose to not accommodate, in which case the employee would not continue working but would receive a percentage of her normal wages from the workers' compensation insurance company. Whether to accommodate a restriction may be a decision for human resources, the employee's manager, the safety department, or any combination of the aforementioned. Human resources and the employee's manager may be reticent to accommodate restrictions and pay full wages if the employee's contribution will be limited because the employee was placed on restricted duty. In such an instance, the employer will have to decide which is more important: the benefit to the company's lost-time accident or DART safety record, which would be obtained by accommodating, or avoiding the cost of paying an unproductive employee.

Another consideration is to what extent does an employer increase its potential liability by having an employee at work who, while not subject to work restrictions, may arguably need restrictions to prevent a worsening of the injury. In other words, if the physician acquiesces to the employer's request to not place restrictions, in order to support a better RIR, and the employee's injury is actually worsened as a result of returning to work, the employer's liability is potentially increased.[70] For example, if an employee is treated for a shoulder strain, but the physician chooses not to place the employee on work restrictions at the behest of the employer, the employee may return to work, causing his condition to deteriorate. Such deterioration might ultimately require

70. *See* P&O Ports Tex., Inc. v. Dir., Off. of Workers' Comp. Programs, No. 11-60298, 2011 WL 5042213, at (5th Cir. Oct. 25, 2011) ("'[W]here an employment injury worsens or combines with a preexisting impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable'" (quoting Strachan Shipping Co. v. Nash, 782 F.2d 513, 517 (5th Cir. 1986)).); *In re* Leafdahl, 54 Van Natta 1796 (Or. Workers' Comp. Bd. 2002).

surgery, increasing costs, and potential liability for the employer. While the employer may have intended for the employee to take it easy, a demanding supervisor might push a recovering employee too hard. Additionally, some employees tend to push through their own discomfort.

It is noteworthy that, while restrictions unilaterally put in place by the employer make a case recordable, OSHA has recognized a limited exception that allows an employer to restrict an employee's work activities and not record the case if the injury is musculoskeletal in nature, if it only resulted in minor discomfort, and if the employee was seen by a physician.[71] If an employer chooses to self-restrict when the physician does not restrict, the employee would need to be closely monitored to prevent a worsening situation. The practical result may be that the employee comes to work and engages in sedentary or other less-intense activities until she fully recovers. On the other hand, if the employee is sent to the regular work area, the employee's supervisor may not adequately ensure that the employee avoids activities that would lead to deterioration of the employee's condition, possibly impeding or slowing recovery, and potentially leading to further treatment like surgery and long-term issues that might culminate in a large settlement payment. Also, a plant or project manager, whose annual bonus likely depends in part on safety performance, would be quite unhappy to learn that a case that initially seemed innocuous has ripened into something that will tarnish the facility or project safety record.

If, following a work-related injury, the treating physician puts an employee out of work altogether until recovery or improvement, the case will be an OSHA-recordable as well as a lost-time accident.[72] Lost time, or a particular number of days of lost time, may trigger an employer's safety metric that is more progressive than the RIR, negatively reflecting on the employer's safety record. If the employer is able to convince the physician to let the employee return on light duty, the outcome may be more preferable in the sense that the case would

71. N.J. State AFL-CIO, OSHA Recordkeeping Questions and Answers 14 (2010), https://www.osha.gov/sites/default/files/2018-12/fy10_sh-20856-10_Recordkeeping_Questions_w_Answers.pdf [perma.cc/28X4-JGFP] ("38. Does the employer have to record a work-related injury and illness, if an employee experiences minor musculoskeletal discomfort, the health care professional determines that the employee is fully able to perform all of his or her routine job functions, but the employer assigns a work restriction to the injured employee? . . . [A] case would not be recorded . . . if 1) the employee experiences minor musculoskeletal discomfort, and 2) a health care professional determines that the employee is fully able to perform all of his or her routine job functions, and 3) the employer assigns a work restriction to that employee for the purpose of preventing a more serious condition from developing . . . .").

72. A lost-time accident is an injury that results in days away from work. *See* 29 C.F.R. § 1904.7(b)(3) (2020) ("When an injury or illness involves one or more days away from work, you must record the injury or illness on the OSHA 300 Log with a check mark in the space for cases involving days away and an entry of the number of calendar days away from work in the number of days column.").

not be a lost-time accident and might not trigger the internal company metric. It would still likely be recordable due to restrictions. In any event, the employer will again have to determine what is most important: preserving its safety record or avoiding the cost of paying full wages to an employee who is not adding value along with a possible worsening of the injury.

B. Second Opinions

Commonly, the employer will seek a second medical opinion regarding work-relatedness, restrictions, and/or medical treatment. Seeking a second opinion could be in the interest of the employer's safety record, for compensability purposes, or both. The criteria for recordability and compensability are different,[73] yet information obtained from a second opinion relating to the former may be useful to the latter, and vice versa.

While OSHA does not restrict an employer with regard to which physician is chosen for a second opinion for purposes of recordkeeping issues, about thirty states place the choice of physician or the option to switch to an alternate physician in the hands of the injured worker for purposes of workers' compensation, and some require consent of the employee or a decision of the workers' compensation commission in order to override the employee's initial choice.[74] One such state is

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73. *See* 66 Fed. Reg. 5916, 5934 (Jan. 19, 2001), https://www.govinfo.gov/content/pkg/FR-2001-01-19/pdf/01-725.pdf ("[R]ecording a case does not indicate fault, negligence, or compensability."); *see also* OSHA INSTRUCTION, CPL 02-00-135, RECORDKEEPING POLICIES AND PROCEDURES MANUAL ch. 5.II (Dec. 30, 2004), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=directives&p_id=3205 [perma.cc/XTW4-DU9D] ("*Question 0-2.* What is the effect of workers' compensation reports on the OSHA records? The purpose section of the rule includes a note to make it clear that recording an injury or illness neither affects a person's entitlement to workers' compensation nor proves a violation of an OSHA rule. The rules for compensability under workers' compensation differ from state to state and do not have any effect on whether or not a case needs to be recorded on the OSHA 300 Log. Many cases will be OSHA recordable and compensable under workers' compensation. However, some cases will be compensable but not OSHA recordable, and some cases will be OSHA recordable but not compensable under workers' compensation.").

74. *See* TEX. DEP'T OF INS. WORKERS' COMP. RSCH. GRP., COMPARISON OF STATE WORKERS' COMPENSATION SYSTEMS 7 (2004), https://senate.texas.gov/cmtes/78/c780/comprswcompn0325.pdf [https://perma.cc/G4VR-Z5BM] ("Texas is currently one of 30 states that allow injured workers to choose their initial medical provider . . . ."); *see also* GA. CODE ANN. § 34-9-201(c)(1) (2020); Pruitt v. Se. Pers. Leasing Inc., 33 So.3d 112, 114 (Fla. Dist. Ct. App. 2010) ("The statute affords the employee "an absolute right to a one-time change in treating physician." The statute does not, however, give the employee an absolute right to select the alternate physician. Only if the E/C does not timely authorize an alternate physician does the statute give the employee the *option* of selecting the physician. If the employee fails to exercise that option, he or she may waive the right to select the alternate physician" (citations omitted).). *But see* Wash. Twp. Fire v. Beltway Surgery Ctr., 911 N.E.2d 590, 597 (Ind. Ct. App. 2009) ("[I]n Indiana, the employer or the employer's insurer chooses the treating physician; the employee does not" (citing Young v. Marling, 900 N.E.2d 30, 36 (Ind. Ct. App. 2009).).

Georgia,[75] which also allows the employee to switch to another physician on the panel without employer consent.[76] Apart from the employee's right to make one change in physician, other "changes of physician or treatment are made only by agreement of the parties or by order of the Board [of Workers' Compensation]."[77]

If an employee in a state like Georgia suffers a work-related injury, chooses a physician, and then the physician puts the employee out of work, the employer may be concerned about the impact of that decision on its lost-time accident rate and/or another internal safety metric. The employer could invite the employee to agree to a change in physician. If the employee agrees, and the second physician permits the employee to return to work, the employer could then require the employee to return,[78] and any days beyond that point, barring any changes in direction by the new treating physician, would not count as lost time.

C. Having Your Cake and Eating It Too

The issue of second opinions raises another question: might an employer follow one opinion for purposes of workers' compensation and a separate opinion for purposes of recordkeeping to attain the preferred recordkeeping outcome?[79] If dealing with an internal company safety

75. Ga. Code Ann. § 34-9-201(c)(1) ("[T]he employer shall . . . take all reasonable measures to ensure that employees . . . [u]nderstand the employees' right to select a physician" [from the panel or managed care organization procedures].); *id.* § 34-9-201(a) ("An employee may accept the services of a physician selected by the employer from the panel or may select another physician from the panel . . . . The employee may make one change from one physician to another on the same panel without prior authorization of the board.").

76. *Id.* § 34-9-201(b)(1).

77. Rules & Regs. of the State Bd. of Workers' Comp. R. 200(b)(1) (Ga. 2019); *see also* Ga. Code Ann. § 34-9-201.

78. Rules & Regs. of the State Bd. of Workers' Comp. R. 200 (b)(1) ("(1) Changes in treatment. Except as provided in subsection (b) of [Georgia Code Annotated] § 34-9-201, changes of physician or treatment are made only by agreement of the parties or by order of the Board. If there has been no hearing requested, a party requesting a change shall make a good faith effort to reach agreement on the change before requesting an order from the Board.").

79. A Georgia employer might take the position that obtaining an opinion from a second physician permitting the employee to return, obtaining the employee's consent, and continuing treatment with the original, treating physician would constitute a permissible agreement to change treatment, without a change in authorized treating physician. Georgia's Rule 200 provides that "changes of physician or treatment are made only by agreement of the parties or by order of the Board." *Id.* A plain reading of this rule would result in the parties being able to agree to change physician *or* treatment, with the terms *physician* and *treatment* not being mutually exclusive or mutually necessary. However, such an interpretation would produce an absurd result and is belied by other regulatory provisions. For example, Rule 61(b)(28) provides that "[p]arties who agree on a change of physician/additional treatment shall file a properly executed Form WC-200a with the Board." *Id.* R. 61(b)(28). The forward slash after "physician," along with the words "additional treatment," indicate that anticipated agreements regarding treatment would indeed include something *additional*, specifically, something that adds cost, as opposed to changing work restrictions or return-to-work date. Additionally, it would be an absurd result to permit employers to circumvent the system which provides

metric, the employer may theoretically determine its own system of rules relating to medical opinions and recordkeeping, although such an approach might create internal confusion if it differs from OSHA rules. In any event, the employer must simultaneously follow OSHA's recordkeeping regulations.

OSHA permits an employer to obtain two or more opinions from physicians and then choose to follow the opinion it finds most authoritative with regard to whether an employee may return to work and/or work without restrictions.[80] If the employer chooses to follow an opinion that allows the employee to return to work without restrictions for recordkeeping purposes, may the employer subsequently tell the employee, for purposes of workers' compensation, that it has chosen to follow another opinion, placing work restrictions or taking the employee out of work altogether, and still not record the case? In other words, may the employer choose one opinion for purposes of workers' compensation and another for recordkeeping, the former of which would dictate recording the case, and yet choose to not record?

The answer is "no." In effect, under such a scenario, the employer would be implementing its own restrictions or simply putting the employee out of work. OSHA provides that an employee's work is restricted if the restrictions are placed by a physician *or by the employer*.[81] Additionally, if at least one physician has taken the employee out of work altogether, the case would likely not fall under the earlier-mentioned exception permitting an employer to restrict and yet not record. Finally, if the employer implements the restrictions or tells the employee to stay home, arguably it is *de facto* choosing the opinion of the physician that recommended the restrictions.

The result might be different when it comes to work-relatedness, but largely to no avail from a recordkeeping standpoint. A case is work-related "if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness," and "[w]ork-relatedness is presumed for

for employee choice of physician, by overriding the authorized treating physician's directive with regard to days away from work, only to have the employee return to the originally authorized treating physician for continuing care. Construing Rule 200 to allow the board of workers' compensation to change the treatment of an employee without such change being recommended by a newly authorized treating physician would also produce an absurd result, as most board members are likely attorneys rather than medical doctors.

80. 29 C.F.R. § 1904.7(b)(4)(viii) (2020); *see also* Occupational Safety & Health Admin., Standard Interpretation Letter 2005-11-15-0 (Nov. 15, 2005), https://www.osha.gov/laws-regs/standardinterpretations/2005-11-15-0 [perma.cc/WU5Q-MYZQ].

81. 29 C.F.R. § 1904.7(b)(4)(i). *But see* N.J. STATE AFL-CIO, *supra* note 69, at 14 (providing that a case would not be recordable if "1) the employee experiences minor musculoskeletal discomfort, and 2) a health care professional determines that the employee is fully able to perform all of his or her routine job functions, and 3) the employer assigns a work restriction to that employee for the purpose of preventing a more serious condition from developing").

injuries and illnesses resulting from events or exposures occurring in the work environment," unless an exception specified in the standard is applicable.[82] While this standard might appear quite similar to the workers' compensation standard for compensability, OSHA has arduously labored to distinguish the former from the latter.[83]

While a medical opinion may be necessary or desired in determining whether an injury arose out of the employment, OSHA anticipates that it would rarely be necessary in determining work-relatedness for purposes of recordkeeping.[84] Perhaps more significant is the fact that "the determination of work-relatedness ultimately rests with the employer,"[85] so, even if a physician opines that a case is not work-related for purposes of recordkeeping, with the exception of hearing loss cases,[86] the employer would need to verify or at least evaluate that the physician's opinion is correct with respect to OSHA's criteria for

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82. 29 C.F.R. § 1904.5(a).

83. *E.g.*, Occupational Safety & Health Admin., OSHA Recordkeeping Handbook 2 (2005), https://www.wisconsin.edu/workers-compensation/download/frequently_used_guidance/OSHA%201904%20Recordkeeping%20pub3245rev.pdf ("The rules for compensability under workers' compensation differ from state to state and do not have any effect on whether or not a case needs to be recorded on the OSHA 300 Log.").

84. *See* 66 Fed. Reg. 5946–5962 (Jan. 19, 2001), https://www.govinfo.gov/content/pkg/FR-2001-01-19/pdf/01-725.pdf.

> OSHA has concluded that requiring employers to rely on a health care professional for the determination of the work-relatedness of occupational injuries and illnesses would be burdensome, impractical, and unnecessary. Small employers, in particular, would be burdened by such a provision. Further, if the professional is not familiar with the injured worker's job duties and work environment, he or she will not have sufficient information to make a decision about the work-relatedness of the case. OSHA also does not agree that health care professional involvement is necessary in the overwhelming majority of cases. Employers have been making work-relatedness determinations for more than 20 years and have performed this responsibility well in that time. This does not mean that employers may not, if they choose, seek the advice of a physician or other licensed health care professional to help them understand the link between workplace factors and injuries and illnesses in particular cases; it simply means that OSHA does not believe that most employers will need to avail themselves of the services of such a professional in most cases.
>
> Accordingly, OSHA has concluded that the determination of work-relatedness is best made by the employer, as it has been in the past. Employers are in the best position to obtain the information, both from the employee and the workplace, that is necessary to make this determination. Although expert advice may occasionally be sought by employers in particularly complex cases, the final rule provides that the determination of work-relatedness ultimately rests with the employer.

Id. at 5950.

85. *Id*. at 5950.

86. *See* 29 C.F.R. § 1904.10(b)(6) ("*If a physician or other licensed health care professional determines the hearing loss is not work-related, do I still need to record the case?* If a physician or other licensed health care professional determines, following the rules set out in §1904.5, that the hearing loss is not work-related or that occupational noise exposure did not significantly aggravate the hearing loss, you do not have to consider the case work-related or record the case on the OSHA 300 Log.") Note that, even with regard

work-relatedness. Given OSHA's presumption of work-relatedness for injuries and illnesses "resulting from events or exposures occurring in the work environment,"[87] it would be possible but rare that a compensable injury is not also work-related for recordkeeping purposes, although the converse is not necessarily true.

III. Equal Employment Opportunity Implications

Equal employment opportunity issues abound in the context of an employer's injury management decisions. Under Title VII, the employer may not discriminate "on the basis of race, color, religion, sex, or national origin."[88] Title VII, which "prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact'),"[89] may be implicated in the decision of whether to accommodate an employee's temporary work restrictions following a work-related injury.

In *Young v. United Parcel Service, Inc.*, the Supreme Court considered an action that was brought against an employer under Title VII and the Pregnancy Discrimination Act after the employer did not permit a pregnant employee to continue working due to a lifting restriction.[90] The employee introduced evidence that the employer had accommodated employees with work-related injuries, disabled employees, and employees who had lost Department of Transportation (DOT) certifications.[91] Not at issue with the court was whether, generally, the decision to not accommodate a temporary work restriction could, in the first place, constitute impermissible discrimination under Title VII and the Pregnancy Discrimination Act.[92] By implication,[93] the failure to accommodate a temporary work restriction on the basis of race, color, religion, sex, or national origin may constitute impermissible discrimination and subject the employer to liability.[94] Also, despite the fact

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to hearing loss, the employer should verify that the physician followed OSHA rules in making her determination.

87. *Id.* § 1904.5(a).

88. Ricci v. Destefano, 557 U.S. 557, 578 (2009) (citing 42 U.S.C. § 2000e-2(a)).

89. *Id.* at 577.

90. Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1344 (2015).

91. *Id*. at 1347.

92. *Id.* at 1345.

93. Of course, a frequent occurrence is that legitimate issues are not before a court because they were previously resolved or because a party failed to raise the issue, but, typically, the court will note that at the outset of its opinion or analysis, or at some point therein.

94. The Court noted that amendments to the ADA, enacted after that particular case, could change the outcome of a similar case with regard to whether an employer must accommodate lifting restrictions; however, the court did not opine on the legitimacy of the amendments or the EEOC's interpretation of said amendments. *Id.* at 1348 ("We note that statutory changes made after the time of Young's pregnancy may limit the

that this case involved a work restriction not related to a work-related injury, it is evident that failure to accommodate a restriction put in place following a work-related injury could similarly constitute impermissible discrimination if based on membership in a protected class.

Given the Title VII and Pregnancy Discrimination Act framework, documentation regarding whether to accommodate work restrictions following an injury is vitally important. The court in *Young* described the framework for these statutes as follows. When a plaintiff makes an initial case for discrimination, the employer has an "opportunity to articulate some legitimate, non-discriminatory reason for treating employees outside the protected class better than employees within the protected class."[95] "If the employer articulates such a reason, the plaintiff then has an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the . . . [the employer] were not its true reasons, but were a pretext for discrimination."[96]

To meet opportunities presented by this framework, an employer should document its decisions to accommodate or not accommodate restrictions, and, in doing so, should be cognizant of the rules of evidence that will dictate whether such documentation will be admissible later on to support the employer's defense. While a written note or report relating to why a restriction was or was not accommodated would generally be inadmissible in a judicial proceeding under the hearsay rule,[97] such a document could be admitted under the "records of a regularly conducted activity" exception to the rule if it satisfies certain elements, among which are requirements that the record be made near the time of the decision, the record is retained, and making the record is a regular practice.[98] While many discrimination cases may

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future significance of our interpretation of the Act. In 2008, Congress expanded the definition of 'disability' under the ADA to make clear that 'physical or mental impairment[s] that substantially limi[t]' an individual's ability to lift, stand, or bend are ADA-covered disabilities. As interpreted by the EEOC, the new statutory definition requires employers to accommodate employees whose temporary lifting restrictions originate off the job. We express no view on these statutory and regulatory changes") (citations omitted).); *see* 29 C.F.R. § 1630.2(j)(1)(ix) (2020) ("The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.").

95. *Young*, 135 S. Ct. at 1345 (internal quotation marks and citations omitted).

96. *Id*. (internal quotation marks and citations omitted).

97. *See* FED. R. EVID. 802 (noting that "Hearsay is not admissible unless . . . "); FED. R. EVID. 801(a)–(c).

98. *See* FED. R. EVID. 803(6). ("(A) the record was made at or near the time by—or from information transmitted by—someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness."). It should be mentioned that other hearsay rule exceptions, like the

never be litigated, requiring the aforementioned documentation that meets this exception to the hearsay rule could place an employer on more solid ground initially with the Equal Employment Opportunity Commission (EEOC) or, later, when negotiating with an employee's attorney. Finally, a discussion with an injured employee attendant to whether the employer will accommodate restrictions is not the time for loquaciousness on the part of the HR representative, but, rather, it would behoove the HR representative to show compassion but stay laconic, not giving the employee the opportunity to use his words in future litigation.

The need for thoughtful consideration related to discrimination issues is further enhanced by the pandemic. The pandemic's disproportionate impact on minorities has been widely reported,[99] and employers should be cognizant of how certain decisions are perceived related to, for example, which employees are permitted to work from home. Employees who are minorities may "be less likely to be able to work remotely and as a result face greater exposure to the virus."[100] Even where decisions may not amount to discrimination, perception matters, especially as employers continue to recognize the value of a diverse workforce and strive for all employees to feel included.

IV. ADA Implications of Workers' Compensation Decisions

Apart from Title VII, other federal statutes could be implicated by an employer's decision to not accommodate an employee's restrictions following a work-related injury, such as the Americans with Disabilities Act (ADA), [101] the Rehabilitation Act,[102] and the Age Discrimination in Employment Act of 1967 (ADEA).[103] Additionally, states have their

present sense impression, might apply to notes relating to accommodation decisions; however, the business records exception would be the best guide for employers in working to ensure their documentation is admissible. Another concern that could arise would be double or triple hearsay within documentation regarding the decision to accommodate or not. An exception to the hearsay rule would need to apply in order to admit each statement within the documentation that constitutes hearsay, in and of itself. Additionally, while some statements within a generally admissible document might not be admissible as substantive evidence under an exception to the hearsay rule, they may be admissible in order to impeach a witness. FED. R. EVID. 801(d)(1)(A).

99. *See COVID-19 Racial and Ethnic Health Disparities*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 10, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/index.html [https://perma.cc/2MBJ-SWSE]; Hannah Cohen, *The Disproportionate Effects of COVID-19 on Racial & Ethnic Minorities*, RTI INT'L (June 19, 2020), https://www.rti.org/insights/covid-19-effects-on-minorities [https://perma.cc/Q9GW-23KL].

100. Kevin M. Kniffin et al., *COVID-19 and the Workplace: Implications, Issues, and Insights for Future Research and Action* (Harv. Bus. Sch. Working Paper 20-127, 2020), https://hbs.edu/ris/Publication%20Files/20-127_6164cbfd-37a2-489e-8bd2-c252cc7abb87.pdf [https://perma.cc/7H6H-9B6E].

101. 42 U.S.C. §§ 12101–12213.

102. 29 U.S.C. §§ 701–794g.

103. 29 U.S.C. §§ 621–633a.

own anti-discrimination statutes that run parallel to their federal counterparts, and may go further, providing additional protections for employees.

The ADA prohibits employers from discriminating against employees on account of qualifying disabilities.[104] "An individual is disabled if she has (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of such an impairment; or (3) is regarded as having such an impairment."[105] Discrimination on the basis of actually having an impairment includes "not making reasonable accommodations to the known . . . limitations of an otherwise qualified individual . . . ."[106] A temporary injury, including one suffered at work, could well constitute a disability for purposes of the ADA.[107] Applicable regulations specifically state that "[a]n impairment that lasts fewer than six months can be substantially limiting,"[108] rendering an individual "disabled."

Considering that temporary restrictions due to a workplace injury could render an employee disabled for purposes of the ADA, perhaps employers should start their consideration of whether to accommodate an employee's temporary restrictions following a workplace injury with a sort of heightened awareness of ADA requirements. But would such an approach place the employer in the position of "regarding" the employee as disabled and in possible violation of the ADA? The answer is not abundantly clear. On the one hand, EEOC regulations illuminate that the statute has excepted impairments that are "transitory and minor" from the "regarded as" prong of ADA protection.[109] On the other hand, the restriction or impairment would need to be both "transitory" and "minor" to meet the exception. In other words, an employee could be placed on post-injury restrictions that are transitory, yet not minor, and, if the employer then regarded the employee as disabled

104. Cleveland v. Pol'y Mgmt. Sys. Corp., 526 U.S. 795, 801 (1999) (quoting 42 U.S.C. § 12112(a)).

105. Winnie v. Infectious Disease Assocs., P.A., 750 F. App'x 954, 960 (11th Cir. 2018) (citing 42 U.S.C. § 12102(1)).

106. 42 U.S.C. § 12112(b)(5)(A).

107. *See* Summers v. Altarum Inst., Corp., 740 F.3d 325, 329–30 (4th Cir. 2014) ("In dismissing Summers's wrongful-discharge claim, the district court held that, even though Summers had suffered a very serious injury, this injury did not constitute a disability because it was temporary and expected to heal within a year. That holding presented an entirely reasonable interpretation of *Toyota* and its progeny. But, in 2008, Congress expressly abrogated *Toyota* by amending the ADA.").

108. *Id*. (citing 29 C.F.R. § 1630.2(j)(1)(ix) (2013)).

109. *See* 29 C.F.R. § 1630(j)(1)(ix) (2020) ("The six-month 'transitory' part of the 'transitory and minor' exception to 'regarded as' coverage in § 1630.15(f) does not apply to the definition of 'disability' under paragraphs (g)(1)(i) (the 'actual disability' prong) or (g)(1)(ii) (the 'record of' prong) of this section. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.").

and discriminated against the employee on that basis, it would violate the ADA.[110]

Nonetheless, even if the employer temporarily regards the employee as disabled, absent some other adverse action, the employer would not violate the ADA by not accommodating the temporary restrictions under the "regarded as" prong.[111] However, if the employer receives a doctor's note from the employee listing the restrictions, such a note constitutes a request for accommodation.[112] Therefore, if the restrictions demonstrate an impairment that would constitute an actual disability under the first prong of the ADA definition, then the employer must provide a reasonable accommodation unless doing so would cause an undue hardship.

Permanent restrictions placed on an employee must be distinguished from temporary restrictions. The moment that the employer determines that the employee cannot do his job because of permanent restrictions, the employer is regarding the employee as disabled, and, if the employee has presented the doctor's note with said restrictions, the employee has requested an accommodation, bringing the first prong of the ADA into play.

A. Fitness-for-Duty Exams

Following a workplace injury, a workers' compensation adjustor may express concerns to an employer's HR or safety manager that an employee's condition may be worse than what has been diagnosed up to that point. A supervisor may express concern regarding an employee's ability to do the job. For safety or other reasons, an employer may refer an employee for a fitness-for-duty exam. The ADA permits referral for a fitness-for-duty exam if the exam is job-related and consistent with business necessity, [113] that is, the employer has "a reasonable belief"

110. But see Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL'Y 384, 408–09 (2019) for examples of decisions disregarding the "minor" portion of the transitory and minor exception.

111. 42 U.S.C. § 12201(h) ("A covered entity . . . need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability . . . solely under [the regarded as prong].").

112. EQUAL EMP. OPPORTUNITY COMM'N, NO. EEOC-CVG-2--3-1, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE ADA (Oct. 17, 2002), https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting [https://perma.cc/K6NK-PS4Q] (scroll down to Example A under question number 8 under "Requesting Reasonable Accommodation" header) (A doctor's note stating that an employee may return to work on light duty "constitutes a request for reasonable accommodation.").

113. *See* 42 U.S.C. § 12112(b)(6) (Unlawful discrimination includes, *inter alia*, "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.").

that "an employee's ability to perform essential job functions will be impaired by a medical condition" or that "an employee will pose a direct threat due to a medical condition."[114]

In *Mesa v. City of San Antonio*, the employee alleged, *inter alia*, that the employer had regarded him as disabled because it had not permitted him to return to work and told him to undergo a fitness-for-duty exam.[115] The court denied the employer's motion to dismiss on the basis that the employee had "pled that he was not permitted to return to work, that he needed to obtain a Fitness for Duty form, and that his employer perceived him as disabled," and that the employee had not asserted that the "[d]efendant perceived him to have a minor or transitory impairment."[116] The court noted that under ADA revisions (the Americans with Disabilities Act Amendments Act of 2008 (ADAAA)), it is sufficient to show that the employer "perceive[ed] that the individual has a physical or mental impairment," and the employee need not show "that the employer regarded him or her as being substantially limited in a major life activity."[117]

However, in *Johnson v. University Hospitals Physician Services*,[118] an unpublished case decided in 2015, the Sixth Circuit, relying on its previous decision in *Sullivan v. River Valley School District*, which was decided well before the 2008 amendments to the ADA, determined that an "employer's perception that health problems are adversely affecting an employee's job performance is not tantamount to regarding that employee as disabled."[119] The court stated that an "employer's request that an employee undergo a medical exam 'may signal that an employee's job performance is suffering, but that cannot itself prove a perception of a disability because it [alone] does not prove that the employer perceives the employee to have an impairment that substantially limits one or more of the employee's major life activities.'"[120]

The court's reasoning that "deteriorating [employee] performance may be linked to motivation or other reasons unrelated to disability,"

114. Equal Emp. Opportunity Comm'n, EEOC-CVG-2000-4, Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) (July 26, 2000), https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees #5 [https://perma.cc/E28L-VDNJ] (scroll down to A.5 under "Job-Related and Consistent with Business Necessity" heading).

115. Mesa v. City of San Antonio, No. SA-17-CA-654-XR, 2017 WL 5924263, at *4 (W.D. Tex. Nov. 29, 2017).

116. *Id.* at *6.

117. *Id.* at *3 (citing Dube v. Tex. Health & Human Servs. Comm'n, No. SA-11-CV-354-XR, 2012 WL 2397566, at *3 (W.D. Tex. June 25, 2012)); *see also* Alexander v. Wash. Metro. Area Transit Auth., 826 F.3d 544, 547–48 (D.C. Cir. 2016) (citing 29 C.F.R. § 1630.2(*l*)(2)(2015)).

118. Johnson v. Univ. Hosp. Physician Servs., 617 F. App'x 487, 491 (6th Cir. 2015).

119. *Id.* (quoting Sullivan v. River Valley Sch. Dist., 197 F.3d 804, 810 (6th Cir. 1999)).

120. *Id.* (quoting *Sullivan*, 197 F.3d at 811).

is valid to the extent that the employer may be using the exam to rule out a disability rather than because it regards the employee as disabled.[121] Nonetheless, the court erroneously seemed to require that the employee show that the employer not only regarded the employee as having an impairment, but that the employer also regarded the impairment as substantially limiting to a major life activity.[122] Apparently the *Johnson* court is not alone in its failure to recognize how the ADA amendments should have changed its approach to this issue, as several other post-amendment decisions have been noted for similar failings.[123]

The best approach for courts with regard to fitness-for-duty exams and perceived-as claims would be to consider referrals for such exams as evidence, but insufficient as the sole evidence, on the element of regarded-as. It would also seem that requiring the employee to be out of work until obtaining exam results would reasonably accompany the request permitted by statute and should not be sufficient, in combination with the request, to satisfy the regarded-as element, assuming the employee has not set forth facts that, if true, would establish that the exam was not job-related or consistent with business necessity.

Any approach construing an employer's legitimate request that an employee undergo a fitness-for-duty exam as adequate evidence on the element of regarded-as would produce an absurd result. It would be absurd if an employer could exercise a statutory right only if also willing to prove the first element of a regarded-as claim for the employee, even though that appears to be the result in *Mesa*. It should also be noted that, to state a claim, the employee would also have to allege facts that if true would demonstrate that an adverse action was taken. If the results of the exam are that the employee can continue working, and the employee does continue working, then there is no regarded-as claim because there has been no adverse employment action.

A related issue is whether the employee is paid while off awaiting the results of the exam or while attempting to schedule the exam. It would behoove employers to pay employees during this period because doing otherwise might constitute an adverse action. In fact, if an employer puts an employee out of work without pay pending a

121. *Id.* (quoting *Sullivan*, 197 F.3d at 811); *see* Barnum v. Ohio State Univ. Med. Ctr., No. 2:12-cv-930, 2015 WL 774390 (S.D. Ohio Feb. 24, 2015) ("'Given that an employer needs to be able to determine the cause of an employee's aberrant behavior, [evidence that the employer requested such examinations] is not enough to suggest that the employee is regarded as mentally disabled. As the district court ably explained, a defendant employer's perception that health problems are adversely affecting an employee's job performance is not tantamount to regarding that employee as disabled'" (quoting *Sullivan*, 197 F.3d at 810).)

122. *See Johnson*, 617 F. App'x at 491 (quoting *Sullivan*, 197 F.3d at 811).

123. *See* Porter, *supra* note 110, at 397 (In the post-amendment context, "[t]he focus is now on the employer's motivation for its adverse action, rather than on how serious the employer considered the plaintiff's condition. The failure of courts to appreciate this distinction caused many meritorious claims to be dismissed.") (internal citations omitted).

fitness-for-duty exam, where there is reasonable cooperation on the part of the employee, it would be reasonable for courts to find that fact, combined with the referral and the employee being out of work, sufficient to meet the regarded-as element.

In addition to the ADA implications created by workplace injury cases, the pandemic has also created new ADA considerations. OSHA has stated that "workers identified as high-risk who can do some or all of their work at home (part or full-time), or in less densely-occupied, better-ventilated alternate facilities or offices," may be "entitled to 'reasonable accommodations'" under the ADA.[124] Additionally, OSHA provides that "employers must discuss the possibility of 'reasonable accommodation' for any workers who are unable to wear or have difficulty wearing certain types of face coverings due to a disability."[125]

V. Estoppel and Retaliation

Most employees who suffer work-related injuries are at-will employees. The employment of an at-will employee may generally be terminated at any time and with or without cause,[126] although a variety of additional protections are available for injured employees, including protections discussed thus far in this article. At times, an employee will assert that a contract has been created between herself and the employer based on assertions of the employer, language in an employee handbook, and other relevant information.[127] A claim of breach of contract by an employee is often accompanied by an alternative pleading of promissory estoppel, which requires that the employee show that the employer "made a promise" that the employer "should reasonably have expected to induce action or forbearance on the part" of the employee and "that the promise did in fact induce such action or forbearance."[128] The action or forbearance in reliance on the promise

124. Occupational Safety & Health Admin., *supra* note 19 (scroll down to item 4 under "The Roles of Employers and Workers in Responding to COVID-19").

125. *Id.* (scroll down to "Suppressing the Spread of the Hazard Using Face Coverings").

126. *See* Newby v. City of Andalusia, 376 So.2d 1374, 1375 (Ala. 1979); Lavery v. Southlake Ctr. for Mental Health, 566 N.E.2d 1055, 1057–58 (Ind. Ct. App. 1991); Hamersky v. Nicholson Supply Co., 517 N.W.2d 382, 385 (Neb. 1994); Hall v. Answering Serv., Inc., 289 S.E.2d 533, 533–34 (Ga. Ct. App. 1982).

127. *See* Stinson v. Am. Sterilizer Co., 570 So.2d 618, 620 (Ala. 1990); Lee v. Canuteson, 573 N.E.2d 318, 319 (Ill. App. Ct. 1991).

128. *See* Darby v. Gordon Food Servs., Inc., No. 3:11-cv-00646-DJH, 2015 WL 2511418, at *11 (W.D. Ky. June 8, 2015) (citing Sawyer v. Mills, 295 S.W.3d 79, 89 (Ky. 2009)); *see also* Santiago v. Butler, No. 3:08-CV-1297 (CSH), 2012 WL 527699, at *5 (D. Conn. Feb. 27, 2012) ("Under the doctrine of promissory estoppel, a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise" (citing D'Ulisse-Cupo v. Bd. of Dirs. of Notre Dame High Sch., 520 A.2d 217, 221 (Conn. 1987) and quoting Restatement (Second) of Contracts ¶ 90 (Am. L. Inst. 1981).).

must be reasonable.[129] An employee might claim promissory estoppel in connection with an employer's statements relating to accommodating restrictions or permitting an employee to come back to work after an injury. The employee might assert that she reasonably relied on such statements in the belief that her employment would be continued and that she relinquished other opportunities as a result.

While a claim of promissory estoppel in this context may be a long-shot,[130] some employees are able to successfully put forth sufficient facts to state the claim. [131] *Santiago v. Butler Company* is one such case.[132] In *Santiago*, the employee slipped, fell, and strained his back while working for a landscaping company.[133] He returned to work after this injury and allegedly later requested time away to be with his wife who was terminally ill.[134] However, the landscaping company did not allow him to return to work.[135] He filed an action including claims alleging that the employer violated the Family Medical Leave Act, retaliated against him for filing a workers' compensation claim, and breached an oral employment contract.[136]

In support of his retaliation claim, the employee presented affidavits from other employees who had allegedly been discouraged from filing workers' compensation claims and pressured to drop claims.[137] In addition, he submitted his own affidavit stating that he was denied light duty and pressured to drop his workers' compensation claim.[138] The court construed the employee's contract claim as a claim for

129. *See* Snider v. United Air Lines, No. 09-cv-02746-REB-KLM, 2010 WL 5158380, at *4 (D. Colo. Dec. 14, 2010).

130. *See id.* (providing that to succeed on a claim of promissory estoppel, the employee "must overcome the presumption of at-will employment"); *see also* Healion v. Great-W. Life Assurance, 830 F. Supp. 1372, 1375 (D. Colo. 1993) ("Under Colorado law, an employee hired for an indefinite period of time is presumed to be an 'at will' employee whose position can be terminated without cause or notice and whose termination does not give rise to a cause of action" (citing Burrill v. GTE Gov't Sys. Corp., 804 F. Supp. 1356, 1358 (D. Colo. 1992).); Cont'l Air Lines, Inc. v. Keenan, 731 P.2d 708, 711 (Colo. 1987))); *see also* Newman v. Gagan LLC, 939 F. Supp. 883, 901 (N.D. Ind. 2013) ("The Court recognizes in reaching this conclusion that a *presumption* of at-will employment arising from a contract of indefinite duration may be overcome under Indiana law in three situations: cases of 'adequate independent consideration' for more permanent employment, cases where strict application of the at-will doctrine would violate public policy, and promissory estoppel" (citing Orr v. Westminster Vill. N., Inc., 689 N.E.2d 712, 718 (Ind. 1997)).).

131. *See Santiago* 2012 WL 527699, at *6 (denying the defendant employer's motion for summary judgment on the employee's promissory estoppel claim); *see also* Grant v. John Hancock Mut. Life Ins. Co., 183 F. Supp. 2d 344, 371 (D. Mass. 2002) (denying defendant employer's motion for summary judgment on the employee's promissory estoppel claim).

132. *Santiago*, 2012 WL 527699, at *6.

133. *Id.* at *1.

134. *Id.*

135. *Id.* at *2.

136. *Id.* at *1.

137. *Id.* at *5.

138. *Id.*

promissory estoppel.[139] In support of his claim, the employee submitted his own affidavit that a representative of the employer had promised to give him his job back after his wife passed away, along with deposition testimony by the employer's representative that he indeed did "make representations to [the employee] that . . . after he took care of his wife's illness, . . . he could have his job back."[140] Upon hearing the employer's motion for summary judgment, the court ruled in favor of the employee, finding that he had presented enough evidence to create a genuine issue of material fact.[141]

Like Connecticut law, which was applied to the retaliation claim in *Santiago*,[142] the law of most states prohibits retaliation against an employee who files a workers' compensation claim for a work-related injury.[143] Nonetheless, some states, like Georgia, do not.[144] Depending on the jurisdiction, the extent to which retaliation is prohibited may range from providing protection only from termination to providing protection relating to all terms and conditions of employment.[145] Where state retaliation protections end, other protections may fill in the gap.

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139. *Id.* ("While Plaintiff does not allege the elements of a contract, he does allege facts that support a claim for promissory estoppel under Connecticut law.").

140. *Id.* at *6–7.

141. *Id.* at *7.

142. *Id.* at *4 ("Connecticut state law prohibits an employer from discriminating against an employee because the employee filed a claim for workers' compensation benefits" (citing CONN. GEN. STAT. § 31-290a (2010)).).

143. *See* Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973) ("In summary, we hold that an employee who alleges he or she was retaliatorily discharged for filing a claim [for workers' compensation] . . . has stated a claim upon which relief can be granted. We further hold that such a discharge would constitute an intentional, wrongful act on the part of the employer for which the injured employee is entitled to be fully compensated in damages."); Evans v. Bibb Co., 342 S.E.2d 484, 485 (Ga. Ct. App. 1986) (refusing to judicially create a right of action for retaliation but recognizing that "many states have adopted such a policy"); *see also* Shick v. Shirey, 716 A.2d 1231, 1237–38 (Pa. 1998); Sides v. Duke Univ., 328 S.E.2d 818, 826 (N.C. Ct. App. 1985) ("All of the above cases involve employees discharged for asserting their rights under worker's compensation laws in the particular states. It should be noted, however, that not all of the compensation laws involved in these cases specifically provide a remedy, as North Carolina now does" (citing *Frampton*, 297 N.E.2d 425; Murphy v. City of Topeka-Shawnee Cnty., 630 P.2d 186 (Kan. 1981); Lally v. Copygraphics, 428 A.2d 1317 (N.J. 1981); Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1978); Sventko v. Kroger Co., 245 N.W.2d 151 (Mich. Ct. App. 1976); Texas Steel Co. v. Douglas, 533 S.W.2d 111 (Tex. Ct. App. 1976)).).

144. *Evans*, 342 S.E.2d at 485.

145. *See* Henderson v. Traditional Log Homes, Inc., 319 S.E.2d 290, 292 (N.C. Ct. App. 1984) ("No employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the North Carolina Workers' Compensation Act, or has testified or is about to testify in any such proceeding" (citing N.C. GEN. STAT. § 97-6.1(1983).); *see also* Gonzales v. Purolite Corp., No. 17-2983, 2019 WL 4277456, at *8 (E.D. Pa. Sept. 10, 2019) ("Plaintiff must prove that (1) he engaged in a protected activity under the Workers' Compensation Act; (2) he suffered an adverse employment and (3) there exists a causal connection between the protected activity and the adverse action" (citing Kieffer v. CPR Restoration & Cleaning Servs., LLC, 733 F. App'x 632, 638 (3d Cir. 2018)).); *Ex parte* Breitsprecher, 772 So. 2d 1125, 1129 (Ala. 2000) (recognizing that prohibiting retaliatory termination includes "constructive discharge").

For example, the Occupational Safety and Health Act (OSH Act) prohibits employers "from discriminating against an employee for reporting a work-related fatality, injury, or illness."[146]

Conclusion

Employer decisions in workplace injury cases have far-reaching consequences. Competing interests and liabilities attendant to such decisions could lead to inconsistencies that could lead to liability and greater consequences that were sought to be avoided in the first place. Developing a cohesive approach is challenging and, even more so, with the pervasive effect of the pandemic.

146. *See* 29 C.F.R. §1904.36 (2020).