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Employment Panel

A PRACTICAL GUIDE TO LAWS AFFECTING THE RIGHTS OF EMPLOYEES WITH DISABILITIES, WORK-RELATED INJURIES, OR LEAVE TIME NEED FOR FAMILY CHILD OR HEALTH CARE REASONS

INTRODUCTION

The most rapidly changing areas of employment law are those affecting the rights of employees who request leave time or special accommodations because of disabilities, injuries, or personal or family child or health care needs. Because of the complexity of these laws, and the necessity of monitoring judicial developments in these areas on an almost daily basis, it is essential that before problems or issues arise, an employer retain the services of a lawyer whose specialty is employment law. Employers whose liability insurance coverage includes defense of claims should ascertain whether the attorneys retained for such claims are employment law specialists, and should nonetheless establish a consultative relationship with lawyers whose practice includes focus on employment law. Changes in the laws affecting employees with special physical or personal health and child care needs are, in and of themselves, areas of employment law which change so frequently that it is impractical to expect laypersons, or lawyers specializing in non-employment matters, to keep up to date.

The primary laws affecting employees requiring leave time or special accommodations because of disabilities, injuries, or personal or family child or health care needs are Title I of the Americans With Disabilities Act of 1990 ("ADA")[1]; the Family and Medical Leave Act of 1993 ("FMLA")[2]; and in Pennsylvania, the Pennsylvania Human Relations Act of 1955, *as amended* ("PHRA")[3] and the Pennsylvania Workers' Compensation Act of 1915, *as amended* ("WCA").[4]

The two threshold considerations for every employer are (1) "does the law apply to us" and (2) "is the employee eligible"? The answers to those threshold questions may not be the same. Assuming the answer is "yes" to each of those questions, the obvious final question is (3) "what is our obligation to the employee under the law'?

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[1] 42 U.S.C. §§12101, et seq. Regulations codified at 29 C.F.R. §§1630.1, et seq.
[2] 29 U.S.C. §§2601, et seq. Regulations codified at 29 C.F.R. §§800.100, et seq.
[3] 43 P.S. §§951, et seq. Regulations codified at 16 Pa. Code §§42.1, et seq.
[4] 77 P.S. §§1, et seq. Regulations codified at 34 Pa. Code §§131.1, et seq. *Also see*, for employees working in certain dangerous occupations, the Pa. Heart and Lung Act of 1935, *as amended*, 53 P.S. §§637-638, which provides, as an exclusive alternative to workers' compensation, full salary, not "compensation", to such employees injured on the job but who are expected to recover and return to work in the foreseeable future.

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I. The Americans With Disabilities Act ("ADA")[5]

A. Does the law apply to us?

The ADA prohibits employers from discriminating against, or failing to provide reasonable accommodations for, qualified individuals with disabilities. *See*, 29 C.F.R. §1630. The ADA applies to employers with 15 or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. 29 C.F.R. §1630.2(e). However, under the ADA an "employer" does not include a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code. *Id*., 29 C.F.R. §1630.2(e)(2)(ii).

B. Is the employee eligible?

1. Does the employee have a disability, or is the employee regarded as having a disability?

To be eligible under the ADA, the employee must have a disability as defined by the Act. A "disability" is defined as:

(1) "a physical or mental impairment that substantially limits one or more of the major life activities of such individual;"
(2) "a record of such impairment; or"
(3) "being regarded as having such impairment."

42 U.S.C. §12102(2).

2. Does the disability substantially limit a major life activity?

An employee is not eligible under the ADA if the disability does not substantially limit one or more of the major life activities. The Act does not define "major life activities". However, the regulations define "major life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. §1630.2(i).

The term "substantially limits" is defined in the regulations as "unable to perform a major life activity that the average person in the general population can perform; or significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. 29 C.F.R. §1630.2(j).

Understandably, these terms have engendered much litigation. For instance, in Bragdon v. Abbott, 524 U.S. 624, 638 (1998) the U.S. Supreme Court rejected an argument that a major life activity is limited to "those aspects of a person's life which

[5] Note that two of the ADA's three titles may apply to non-profit institutions: Title I (employment) and Title III (public accommodations and services operated by private entitles).

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have a public, economic, or daily character." In that case, the Court held that HIV infection (although no symptoms of AIDS had developed) is a physical impairment which substantially limits a major life activity (reproduction), not because it physically prevented pregnancy, but because the infection deterred the plaintiff from seeking to become pregnant.

In Fiscus v. Wal-Mart Stores, Inc., 385 F.3d 378 (3rd Cir. 2004), the U.S. Third Circuit Court of Appeals held that eliminating waste from one's blood is a major life activity. Thus an employee whose kidney failure required daily dialysis treatments was disabled. The Court explained that to be a major life activity the function must be central, important and significant to the life process, though not necessarily daily, visible, or volitional.

Notwithstanding the existence of an impairment of a physical ability that may limit an employee's ability to perform a particular job, such that the employee is qualified for workers' compensation, the employee is not a qualified individual with a handicap for purposes of the ADA unless a major life activity is "substantially limited". Thus there is a fine and often difficult distinction between a disability in the sense of being impaired in the ability to perform a job with the duration or frequency as previously, and a disability under the ADA. The U.S. Supreme Court first addressed these difficult issues in Toyota Motor Mfg., Kentucky, Inc. v. Williams, 112 S. Ct. 681 (2002). In that case the Court held than an assembly line worker with carpal tunnel syndrome was not legally entitled to a reasonable accommodation under the ADA, notwithstanding the fact that she applied for workers' compensation and, after being off the job for a period of time, was brought back to her job with permanent work restrictions. She claimed discrimination under the ADA after a dispute arose concerning the job restrictions and certain transfers and job modifications. The appellate court had held that the employee was covered by the ADA because she demonstrated that she was substantially limited in her ability to perform manual tasks. However, the Supreme Court reversed the appellate court, concluding that the lower court used the wrong definition of disability by focusing on the employee's limitations at work. The Court held that the employee must have an impairment that substantially limits the employee from performing activities that are essential to daily living. Under the ADA, the definition of disability focuses not on the employee's ability to perform a particular job function, but instead on whether the employee has an impairment which substantially limits an activity which is central and significant to the life process.

The fact that a major life activity is affected does not necessarily mean that it is "substantially limited". A separate analysis is applied to determine whether the major life activity is substantially limited. Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778 (3rd Cir. 1998); 29 C.F.R. §1630.2(j)(3). Factors to be considered in determining whether the major life activity is substantially limited include:

(i) the nature and severity of the impairment;
(ii) the duration or expected duration of the impairment; and
(iii) the permanent or long term impact, or the expected permanent

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or long term impact of or resulting from the impairment.
29 C.F.R. §1630.2(j)(2).

In making the determination as to whether the employee is substantially limited in a major life activity, the employer may consider the employee's condition after medications or the application of ameliorative corrective or prosthetic devices. Sutton v. United Airlines, Inc., 527 U.S. 471, 119 S. Ct. 2139 (1999). Also see, Murphy v. United Parcel Service, 529 U.S. 516, 119 S. Ct. 2133 (1999); Albertson, Inc. v. Kirkenburg, 527 U.S. 555, 119 S. Ct. 2162 (1999).

3. Can the employee, with or without a reasonable accommodation, perform the essential functions of the job?

To be eligible under the ADA, an employee must be a "qualified individual with a disability" which means "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. 12111(8). Thus even if the employee has a substantial limitation of a major life activity, the employee is not eligible for coverage by the ADA if the employee cannot, with or without a reasonable accommodation, perform the essential functions of the job. The Act provides that:

> For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of the job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. 12111(8).

Notwithstanding the above-quoted language of the Act, the employer does not have the last say as to what are the essential functions of a particular job. This is always a fact-specific inquiry. In Turner v. Hershey Chocolate USA) a/k/a The Hershey Company, No. 04-4674 (3rd Cir., Mar. 20, 2006), the Third Circuit rejected the employer's contention that a rotation scheme, devised by the employer to allow plant workers to move or "rotate" from one job to another to reduce the occurrence of wrist and arm repetitive stress injuries in shaker table inspectors, was an essential function of the shaker table inspector position. The Court commented, almost comically, that "…(i) the shaker table inspector position does not exist in order that inspectors may rotate; …(ii) implementing or not implementing the rotation scheme would appear to have no effect on the number of employees required to operate the shaker tables; and (iii) rotating is not a highly specialized function and Turner was not hired for her rotating ability".

The Court, in Turner, concluded that "[w]hether a job duty is an 'essential function' turns on whether it is 'fundamental' to the employment position. 29 C.F.R. 1630.2(n)(1). The term 'essential function' does not include the 'marginal' functions of

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the position. *Id*. A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

Turner, supra., slip op. at p. 17.

C. What is our obligation to the employee under the law?

1. Non-discrimination

An employee who satisfies the above-referenced eligibility requirements is someone who, by definition, is able to work. The employer cannot contest the employee's ability to work based on the employee's statements regarding his or her partial or total disability status in another forum. For instance, in Turner v. Hershey Chocolate USA a/k/a The Hershey Company, No. 04-4674 (3rd Cir., Mar. 20, 2006), the Third Circuit rejected the employer's contention that because the employee certified in her applications for Social Security Disability Insurance ("SSDI") and long-term disability benefits, that she could not work, that she was judicially estopped from asserting a claim under the ADA. The Court held that the employee's statements made in the context of applications for SSDA and disability insurance have nothing whatever to do with whether she could perform the essential functions of the job at issue with a reasonable accommodation.

Thus assuming the employee meets the ADA eligibility requirements, the employer has a number of obligations to the employee or prospective employee:

1. avoid discriminating against the employee, i.e., limiting, segregating, or classifying the employee or applicant in an way that adversely affects the opportunities or status of such employee or applicant because of the disability;
2. avoid participating in a contractual or other arrangement or relationship which has the effect of subjecting the employee to discrimination as defined in the Act;
3. avoid using standards that have the effect of discriminating against the employee or which perpetuates the discrimination by others;
4. avoid excluding the employee from or denying the employee equal job benefits or opportunities because of the employee's disability;

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5. avoid using or administering tests or selection standards which screen out the disabled for reasons unrelated to their ability to perform the job; and
6. avoid discriminating against the employee or applicant by not making a reasonable accommodation to the known physical or mental limitations to an otherwise qualified individual with a disability.

42 U.S.C. §12112(b).

Thus denying a reasonable accommodation is a form of discrimination under the ADA. Taylor v. Phoenixville School District, 184 F.3d 296 (3rd Cir. 1999).

2. The interactive process to determine reasonable accommodation

If the employer is aware that the employee has a qualified disability, or if the qualified employee requests a reasonable accommodation, the employer should meet with the employee to engage in an informal, flexible interactive process to identify the employee's precise limitations and the potential reasonable accommodations which might overcome those limitations. If the employer is aware of the qualified disability, the employer should initiate this process. 29 C.F.R. 1630.2(o)(3). If the employer is not aware of the qualified disability, the employee must initiate this process. See, Taylor v. Phoenixville School District, 184 F.3d 296, 317-320 (3rd Cir. 1999).

However, in initiating this process, the employee need only express a need for a reasonable accommodation, not a specific reasonable accommodation. Armstrong v. Burdette Tomlin Memorial Hospital, et al., No. 03-3553 (3rd Cir., Jan. 30, 2006).

The employer is not required to subject itself to an "undue hardship" to provide a reasonable accommodation, in view of the degree of difficulty in making the accommodation, or the employer's financial resources. 29 C.F.R. 1630.2(p). However, the employer is expected to make reasonable changes and concessions such as modifying work schedules; making facilities or equipment more easily accessible; restructuring the job involved to re-assign certain functions to other employees; adjust schedules; permit guide dogs on premises; set aside special work places or reserved parking spaces; etc.

II. The Family and Medical Leave Act ("FMLA")

A. Does the law apply to us?

The FMLA provides eligible employees up to 12 weeks of unpaid leave per year for their own serious health condition, the serious health condition of a spouse, parent, or child, for the birth or adoption of their child, or the placement of a child with the employee for foster care. 29 U.S.C. §2612(a).

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Under the FMLA, an "employer" is defined as a "public or private individual with 50 or more employees for 20 or more calendar workweeks in the current or preceding calendar year." 29 U.S.C. §2611(4)(A). Separate divisions of the same corporate employer are deemed to be one employer notwithstanding the fact that fewer than 50 employees are stationed at a particular division. Separate corporations are deemed separate employers, but interrelated corporations may be deemed one employer if they have common management, interrelation between their operations, centralized control of labor relations, or common ownership or financial control. 29 C.F.R. §825.104(c)(2).

In individual may be deemed liable as an employer under the FMLA because the definition of "employer" includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." 29 U.S.C. §2611(4)(A).

B. Is the employee eligible?

1. Duration of work and location criteria

To be eligible under the FMLA the employee must, on the date the leave is to commence, have (1) been employed by the employer for at least 12 months; and (2) worked at least 1,250 hours during the 12-month period immediately preceding the commencement of the leave. If the employee was on the payroll for any part of a week during which employment benefits were continued, that week counts towards FMLA entitlement.

Notwithstanding the above, however, an employee is excluded from eligibility if the employee "is employed at a worksite at which the employer employs fewer than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is also fewer than 50". 29 C.F.R. §825.800.

2. Health condition criteria

A "serious health condition" under the FMLA is "an illness, injury, impairment, or physical or mental condition that involves:

(1) Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity …

(2) Continuing treatment by a health care provider [during]…

(i) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days,…

(ii) Any period of incapacity due to pregnancy, or for prenatal care.

(iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition.

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(iv) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(v) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis)."

Absent complications, common ailments such as the common cold, flu, ear aches, etc. are not considered serious health conditions under the FMLA.

29 C.F.R. §825.114.

An employer may require the employee requesting FMLA leave based on a serious health condition to provide a physician's certification. The employer may also request periodic medical recertification by a physician. 29 U.C.C. §2613(a). The certification is sufficient if it provides the date the serious health condition began, its probable duration, relevant medical facts, and a statement that the employee is unable to work. If the employer "finds a certification incomplete, it must provide the employee a reasonable opportunity to cure any such deficiency." 29 C.F.R. §825.305(d). Also see, Kauffman v. Federal Express Corporation, No. 04-2433, slip op. at p.10 (7th Cir., Oct. 18, 2005).

C. What is our obligation to the employee under the law?

1. Determine the 12-month period

The employer is entitled to decide what 12-month period is applicable for purposes of determining FMLA eligibility. The options include a calendar year, a fiscal year, a 12-month period commending with when the employee first becomes eligible (in terms of hours worked), or a 12-month period commencing with when the employee takes FMLA leave. However, the employer must be consistent is this decision. The employer's method of measuring the applicable 12-month period must be consistently applied throughout the employer's workforce, to all employees. 29 C.F.R. §825.200(b).

2. Determine if the leave to be granted is FMLA or other leave

If the employer is aware of the employee's entitlement to FMLA leave at the time the employee requests or commences any other type of leave, the employer may designate the leave as FMLA leave, and must notify the employee at the commencement of the leave that it has been designated FMLA leave. If at the beginning of any other type

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of leave the employer had sufficient information to know of the employee's entitlement to FMLA leave, once the leave commences, the employer may not retroactively designate it as FMLA leave. In that event, the full entitlement to FMLA leave is to be added to any other type of leave already commenced., and none of the absence preceding the employer's notice may be counted towards the employee's FMLA leave entitlement. See, 29 C.F.R. §825.208(c).

3. Determine the type of FMLA leave to which the employee is entitled

If the employee requests FMLA leave due to the serious health condition of the employee or a family member, the employee is entitled to take the leave all at one time, or on an intermittent or reduced schedule basis. 29 C.F.R. §§825.116(c).

However, if the employee requests FMLA leave for the birth or adoption of a child, or the foster care placement of a child with the employee, leave may be taken on an intermittent or reduced schedule basis only if the employer agrees. 29 C.F.R. §825.203.

An employer is entitled not to have its operations disrupted by intermittent or reduced schedule FMLA leave. Hence an employer is entitled to assign the employee to another position (with equivalent pay and benefits) that better accommodates the intermittent or reduced schedule leave. 29 C.F.R. §825.117.

4. Restore employment at the end of the FMLA leave

The employer must, at the conclusion of the FMLA leave, reinstate the employee to the same or equivalent position with the same pay, benefits, working conditions, privileges and status, with substantially similar responsibilities and duties, and which entails substantially equivalent skill, effort, responsibility and authority. 29 C.F.R. §825.215.

Where the FMLA leave was taken because of the employee's serious health condition, upon the return of the employee, the employer may require a certification from a physician that the employee is able to return to work, provided that this practice is applied uniformly by the employer. 29 C.F.R. §825.310.

III. The Pennsylvania Human Relations Act ("PHRA")

A. Does the law apply to us?

The PHRA applies to employers employing four or more persons within the Commonwealth of Pennsylvania. It prohibits discrimination against an employee with a "non-job related handicap or disability."

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B. Is the employee eligible?

Under the PHRA, the definition of a "handicap or disability" is substantially similar to the definition under the ADA. It is defined as a (1) "physical or mental impairment which substantially limits one or more of such person's major life activities; (2) a record of having such impairment; or (3) being regarded as having such an impairment…" 43 P.S. §954(p.1)

A person has a "non-job related handicap or disability" if the handicap or disability "does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in or has engaged in." 43 P.S. §954(p).

Hence the analysis of an ADA claim applies equally to a PHRA handicap or disability claim. Kelly v. Drexel University, 94 F.3d 102, 105 (3rd Cir. 1996); Taylor v. Phoenixville School Dist., 184 F.3d 296 (3rd Cir. 1999).

In determining whether or not the employee is eligible to invoke the protections of the PHRA, the considerations are similar to those applicable to the ADA. For instance, just as the Third Circuit, in Turner v. Hershey Chocolate USA a/k/a The Hershey Company, supra., held that the doctrine of judicial estoppel does not preclude an employee from proceeding under the ADA even though the employee earlier claimed total disability in an SSDI or disability leave application, the Pennsylvania Supreme Court has held that a claimant under the disability provisions of the PHRA who earlier successfully applied for SSDI benefits is not judicially estopped from proceeding under the PHRA. The issue under the PHRA is whether the claimant has a non-job related handicap or disability, i.e., whether with a reasonable accommodation the employee can work. See, Trowbridge v. Scranton Artificial Limb Co., 560 Pa. 640, 747 A.2d 862 (2000).

C. What is our obligation to the employee?

Although it is clear that under the PHRA an employer may not discriminate against an employee or prospective employee with a non-job related handicap or disability, the statute itself is not as detailed as the ADA with regard to the employer's obligation to provide a reasonable accommodation. However, the regulations make it clear that, like the ADA, a failure to provide a reasonable accommodation is a form of discrimination under the PHRA. 16 Pa. Code § 44.14(a) provides that an "employer shall make reasonable accommodations by modifying a job, including, but not limited to, modification of duties, scheduling, amount or nature of training, assistance provided, and the like, provided that the modification does not impose an undue hardship."

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IV. The Workers' Compensation Act ("WCA")

A. Does the law apply to us?

An "employer" is defined under the WCA "to be synonymous with master, and to include natural persons, partnerships, joint-stock companies, corporations for profit, corporations not for profit, municipal corporations, the Commonwealth and all governmental agencies created by it." 77 P.S. § 21. Thus the WCA covers all employers.

B. Is the employee eligible?

1. Was the employee injured in the course of employment?

An "employee" is defined by the WCA "to be synonymous with servant, and includes all natural persons who perform services for another for a valuable consideration." 77 P.S. §22.

The WCA provides compensation to employees who are injured in the course of employment. The injury must be one which results in loss of time from work and/or medical treatment. Income loss benefits are payable according to statutory schedules which provide for a percentage of pre-injury average weekly wages to be paid up to a statutory limit. The compensation amounts vary depending on whether the employee suffered a total or partial disability, and whether the injury involves loss of a limb or appendage. See, 77 P.S. §§511 and 582. Income loss compensation compensates the employee during periods of partial or total disability.

There are many exceptions to eligibility under the WCA. For instance, an "injury" under the WCA does "not include an injury caused by an act of a third person intended to injure the employee because of reasons personal to him, and not directed against him as an employee or because of his employment; nor shall it include injuries sustained while the employee is operating a motor vehicle provided by the employer if the employee is not otherwise in the course of employment at the time of injury." 77 P.S. §411. Also, employees who claim to have sustained psychological injuries in the course of employment caused by a mental stimulus such as stressful conditions or traumatic events are eligible for benefits only if they can show, with corroborated evidence, that the injury was caused by abnormal working conditions over a long period of time, or an unusual employment event. See, Heath v. Pa. Bd. of Probation and Parole, 869 A.2d 39, 46 (Pa. Cmwlth., 2005), on remand from Heath v. WCAB, 860 A.2d 25 (Pa. Supreme Ct., 2004); Blecker v. WCAB (Pa. Human Relations Commission), 141 Pa. Cmwlth. 317, 595 A.2d 729, 732 (1991), *aff'd*., 546 Pa. 83, 683 A.2d 262 (1996).

2. Did the employee give the employer timely notice of the injury?

Unless the employer otherwise has notice of the injury, to be eligible for benefits the injured employee must give the employer notice of the occurrence of the injury within 21 days of such occurrence, and not later that 120 days after the occurrence of the injury.

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C. What is our obligation to the employee under the law?

In addition to taking steps to assure a safe work environment, the employer should maintain workers' compensation liability coverage, provide a well-known mechanism by which employees are to promptly report work-related injuries, promptly investigate claims of work-related injuries, and promptly notify the carrier of reported injuries.