AMERICAN BAR ASSOCIATION
Tort Trial and Insurance Practice Section

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COMMITTEE NEWS

Workers' Compensation and Employer Liability Committee

Florida's Judge David Langham, In New White Paper, Instructs On, Cautions Against, Covid-19 Presumption Laws

David Langham & Chris Mandel, *American Workers' Compensation – A Study in Disparities and the Expanded Use of Presumptions* (Sedgwick Institute, July 2020), https://www.sedgwick.com/assets/uploads/documents/Sedgwick-Institute_Workers-Comp_7.8.20-1.pdf.

In this important insurance industry white paper, the authors review the recent popularity of presumptions in workers' compensation laws. They first provide a short history of workers' compensation from its inception. They note, among other things, that in some jurisdictions, laws provided for presumptions of compensability, giving the injured worker the "benefit of the doubt" in ambiguous cases that the injury *arose* out of the employment. These types of laws have, over the recent decades, been repealed, with most jurisdictions currently obliging the injured worker to prove his or her claim as in a tort case.

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David B. Torrey WCJ,
Pittsburgh, PA

***David B. Torrey**, of Pittsburgh, PA, has been a Workers' Compensation Judge for the Pennsylvania Department of Labor & Industry, in Pittsburgh, PA, since January 1993. He teaches the workers' compensation law courses at the University of Pittsburgh School of Law. His four-volume treatise on Pennsylvania*

In This Issue

Chair Message

I am both grateful and excited to be your Chair of the Workers' Compensation and Employers Liability Committee for 2020-2021. We have a busy and productive year planned, and hope to build upon our successes from recent years. This year, we welcome many new members joining us from the Labor and Employment Section's workers' compensation committee, as well as several new student-members from law schools across the nation. We have a stand-alone Mid-Winter Conference scheduled for March 2021, as well as several virtual CLE programs and webinars to provide our members with continuing education and networking opportunities. I encourage all members to be active through our monthly Zoom meetings on the second Wednesday of every month, where new ideas are always welcome. I am looking forward to meeting and working with each of you over the next year!

Charley Drummond

Fish Nelson & Holden, LLC

Charley M. Drummond *is an attorney at the Birmingham insurance defense firm of FISH NELSON & HOLDEN, LLC. Charley focuses his practice primarily on legal matters involving workers' compensation, employers' liability, OSHA and FMCSA regulation, and other employer-related health and safety issues. Charley was born and raised in Jasper, Alabama and received his B.S. Degree in Business Management from the University of Alabama in 1998. He earned his J.D. Degree from Birmingham School of Law, where he graduated Summa Cum Laude in 2009. Charley is the President of the Alabama State Bar Workers' Compensation Section. and Chair of the American Bar Association's Workers' Compensation & Employer's Liability Law Committee. He also serves on the Board for the Alabama Chapter of the Risk & Insurance Management Society (RIMS), and is an active member in good standing of the Alabama State Bar, the Alabama Workers' Compensation Organization (AWCO), the Alabama Workers' Compensation Defense Lawyers Association (AWCDLA), the Alabama Defense Lawyers' Association (ADLA), the Alabama Self-Insurers Association (ASIA), Birmingham Bar Association, American Bar Association Tort Trial & Insurance Section (TIPS), and Montgomery Claims Association. Charley is a frequent speaker at conferences and seminars for other attorneys, judges, insurance adjusters, risk managers, and employer representatives, and is a former adjunct professor of workers' compensation law at Birmingham School of Law. Charley is active in fundraising and community-awareness activities for Muscular Dystrophy Association of Alabama, and renders pro-bono legal assistance to families of children affected by Duchenne muscular dystrophy. Outside of work, Charley enjoys spending time with his son, Will.*

Editor Message

The ABA TIPS Workers' Compensation and Employer's Liablity Standing Committee are seeking a student liaison to join the committee and learn about the important work the Committee does to promote scholarship, collegiality and inclusion in the area of workers' compensation law and practice. Interested students should reach out to our Chair, Charley Drummond to learn more about this opportunity.

Additionally, the Committee is seeking a member who would be willing to become the next editor of the newsletter. It is an interesting role and supports the work of the Committee. Interested members should again reach out to our Chair to learn more about this role.

Finally, the Committee is always looking for new members to serve in the various roles that promote the work of the Committee. There are myriad ways to serve and all contributions, big or small, are welcome. Again, reach out to the Chair to voice your interest.

Elizabeth Connellan Smith
Verrill Dana, LLP

Elizabeth Connellan Smith *practices in the areas of workers' compensation, labor, and employment law counseling and litigation. Her articles on workers' compensation law have appeared in various local and national publications and she regularly lectures on employment law topics. Beth's practice includes representing clients with diverse employment-related concerns, including in proceedings pending before the Maine Human Rights Commission, the Maine Unemployment Commission, the Maine Workers' Compensation Board, and the Maine Supreme Judicial Court. Beth was graduated cum laude from Bowdoin College in 1987, and was graduated in 1992 from the University of Maine School of Law.*

Beth is the Maine member of the National Workers' Compensation Defense Network, and is Board Secretary of that organization. Beth is currently Chair-Elect of the ABA Tort, Trial & Insurance Practice Section's Workers' Compensation Standing Committee and she is a Fellow of the College of Workers' Compensation Lawyers.

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Workers' Compensation for an at Home Workforce

With unprecedented speed, the effect of the COVID-19 pandemic on the United States and the world has been enormous and historic. The economic impact on the world has been extraordinary. Following the World Health Organization's declaration on March 11, 2020 that COVID-19 was a global pandemic, by March 31, 2020, more than one-third of humanity was under some form of lockdown, and by April 7, 2020, roughly 95% of all Americans were under lockdown with 42 states declaring stay-at-home orders[1].

While the unemployment rate has soared to levels paralleling those of the Great Depression[2], millions more Americans who have been able to retain their jobs have been asked or directed by their employers to work remotely from home. In New York, all businesses and not-for-profit entities throughout the state other than those providing essential business and services were ordered to reduce the in-person workforce at any work location by 100% on March 22, 2020[3]. That included the Workers' Compensation Board (the Board), which closed all of its locations statewide and conducted all hearings remotely through its Virtual Hearings Service[4], with some Workers' Compensation Law Judges (WCLJs) conducting those virtual hearings from their own homes.

Even as American society slowly eyes a reopening, however, some of these changes may be here to stay, and working from home may become much more of the norm than it was prior to the worldwide spread of the COVID-19 virus[5]. With the workplace now encompassing the home offices and dining rooms of millions of Americans, the potential for accidents and illnesses in workers' homes must be considered on a scale that previously did not exist.

In New York, the Workers' Compensation Law (WCL) provides protections for both workers and employers when work-related injuries and illnesses occur. It is a fundamental principle of the WCL that coverage for workers and liability of employers is based upon injuries and illnesses that arise out of and in the course of employment[6]. Although injuries sustained in accidents outside the workplace are generally not compensable, injuries from at-home work may qualify when the employee engages in a specific work assignment for the employer's benefit or so regular a pattern of work at home that the home achieves the status of the place of employment.[7]

A "home office exception" has evolved to allow recovery under the WCL for work-related injuries that occur at home, although the scope of coverage for injuries to

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Alex C. Dell,
Law Firm of Alex Dell, PLLC

***Alex C. Dell, Esq**. is the founder of the Law Firm of Alex Dell, PLLC. He represents injured and disabled workers throughout New York and Florida with their Workers' Compensation, Disability Retirement, Social Security Disability/ Supplemental Security Income and Veterans' Affairs claims.*

In 2016, Alex was inducted into the College of Workers' Compensation Lawyers, a nationwide organization established to honor those attorneys who have

Bio Cont...

Ed Obertubbesing
Law Firm of Alex Dell, PLLC

Ed has over 30 years of experience in the area of Workers' Compensation Law. He is an attorney in the firm's Workers' Compensation Department, where he focuses his practice on handling appeals before the New York Workers' Compensation Board and the Courts of New York State.

Ed received his Bachelor's degree from the State University of New York at Plattsburgh in 1985, where he studied Mass Communications and Journalism.

Bio Cont...

Sexual Harassment and Sexual Assault Injury in the Workplace: Paths to Recovery In and Outside of Workers' Compensation

Matthew B. Schiff
Sugar Felsenthal Grais & Helsinger LLP

Matthew B. Schiff *leads the firm's Labor and Employment group. Matt represents management and executives in disputes claiming breach of contract, discrimination, retaliation, harassment, and employment torts. He counsels clients in all aspects of employment and labor relations including wage and hour disputes, trade secrets, confidentiality, non-compete and non-solicitation agreements.*

Elizabeth Connellan Smith
Verrill Dana LLP
Portland, Maine

This article will address how sexual harassment and sexual assault injuries occurring in the workplace are addressed across the country.[1]

I. Overview of workers' compensation statutory systems and exclusivity of workplace injury claims.

Workers' compensation is a form of accident or illness insurance paid for by employers to compensate workers for injuries arising out of and in the course of employment. In exchange for relinquishing a right to sue in tort, injured workers are provided with swift access to medical and wage replacement benefits. If an employee is injured on the job or contracts a work-related illness, workers' compensation insurance will pay his or her medical expenses. If an employee is unable to work, workers' compensation insurance also provides wage-loss compensation until he or she can return to work. Most states also provide a wage differential if the employee returns to a lower paying job either with the pre-injury employer or with a new employer, as long as the lower wages result from the lingering effects of the work injury. Employees who sustain permanent debilitating injuries that prevent a return to gainful employment in the ordinary labor market may be eligible to receive benefits for the rest of their lives. In most jurisdictions, surviving dependents can receive death benefits, and in some jurisdictions, surviving parents may also receive death benefits.

Available benefits are paid by a private insurance company, the self-insured employer, or state-run workers' compensation funds. Statutes and precedential case law dictating what constitutes a "covered injury" and benefits available to individual workers vary throughout the country because employer obligations regarding workers' compensation are governed by state law.

Workers' compensation statutory systems provide a no-fault avenue for employees when they are injured in the workplace in exchange for employer protection against civil liability. The system depends on workers' compensation statutes providing exclusive remedy for any claims brought against the employer. However, most states provide some exceptions to exclusivity.

Typically, an employee cannot receive workers' compensation benefits while simultaneously pursuing tort causes of action against his or her employer. However, employees may be able to avoid exclusive recovery under their state's workers'

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Workplace Stress: Past, Present, and Future

The caption of this article is the title of a book soon to be released by David Torrey and I. Modern-day stress is said to cause accidents, illness, disease, and death; incite marital distress and contribute to the dysfunction of families; promote job dissatisfaction; and create other organizational ills. It also has been attributed to an increase in drug/alcohol abuse and mental disabilities ranging from anxiety to paranoid schizophrenia among workers at all levels in all occupations. The cost to the U.S. economy is roughly $100 billion yearly, and that cost is expected to continue to rise.

What follows in our book is a review of current stressors that may result in legal claims, primarily workers compensation claims; an up-to-date review of the mental stress causing mental disability workers compensation laws in all 50 states, as well as federal workers compensation laws; and a 50-state legal analysis of laws related to first responder claims, *i.e.*, those of firemen, law enforcement and emergency workers, health care workers, essential workers, and others. Included in the review will be reporting on interesting studies and surveys related to stress causes and results. Finally, the book features a brief review of solutions used by individuals and businesses to prevent or control stress and related claims.

I.

Stress and the problems it creates has been the focus of media coverage for most of the last 50 years. For example, *Time* magazine ran a cover story in June 1983, which labeled stress as the "Epidemic of the Eighties" for many Americans. Given what has occurred between then and now, including an increase in terrorist and mass shooting attacks, protest and riots in many states triggered by the Minnesota death of George Floyd at the hands of a police officer, a series of global financial crises, a movement of many jobs to a less stable gig economy, our 24-hour news cycle, the COVID-19 pandemic, and the increase in the use of social media, contemporary stress is even more pervasive now than during the "Epidemic Eighties."

Stress experienced in the U.S. seems greater than in the rest of the world. In the U.S., about 55 percent of adults said they had experienced stress during much of the day, compared with just 35 percent globally. Things appear to only be getting worse for U.S. employees and their employers, as research by NIOSH on workplace stress statistics throughout the years shows that "75 percent of U.S. workers think they are experiencing more stress than previous generations did."

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Donald T. DeCarlo
Fresh Meadows, NY

***Donald T. DeCarlo** is the principal of an independent law firm in Fresh Meadows, NY, which focuses on mediation/arbitration and regulatory and insurance counseling. Before establishing the firm in 2005, Mr DeCarlo was a Partner at Lord Bissell & Brook LLP and headed its New York, office. Formerly, he was Senior Vice President and General Counsel of The Travelers Insurance Companies, Deputy General Counsel for its parent corporation Travelers Group, Inc., and Executive Vice President and General Counsel for Guld Insurance Group; and served as General Counsel for the National Council on Compensation Insurance (NCCI) for 14 years.*

Book Review

Uberland: How Algorithms are Rewriting the Rules of Work

by Alex Rosenblat
University of California Press. 271 pp. 2018.

David B. Torrey, WCJ
Pittsburgh, PA

I.

The major issue for workers' compensation, when it comes to Uber drivers and other "ride hail" workers, is whether they are, as Uber claims, independent contractors or, instead, employees. This pivotal categorization issue has been treated by court opinions, especially those in FLSA cases, and in abundant academic writing. This writer has addressed the issue in the workers' compensation context in a recent American Bar Association publication, *The Brief.*[1]

It may be, however, that the most comprehensive analysis is found in the 2018 title, *Uberland: How Algorithms are Rewriting the Rules of Work*.

The author, research journalist Alex Rosenblat, does not purport to be authoring either a labor history or treatise on the independent contractor/employee distinction. Instead, she states that her book "is an exploration of how Uber and other corporate giants in Silicon Valley are redefining everything we know about work in the 21st century through subtle changes ushered in by technology."

The book "is an exploration of how Uber and other corporate giants in Silicon Valley are redefining everything we know about work in the 21st century through subtle changes ushered in by technology."

This characterization is, after two readings, certainly fair. On the other hand, in undertaking the exploration, the author cannot avoid the fact that Uber could seemingly not exist as a profitable enterprise unless it arranged its workers as independent contractors. It simply cannot exist, apparently, if its workers are employees. This reality is reflected in every chapter of the book.

II.

A threshold issue is whether Uber drivers are workers at all, or are, instead, mere *consumers* of the Uber app. While one senses that the author personally believes that drivers are workers – even employees – she admits, at the end of the book, that some ambiguity exists in this regard. This is so because of the interposition of the communications technology which also supports Uber's business model. Perhaps, she hypothesizes, Uber is not just engaging in rhetoric in characterizing drivers as consumers. She remarks:

> Uber has developed a reputation for changing course whenever the rules catch up with it. But upon closer examination, Uber does treat

> drivers both like consumers and like workers. By blurring these lines, Uber creates a legacy for how we all identify as workers or consumers. Uber benefits from this strategic ambiguity because it is hard to decide *which* rules apply to its model. If drivers are unpaid for work they perform, should they allege wage theft under labor law, or seek redress for unfair and deceptive practices under consumer protection law? Uber broke norms, not just laws, exposing the fragility of both.…

While the author admits to this ambiguity, she precedes these remarks with a minor treatise on how Uber controls its drivers' work. And, of course, workers' compensation analysis (in Pennsylvania, my state, and in many others) draws the distinction between employee and independent contractor precisely on this factor.

On this topic, the principal chapter is the fifth, *Behind the Curtain: How Uber Manages Drivers with Algorithms.* But, as foreshadowed above, the entire book addresses how Uber controls its drivers' labor. And this is so, of course, despite the lack of an immediate flesh-and-blood supervisor. In one area of summary, she posits, "The autonomy celebrated by Uber's model stands in stark contrast to the everyday experience of its drivers, who are carefully monitored by an algorithmic boss. Evidence of control is scattered everywhere. The company determines the types of cars that are eligible on its platform ….; sets and changes the pay rates as it wishes; controls the dispatch; targets drivers unevenly with incentives; retains the full power to suspend or fire drivers without recourse; and mediates and resolves conflicts at its discretion, ranging from issues of passenger disputes to wage theft. An algorithmic manager enacts its policies, penalizes drivers for behaving in a manner unlike what Uber 'suggests,' and incentivizes them to work at particular places at particular times…."

So pervasive is the theme of control that *Uberland* stands as the lawyers' field manual for establishing such workers as employees – not independent contractors – under workers' compensation laws. Of course, Uber is constantly *changing* its precise terms of operation. Consequently, one would need to update the Rosenblat research and, in a litigated case, determine precisely how the driver was, at the time of injury, being managed by Uber and its algorithm.

III.

Uber, Rosenblat insists at the outset, "leverages significant control" over its drivers. Uber denies it, but the author's mission throughout is to dispel the Uber rhetoric and strategies that seek to hide the fact of control. Toward that end, the author tries to demolish Uber's "three myths" about how it is special and not a regulable employer of labor.

The first myth is the "myth of sharing," that is, the utopian idea present at the outset of the internet that ride sharing (now more commonly called ride hailing) is some sort of communalistic effort, with no one really profiting. Uber, by portraying drivers as simply sharing available, but unused resources, with others, seeks to divorce itself from the drivers who do the actual work and avoid the idea that of an employer-employee relationship.

The second myth is that of Uber's "technological exceptionalism." Under this concept, Uber and its app reflect some completely new model of work, possessing no precedent in history.[2] This new model purportedly compels the conclusion that it is divorced from the traditional idea of employer-employee relations when it comes to labor regulation. Through this depiction of itself as "exceptional," Uber seeks to avoid regulation by state and local authorities as simply *inapplicable*.

The third myth is that of Uber driving as "glamorized millennial labor." Under this myth, which Uber seeks especially to exploit, millennials flock to Uber to be free of the prison of employer domination of life and its nine-to-five drudge. Instead, millennials can be free-spirited entrepreneurs, set their own hours, and be unconcerned about punching the clock.

The author deconstructs these myths as inconsistent with reality.

How so? Her critique is driven by years of intense interviews with drivers throughout the country, and world, and a study of how the app actually influences, and manipulates, its worker-users. A summary of her consequent findings is set forth above, but she details those observations throughout the book.

One such detail: one of Rosenblat's sharpest critiques is that most Uber drivers are entrepreneurs. The idea, to her, is laughable: "Drivers' experiences demonstrate the gap between rhetoric and reality when Uber talks about being a beacon of entrepreneurial opportunity. The image of driver-as-entrepreneur fails for three main reasons: drivers have no control over the rate at which they work; they do not determine which jobs they take while logged in; and they are routinely punished for any attempt to 'disrupt' the system that Uber imposes." The idea that drivers have the entrepreneurs "autonomy," she argues, is an illusion.

Rosenblat emphasizes how Uber tracks driver behavior through its well-known, and all-important, rating systems, whereby passengers assess driver performance, and then communicate that data to both Uber and the driver. For the uninitiated, she explains:

> After each trip, passengers are prompted by the Uber Passenger app to rate drivers on a scale of 1 to 5 stars on their mobile app. A driver's rating is the average of ratings from his or her last 500 trips. ….

> [H]istorically, drivers risk being deactivated if their ratings fell below a certain threshold …; if their ride-acceptance fell below 80-90 percent; or if their cancellation rate climbed above 5 percent. …

This process, in turn, controls whether Uber will permit the driver to continue using the app. This reality shows that Uber in effect possesses the right to fire its driver.

The author, indeed, titles a subsection, "[Drivers:] Controlled Through the Rating System." She remarks, "the rating system at Uber effectively makes management omnipresent, because it subtly shifts how drivers behave on the job."

Although Uber, as of 2016, merely *suspends* drivers for unsatisfactory performance ratings, the author asserts: "Despite the claim that Uber drivers are independent contractors and entrepreneurs, they must deliver a standardized experience to passengers or risk suspension, deactivation, or loss of pay. …The rating system functions as both carrot and stick, a mediating force to insure the drivers fulfill the expectations that Uber scaffolds for the passengers who evaluate them."

Rosenblat also discusses the process of "telematics" – that is, how drivers brake, accelerate, and speed as they undertake their work – and how Uber monitors and collects individuals' personal data.

Rosenblat also explains the "dispatching function" that Uber undertakes "as a tool to control its drivers." She explains, "drivers may apply to drive for Uber with the intention of working for a particular service tier (because each tier, such as Uber X or Uber SUV, requires a specific make and model of car), but Uber often pushes drivers to accept dispatches for lower tiers. An Uber Black driver may be dispatched to pick up an Uber X customer, who pays the lower Uber X rates, even though the driver continues to absorb the cost of operating a higher-end, gas-guzzling vehicle…."

IV.

An outstanding feature of *Uberland* is the author's exploration of all aspects of Uber as a new form of employment or consumerist relation. As noted above, she grapples with the conceptual issue of whether an Uber driver is really just a consumer of the Uber app product, as opposed to undertaking work as traditionally conceived.

This inquiry is a crucial aspect of the book. Yet, to this reader, this conceptual query seems superfluous. This is so when two aspects of the Uber experience are appreciated.

First, Uber has acknowledged that one of its biggest competitors for labor is none other than McDonald's. This fact strongly suggests (or proves) that driving for Uber

is simply just another entry-level job which requires only minimal skill (granted, the worker will need a car).

Second, a major anxiety for many full-time Uber drivers, pressed as they are by Uber never to get off the app, is finding a convenient time and place to take a bathroom break. This fact points up that, for all Uber's technology and mystique, in the end it can only operate and receive its riches via an army of entry-level workers desperate to find the nearest porta-potty.

Is the conceptual issue really so complex?

V.

Uberland is attractive to the lawyer reader because of its sophistication with regard to the critical legal issues that we consider. Rosenblat references the *O'Connor* decision, decided under the FLSA in California, and agrees with the federal district court judge that Uber's model suggests not independent contractorship but employment.[3] She also references the Pennsylvania *Lowman* unemployment compensation case (in its earliest stages) now recently decided by the Supreme Court. There, the court held that a worker laid off from a job, thereupon seeking work via the Uber app, is *not* "self-employed," and hence is potentially entitled to partial unemployment compensation benefits.[4]

Many books on Uber and employment law exist. Still, *Uberland*, as a field manual, is the best to get the lawyer into the muddy trenches of the pertinent workplace and legal analyses.

Endnotes

1 David B. Torrey, *Workers' Compensation and Laboring in the Gig*, The Brief, p.12 (ABA TTIPS Section 2020), https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2019-20/spring/.

2 This assertion was put to rest in Jeremias Prassl, Humans as a Service: The Promise and Perils of Work in the Gig Economy (Oxford Univ. Press 2018) (asserting that commercial labor intermediaries have existed since the 19th century) (reviewed in this newsletter, No. 135 (August 2018)).

3 O'Connor v. Uber Technologies, Inc., 82 F.Supp.3d 1133 (N.D. Cal. 2015).

4 *Lowman v. UCBR*, 2020 WL 4250088 (Pa., filed July 24, 2020), *affirming* 178 A.3d 896 (Pa. Commw. 2018), http://www.pacourts.us/assets/opinions/Supreme/out/J-73-2019mo%20-%20104494903106653561.pdf?cb=1

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THE BRIEF

Florida's... Continued from page 1

Now, however, a narrower type of presumption has developed, legislated typically at the behest of certain lobbies (firefighters seeking cancer presumptions; police officers seeking mental trauma presumptions). The authors describe such presumptions as "discriminating" and reflecting "disparate treatment by government."

The authors discuss, accurately, how the development of these laws has laid the groundwork for executive and legislative action in the form of presumptions of causation in the realm of worker infection by COVID-19. The authors analyze the likely cost increases to the system brought about by the virus, and the application of presumptions, and caution against their indiscriminate use in this and other contexts. In the authors' view, the overuse of presumptions unfairly upsets the bargain or compromise which is the basis of the system. This is particularly so, they suggest, because the etiology of non-occupation-specific diseases (and psychic injuries, for that matter) is still not well understood.

With regard to costs, the authors seem to acknowledge that the true total costs of COVID-19 in the workplace, and the effect of the presumptions enacted as a consequence, is difficult to estimate. Some of the cases will feature modest costs while others will exhibit serious expenditures. Still, the authors posit that, whatever the total costs, a particular jurisdiction's adoption of a COVID-19 presumption may induce businesses to relocate to another state, or offshore its operations altogether. Notably, the authors reject the idea that such a phenomenon reflects some "race to the bottom" but, instead, characterize the same as a legitimate attempt by such to avoid increased costs – particularly medical expenditures.

It is difficult to argue with many of the points made by the authors. Still, it is important to remember that occupational disease presumptions have long been part of workers' compensation laws. A list of diseases, paired with occupations in which incurrence was thought to be a special risk, was a feature of the second British law of 1907. E.P. Hennock, *The Origin of the Welfare State in England and Germany, 1850-1914: Social Policies Compared* (Cambridge University Press. 2007). My state, Pennsylvania, notably, was to emulate that approach in its enactments of 1937 and 1939.

workers' compensation, published by Thomson-Reuters, is in its Third Edition. Judge Torrey has written and edited the quarterly newsletter of the Pennsylvania Bar Association Workers' Compensation Law Section since June 1988, and he recently published the 139th edition.

"(A) narrower type of presumption has developed, legislated typically at the behest of certain lobbies (firefighters seeking cancer presumptions; police officers seeking mental trauma presumptions)."

Workers' Compensation... Continued from page 5

employees working from home has often been limited in recognition of the distinctive nature of the at-home work environment, and the "home office exception" has been applied cautiously by the Board and the Courts[8].

Previously, where work from home was the exception for many employees rather than the rule, the burden has been on the employee to demonstrate that an at-home injury was work-related. But has the dynamic changed in the current environment where employees are being directed by their employer or by government order to work from home? Should a WCLJ who is himself or herself working from home decide a claim for an at-home work injury brought by an injured worker? When Executive Order of the Governor compels businesses to have their employees work from home should the burden of proving a compensable injury that occurs at the employee's home be lessened? And what protects an employer from liability for injury to its workers in the home environment where personal and employment related tasks and activities intersect and overlap? Case law decided in the pre-COVID-19 world provides a starting point for the analysis of some of these questions, but as more injuries occur to an at-home workforce, the possibility exists for a change in the way these cases are decided.

The "Home Office Exception" Develops

In *Hille v. Gerald Records*, 23 NY2d 135 (1968), the New York Court of Appeals addressed the issue of whether a fatal automobile accident sustained while an employee was on his way home from work arose out of and in the course of his employment. The decedent, Gerald Hille, was a record company executive on his way home to his residence in New Jersey after working late into the evening at the studio's offices in Manhattan. Hille had recording tapes with him at the time of his accident, and in his home was recording equipment belonging to his employer that he frequently used in connection with his job. The evidence demonstrated that it was a common practice for Hille to take tapes home to listen to them and to return to the studio thereafter for editing.

The Board determined in *Hille* that the accident was compensable, finding that Hille was in the course of his employment while traveling home at the time of the accident. The Appellate Division disagreed and dismissed the claim. But on review, the Court of Appeals reversed the Appellate Division, determining that under the circumstances, Hille's home had become an extension of the employment premises such that the accident occurring between his work location and home was compensable.

The Court of Appeals, in extending the "mixed" or "dual-purpose" trip doctrine first set forth by the Court in *Matter of Marks v. Gray*, 251 NY 90 (1929), stated that where there is a specific work assignment for the employer's benefit at the end of

Bios... Continued from page 5

distinguished themselves for more than 20 years in the Workers' Compensation field. He is a member of the executive committee of the workers' compensation division of the New York State Bar Association's Torts, Insurance and Compensation Law section, New York Injured Workers' Bar Association, Florida Workers' Advocates and the Workers' Injury Law Group (WILG), a nationwide organization for attorneys who represent injured workers. In 2019, Alex was appointed Co-Chair for WILG's Nationwide Continuing Legal Education Conference. He also provided continuing legal education on the Workers' Compensation Law to the justices and staff of the Appellate Division, 3rd Department, and to lawyers throughout New York State.

For 25 years, Alex worked as a National Collegiate Athletic Association (NCAA) Division I Ice Hockey Referee. Alex also served as a National Hockey League (NHL) trainee referee and officiated his 1st NHL games on January 23, 1992 between the Toronto Maple Leafs and the New York Islanders at Nassau Coliseum in Uniondale, New York.

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the particular homeward bound trip or so regular a pattern of work at home that the home achieves the status of a place of employment, the Board may permissibly find that a worker's home has become "a place of employment". Relevant considerations include the quantity and regularity of work performed at home; the continuing presence of work equipment at home; and special circumstances of the particular employment that make it necessary and not merely personally convenient to work at home.[9]

Noting that the evidence in *Hille* demonstrated that he regularly took tapes home and worked on them, sometimes by himself and sometimes with another employee; he had work equipment at his home that was owned by the employer; and it was necessary and beneficial to his employer for him to perform duties at home, the Court found that the "mixed" or "dual" purpose doctrine was satisfied. Of significance, the Court of Appeals noted that the test must be applied with caution to professional employees who have frequent occasion to carry work home of varying degrees of importance and substantiality, and warned that the "rule should not be subjected to a process of gradual erosion, through the device of finding some tidbit of work performed at home".

Application and limitation of the *Hille* "home office exception"

Following *Hille*, a series of decisions of the Appellate Division have applied *Hille* to find injuries compensable that occurred either at the employee's home or while traveling to home .

In *Levi v. Interstate Photo Supply Corp.*, 46 AD2d 951 (1974), the claimant's decedent often worked at home with the employer's knowledge and approval. On the day of his fatal work accident his supervisor had instructed him that following a meeting out of the office, if the decedent decided not to return to the office to call his supervisor and to do additional work when he got home. Decedent's body was found partially in the elevator on the second floor of his apartment building with gunshot wounds to the head. His briefcase containing work-related papers had been rifled through. While the referee had disallowed the claim, the Board reversed and found that the death arose out of and in the course of his employment. The Appellate Division affirmed, finding that the decedent's home had achieved the status of a place of employment and in journeying there at the conclusion of his business meeting to continue working until the end of the day, decedent was in the course of his employment.

In *Weimer v. Wei-Munch, Ltd.*, 117 AD2d 846 (1986), the claimant operated a restaurant business and maintained an office for the corporation in his home where all of the paper and telephone work of the business was regularly conducted.

He was employed by the corporation as the restaurant's manager and chef. All business mail was received there and there were business records, files and an adding machine. Payrolls, merchandise ordering, preparation of menus, employee scheduling and business meetings were conducted at that office. He sustained injuries in a motor vehicle accident while traveling from the restaurant to his home. In affirming the Board's finding that the injuries were compensable, and citing *Hille*, the Court noted that if "work duties associated with the employee's home are such that it can genuinely be said that the home has become part of the employment premises", an accident occurring between work and home is compensable.

The Court of Appeals had an opportunity to visit the issue again in *Fine v. S.M.C. Microsystems Corp.*, 75 NY2d 912 (1990), and affirmed its commitment to the principle it had announced in *Hille*. The claimant decedent in *Fine* had a heart attack while driving from his regular employment place to his home where he intended to complete his work. He had set up a separate work area in his home and sometimes worked at home on weekends to complete assignments in a timely fashion. His supervisor testified that the work done by decedent at home inured to the benefit of the employer and that he had permitted the employee to work at home in the past. The Appellate Division had reversed the Board's finding that the death was compensable, but the Court of Appeals reversed the Appellate Division, noting the well-settled rule of *Hille*, stating that an employee's home can achieve the status of place of employment when the employee performs either a specific work assignment for the employer's benefit or a regular pattern of work at home exists[10].

The "home office exception" has not been applied without limitation. In *Bobinis v. State Ins. Fund*, 235 AD2d 955 (1997), the claimant was struck by a car in a parking lot when he stopped to purchase a pen that he needed for his next day's work. He reported to his office only one day a week and otherwise was responsible for attending hearings before the Board to represent the State Insurance Fund. He claimed that his accident while on the way home was compensable, but the Appellate Division affirmed the Board's disallowance of the claim.

The Appellate Division noted in *Bobinis* that the home office exception arises where it is shown that an employee's home has become part of the employer premises. However, the Court observed, as it is commonplace for many professionals and managerial level employees to take work home, the exception is applied cautiously and generally only after consideration of the following indicia: the quantity and regularity of the work performed at home, the continuing presence of work equipment at home and the special circumstances of the particular employment that made it necessary and not merely personally convenient to work at home. In finding his accident not compensable, the Court noted that although the claimant in *Bobinis*

frequently took work at home, there was no proof that he maintained an office or that he had work equipment in his home. Further, his supervisor testified that he encouraged his employees to perform their work, other than hearings before the Board, in the office as much as possible. Based on this record, the Court found no basis to disturb the Board's finding that the claimant's home was not a second employment site.

Similarly, the Appellate Division in *Matter of Kirchgaessner v. Alliance Capital Mgt. Corp.*, 39 AD3d 1096 (2007) affirmed the Board's finding that the claimant's decedent's death did not arise out of and in the course of her employment. Notwithstanding the presence of work equipment in the home which enabled decedent to work from home during irregular business hours, testimony demonstrated that work at home only constituted about 5% to 10% of decedent's overall workload, and that decedent worked at home just three days per month. The employer's preference was for employees to come into the office. While the decedent had worked at home the day prior to her death, the evidence suggested that she did so for personal reasons. The Appellate Division found that the Board had properly disallowed the compensability of the death claim. The Court again noted that the factors to be considered in determining whether an employee's home has achieved the status of an additional place of employment include factors such as the presence of work equipment in the home, the regularity and quantity of the work performed there, as well as the special circumstances of the particular employment which make it necessary, as opposed to personally convenient, for an employee to work at home.

Recent Board decisions reflect that, consistent with *Bobinis*, the home office exception has indeed been applied cautiously. In *IBM Corporation*, 2015 NY Wrk Comp LEXIS 6682, the Board disallowed the claim when the claimant was injured at his home when he slipped and fell on ice. The claimant had a home office above his garage, and while walking from the office into his home to get a cup of tea, he slipped and fell and fractured his ankle. Just prior to his fall he had been using a work computer which had been purchased by the employer and commonly brought home by the claimant. His employer had also purchased a monitor and docking station for his home office. The employer, however, did not help him set up his home office nor did it pay for anything in his home. The testimony indicated that employees were expected to work at the employer's work location but that it was common practice for employees to work from home in the evenings. While the supervisor testified that the claimant's work from home was for both the employer's convenience as well as the employee's, it was mostly for the employee's convenience. In disallowing the claim, the Board found that the claimant did not perform his work at home on a regular basis and did so approximately once per month and at the claimant's convenience in order to perform a special errand. Outside of that once a month

exception the claimant was working from the employer's office location on a daily basis. The employer did not provide substantial equipment for the establishment of the home office and the creation of a home office was never explicitly promoted or paid for by the employer.

The Board similarly denied the compensability of claims in *Aftercare Nursing Services, Inc.*, 2019 NY Wrk Comp LEXIS 9653 and *Matrix Absence Management*, 2019 NY Wrk Comp LEXIS 4888.

In *Aftercare Nursing*, the claimant's work schedule changed on a weekly basis and she was typically required to report to the employer's premises and was allowed to work from home on a daily basis as well. On the date of her injury, while "working on a call" on a work-related matter, she was also interacting with her daughter preparing dinner. A can dropped on her foot and caused fractures of several toes. Noting that the can had nothing to do with her job duties, that there was no evidence that the phone call that the claimant was involved in had to be handled on an urgent basis, and that there is no evidence that the claimant used office space and equipment at home on a regular basis, the Board found her injury to not be compensable.

In *Matrix Absence*, the claimant was injured while installing furniture in his home office. He was hired by the employer as a telecommuter to work from home, but his employer had not provided the furniture or paid for it. The employer had provided the claimant with a computer tower, two monitors and a keyboard, but the claimant ordered the furniture and paid for it himself. He was injured during his work hours while assembling the furniture. In denying the compensability of his injury, the Board noted that when an employee works from home, the distinction between what is work-related and what is personal is not always as apparent as when an employee works at the employer's premises. Noting that more people are regularly working from home today than ever before, the legal standards developed to address whether an injury occurring in a traditional employer-controlled workspace is compensable cannot always be reasonably applied to injuries to employees working from home.

In denying the compensability of the claimant's injuries in *Matrix Absence*, the Board stated that the scope of compensable injuries to employees working from home should be limited in recognition of the distinctive nature of their work environment. Employees who work from home, outside the direct physical control of their employers, are potentially able to alternate between work-related and personal activities when they choose. For this reason, injuries sustained by employees working from home should only be found to be compensable when they occur during the employee's regular work hours and while the employee is actually performing her employment duties. Injuries which occur while a claimant is not actively performing his or her

work duties, such as taking a short break, getting something to eat, exercising or using the bathroom, for example, should be found to have arisen from "purely personal activities [that] are outside the scope of employment and not compensable (citing *Matter of McFarland v. Lindy's Taxi, Inc.*, 49 AD3d 1111 [2008]). Because the claimant's injuries did not occur while he was performing his duties as a claims adjuster and occurred while he was moving furniture during his lunch break, the Board found that the activities that claimant was engaged in were not sufficiently work-related to render his injuries compensable.

For those employees who do truly work full time from home, minor deviations from employment in the home office will not necessarily result in an injury being found not compensable. In *Wellpoint, Inc.*, 2014 NY Wrk Comp LEXIS 11971, the claimant worked from home as a customer service representative. On the date of her accident she had put food in her oven and when the timer went off she stood up from her desk to remove it and was injured when she fell over a bag on the floor. In finding her injury compensable, the Board found that to the extent that her actions amounted to a deviation from her employment in her home workplace, it was a momentary deviation that was reasonable and of a short duration. The Board found that her actions were not disqualifying under the circumstances, that her employment had not been interrupted at the time of her accident, and that her injuries arose out of and in the course of her employment.

"(W)hether the worker will be entitled to workers' compensation benefits for those injuries will require a thorough understanding of the facts and circumstances surrounding the nature and extent of the work performed at home."

Work From Home After COVID-19

In the context of the COVID-19 pandemic, employers throughout New York State were required to act in haste to have their workforce moved from office locations to home environments. Some employees may perform that work solely with an employer issued laptop, some may connect to their employer's servers using a personally owned computer, while others may have a fully equipped office in their home. Many are conducting their work from home while also keeping an eye on their school-age children in the next room doing remote learning.

While the cases discussed herein have shown that the presence of work equipment at the home has been a significant factor, how much of that equipment will be required going forward? Is a laptop enough? Is the compensability of an injury sustained at home limited to accidents occurring during normal work hours (i.e., between 9 AM and 5 PM)? Is a designated "home office" location within the home to be required? How should an injury during a coffee or meal break be handled? The home environment offers opportunity throughout the day for deviations from the employment related tasks at hand. What types of deviations will be tolerated as *de minimis* and which will cause a legal separation from the course and scope of

employment? Cases presenting these very questions will soon be working their way through the Board and the Courts.

Conclusion

The "home office exception" first set forth in *Hille* is now over 50 years old. While it is established in the New York Workers' Compensation Law that injuries which occur at home may be deemed work-related and compensable, Appellate Division decisions and recent decisions of the Board demonstrate that the facts and circumstances of such claims will be carefully scrutinized. In recognition of the work-related and personal tasks that can take place in someone's home, the issue of whether an injury arises while the employee is actually performing work-related duties at the time that an injury occurs will turn frequently on the facts and circumstances involved.

With millions of Americans now working from home, and the prospect that remote work will become the norm rather than the exception, the compensability of injuries that occur at an employee's home promises to occupy the attention of legal representatives of both injured workers and their employers. As this discussion demonstrates, whether the worker will be entitled to workers' compensation benefits for those injuries will require a thorough understanding of the facts and circumstances surrounding the nature and extent of the work performed at home.

Workers' Comp and Working at Home – An Update

One of the cases that we discussed in that article was Matrix Absence, a case where an employee who worked full-time from home was injured while moving furniture in his home office. The employer had not provided the furniture nor paid for it but had provided the injured worker with the computer equipment necessary to perform his work at home. The Board denied compensability of the claim, finding that injuries to employees working from home should be limited to those which occur during the employee's regular work hours and while the employee is actually performing his or her employment duties.

The injured worker in Matrix Absence challenged the Board's decision, and in a recent decision of the State of New York Supreme Court Appellate Division (October 22, 2020), the Board's decision was reversed. The Court was critical of the heightened standard that the Board had applied in Matrix Absence. The Court stated that there is no requirement that the underlying activity at home be done at the employer's

direction or even directly benefit the employer in order for the resulting injury to be compensable. The Court rejected the Board's rigid standard for employees working from home where the Board had tried to limit the liability of an employer to only those injuries occurring during regular work hours while the employee is actively engaged in work duties. The Court reminded the Board that a regular pattern of work at home renders the employee's residence a place of employment just as much as any traditional workplace maintained by the employer. The Court directed the Board to re-examine its decision in Matrix Absence, instructing the Board that it if the act of moving furniture acquired for work use was sufficiently work-related, the employee's injuries should be found compensable.

Endnotes

1 *A Comprehensive Timeline Of The New Coronavirus Pandemic, From China's First Covid-19 Case To The Present* https://www.businessinsider.com/coronavirus-pandemic-timeline-history-major-events-2020-3

2 *U.S. Unemployment Rate Soars To 14.7 Percent, The Worst Since The Depression Era* https://www.washingtonpost.com/business/2020/05/08/april-2020-jobs-report/

3 *Executive Order 202.8, Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency* https://www.governor.ny.gov/news/no-2028-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency

4 *COVID-19: Workers' Comp Hearings Now Remote, Board Offices Closed to the Public* http://www.wcb.ny.gov/content/main/TheBoard/COVID-19-Board-Stakeholders-3-16.jsp

5 *The Massive Work-From-Home COVID-19 Test Was a Great Success and Will Be The New Norm* https://www.forbes.com/sites/jackkelly/2020/05/11/the-massive-work-from-home-covid-19-test-was-a-great-success-and-will-be-the-new-norm/#5892d914e743

6 *Malacarne v. City of Yonkers Parking Auth.*, 41 NY2d 189, 193 (1976)

7 *Matter of Fine v. S.M.C. Microsystems Corp.*, 75 NY2d 912 (1990)

8 See, e.g., *Bobinis v. State Ins. Fund*, 235 AD2d 955 (1997); *Matter of Kirchgaessner v. Alliance Capital Mgt. Corp.*, 39 AD3d 1096 (2007).

9 *Citing* 1 Larsen, Workmen's Compensation Law [1966], §18.32

10 See also, *In re Claim of McRae v. Eagan Real Estate*, 170 AD2d 900 (1991) and *Matter of Shanbaum v. Alliance Consulting Group*, 26 AD3d 587 (2006).

Sexual Harrassment... Continued from page 6

compensation statute by proving their injury was caused by an intentional tort. If an employee can show the employer's failure to prevent workplace violence was intentional, his or her recovery should not be limited to available workers' compensation benefits.[2] Additionally, non-pecuniary losses may be recoverable outside of the framework of workers' compensation insurance, as those losses were not considered part of the "grand bargain".

Sexual harassment and sexual assault are intentional torts that presents unique legal questions for courts to consider. While some states only provide for sexual harassment and sexual assault victims to recover damages pursuant to workers' compensation law, others recognize sexual harassment and sexual assault as an exception and permit further recovery outside of the workers' compensation arena.

"Sexual harassment and sexual assault are intentional torts that presents unique legal questions for courts to consider."

The traditional course of civil litigation for claims which are potentially compensable under workers' compensation is for the employer to raise an affirmative defense that any civil claim is barred by the exclusive remedy provision of the state's worker's compensation statute.[3] At that point, the burden shifts to the plaintiff or employee to assert an exception to exclusivity on which the plaintiff can prevail in court.[4] If no exception applies, the employee is barred from bringing the civil case and may only look to the workers' compensation statute for recovery.[5]

II. States where there is an explicit exemption for sexual harassment and sexual assault in the statute.

Only Hawaii explicitly provides a remedy for sexual harassment and sexual assault in the workers' compensation statute. Hawaii specifically excludes "sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy related thereto" from workers' compensation exclusivity.[6] This extends to negligent and intentional emotional distress claims as well.[7] Hawaii also permits double recovery under the Workers' Compensation Law and a civil action because the legislature explicitly stated that "persons seeking statutory relief under [the] Hawaii Workers' Compensation Law should not be precluded from maintaining a cause of action arising out of the same facts as the workers' compensation claim in a court of law"[8]

III. Where there is no explicit exemption for sexual harassment and sexual assault in the statute, but an explicit exemption for another cause of action that includes elements of sexual harassment or sexual assault.

A few states explicitly allow for intentional torts as exceptions to exclusivity in their statutes. These intentional tort exceptions have been used to support civil actions

around sexual harassment, including assault,[9] battery,[10] and intentional infliction of emotional distress.[11]

- **Michigan:** The Michigan Workers' Disability Compensation Act states that "the only exception to this exclusive remedy is an intentional tort."[12] The statute defines intentional tort as "when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury . . . [meaning] the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge."[13] Courts use this analysis for sexual harassment and sexual assault claims when brought as intentional torts.[14]

- **New York:** The New York Workers' Compensation Law does not apply when the employer engages in conduct constituting an intentional tort.[15] An employee has a private right of action in tort if an employee shows that the employer committed an intentional sexual act resulting in injury to the employee.[16]

- **Ohio**: An employer may be held liable for certain intentional torts if the employee proves that the employer "committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur."[17] In *Kerans v. Porter Paint Co.*, the Ohio Supreme Court explicitly said that not only are intentional torts permitted, but to exclude sexual harassment claims would be to "contravene the legislative intent behind the workers' compensation laws."[18]

- **Oklahoma:** An employee has a private right of action for damages for intentional torts committed by an employer resulting in injury to the employee. An intentional tort is defined as an injury occurring because of the willful, deliberate, and specific intent of the employer to cause such injury.[19] This language in the statute codified previous court findings that intentional torts such as sexual assault were not included under workers' compensation exclusivity.[20]

- **South Dakota:** An employee has a private right of action if an employer commits an sexually motivated intentional tort that results in injury to the employee.[21] However, South Dakota invokes the "alter ego rule" that states that the harasser must be "so dominant in the corporation that he could be deemed the alter ego of the corporation."[22]

- **Texas:** The Workers' Compensation Act "does not prohibit the recovery of exemplary damages . . . by an intentional act or omission of the employer

or by the employer's gross negligence."[23] Texas courts give exclusivity for sexual harassment and sexual assault claims to the Texas Commission on Human Rights Act and not the Workers' Compensation Act.[24]

Many other states have language which courts have commonly interpreted to apply an exception to exclusivity for intentional torts, which covers sexual harassment and sexual assault claims:

- **California:** Exclusivity does not apply "[w]here the employee's injury or death is proximately caused by a willful physical assault by the employer."[25] California courts interpret this language narrowly, only allowing exceptions to exclusivity where "the employer's conduct [ ] contravenes fundamental public policy [and] exceeds the risks inherent in the employment relationship.[26]

- **Louisiana:** The exclusivity of the Workers' Compensation Act does not "affect the liability of the employer, or any officer, director, stockholder, partner, or employee of such employer or principal to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an intentional act."[27] In Louisiana, it is not enough to allege negligent torts related to sexual harassment, only intentional torts are enough to support the exception to exclusivity.[28]

- **Montana:** An employer is liable in tort when their employee is "intentionally injured by an intentional and deliberate act of the employee's employer or by the intentional and deliberate act of a fellow employee while performing the duties of employment."[29] The employer is vicariously liable for intentional actions of co-employees under the statute.[30] Montana courts have explicitly interpreted intentional acts to include sexual harassment.[31]

- **Nevada**: In 1997, Nevada added language to its workers' compensation statute that employers are *not* liable for "the intentional conduct of an employee" if the action was a "truly independent venture of the employee; was not committed in the course of the very task assigned to the employee; and was not reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his or her employment."[32] Nevada's Supreme Court has used this language when analyzing whether employers are liable for the sexually harassment behavior of their employees.[33] Nevada's adoption of this statutory language mirrors the judicial analysis of a compensable injury "arising out of and in the course of employment" that states without such statutory language use to exclude sexual harassment and sexual assault from exclusivity.[34]

- **North Dakota**: "The sole exception to an employer's immunity from civil liability under this title . . . is an action for an injury to an employee caused by an employer's intentional act done with the conscious purpose of inflicting the injury."[35] Showing that the intentional action of the co-employee is the intentional act of the employer in sexual harassment cases can prove tricky.[36]

- **Washington**: "If injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker or beneficiary of the worker shall have the privilege to take under this title [worker's compensation] *and* also have cause of action against the employer as if this title had not been enacted, for any damages in excess of compensation and benefits paid or payable under this title.[37] In sexual harassment claims, negligence or substantial certainty are not enough to invoke the intentional tort bar to workers' compensation exclusivity.[38]

- **Wyoming:** Exclusivity of the Workers' Compensation Act applies "unless the [co]employees intentionally act to cause physical harm or injury to the injured employee, but do not supersede any rights and remedies available to an employee and his dependents against any other person."[39] Wyoming courts in sexual harassment and sexual assault cases have determined that "[t]he test for determining whether the exclusive-remedy provisions of the Worker's Compensation Act operate to prevent actions against covered employers for intentional acts of employees is whether or not the claimed injury would be compensable under the Act."[40]

Occasionally, but rarely, double recovery is allowed in these jurisdictions. New York and Washington provide double recovery.[41] The majority of these jurisdictions do not allow for double recovery. Some states explicitly preclude double recovery, going so far as to require claimants to make an active election to pursue their workers' compensation claim and opt out of their private action rights and vice versa.[42] Most of these jurisdictions view the intentional act exception to workers' compensation exclusivity as an codification of the premise that workers' compensation remedy is for accidental workplace injuries. Therefore, these intentional actions are not governed by workers' compensation statute and there is no means of recovery without a civil action.

IV. Sexual harassment and sexual assault are not compensable under the workers' compensation statute.

Where states provide no statutory basis for suits for intentional acts, courts have created exceptions to workers' compensation statutes based on whether the

act committed would be compensable under the statute. Like the states which have provided some statutory language to indicate intentional acts are not compensable, the reasoning behind these decisions is that employees injured in the workplace should have some means of recovery, and if it is not allowed for under the workers' compensation statute, then exclusivity does not apply and a private action can be brought.

Many states use a test based on the statutory coverage of "an accidental injury [arising] out of and in the course of employment."[43] Some states have additional prongs to this basic analysis.

- **Delaware:** A claimant must be able to show that an assault was within the scope of employment or somehow connected to the employment and that it was not personal in nature. A personally motivated assault is not compensable.[44]
- **Georgia:** An employee who was sexually assaulted in the parking lot on the way to her car after work suffered an injury arising out of and occurring in the course of the employee's employment.[45]
- **Illinois:** To avoid exclusivity, the employee-plaintiff must show: "(1) that the injury was not accidental; (2) that the injury did not arise from his or her employment; (3) that the injury was not received during the course of employment; or (4) that the injury was not compensable under the Act."[46]
- **Indiana**: "Put more succinctly, the Indiana Workmen's Compensation Act is the exclusive remedy available to injured employees if the injury suffered was (1) accidental; (2) arose out of the employment relationship; and (3) occurred in the course of employment."[47]
- **Kansas:** The workers' compensation law applies when "an accidental injury arises out of and in the course of employment."[48] The phrase "in the course of" refers to the time, place and circumstances of the injury, while "arises out of" refers to the cause or origin of the accident and requires "some casual connection between the accidental injury and the employment."[49]
- **Massachusetts:** Common law actions against employers are barred where "(1) the plaintiff is shown to be an employee; (2) her condition is shown to be a personal injury within the meaning of the workers' compensation act; and (3) the injury is shown to have arisen out of and in the course of her employment."[50]

- **Minnesota:** "When an assault or battery is the source of an employee's injuries, three requirements must be met for compensability under the Act: the injury (1) must arise out of the employment, (2) must be in the course of employment, and (3) must not be excluded by the assault exception."[51] The assault exception states that acts by a third person or co-employee which are "intended to injure the employee because of person reasons" and not as a result of their employment are excluded from the definition of "personal injury" and not compensable under workers' compensation.[52] Minnesota courts have found sexual assault to not meet the assault exception to personal injury because "it is the motivation of the assailant that determines whether the act is personal" and therefore outside the scope of workers' compensation.[53]

- **New Mexico:** "A claim falls outside the [Workers' Compensation Act] for work-related injuries if: 1) the injuries do not arise out of employment; 2) substantial evidence exists that the employer intended to injure the employee; or 3) the injuries are not those compensable under the WCA."[54]

- **Tennessee**: "It is the general rule that an injury arising from an assault on an employee committed solely to gratify his personal ill-will, anger, or hatred, or an injury received in a fight purely personal in nature with a fellow employee, does not arise out of the employment within the meaning of the workmen›s compensation acts."[55] In *Anderson v. Save-A-Lot, Ltd.,* the court applied this test to sexual harassment by the Plaintiff's supervisor, finding sexual harassment personal in nature and not meeting the test for workers' compensation exclusivity.[56]

Other jurisdictions do not apply this test but have created one for sexual harassment and sexual assault actions. As with the states which have some statutory language which can cover sexual harassment and sexual assault, judges have created bright line rules for intentional torts or mental disabilities which have been applied to sexual assault and sexual harassment.

- **Arkansas: "**An employee may file a civil action against an employer where the employee is injured by an employer's willful and malicious acts."[57] In *Truman Arnold Companies v. Miller City Circuit Court*, the court notes that they have jurisdiction when there is an issue of law only.[58] Where there are issues of fact or mixed issues of law and fact, the Workers' Compensation Commission has jurisdiction, and cases must be brought through the Workers' Compensation system first to determine jurisdiction before a civil suit may proceed.[59]

- **District of Columbia:** The courts have concluded that sexual harassment is not "a risk involved in or incidental to employment." They base this on the intent behind the Human Rights Act, which "forbids such harassment during day-to-day workplace interaction" but "more fundamentally, because sexual harassment is altogether unrelated to any work task."[60]
- **Mississippi:** Courts have commonly held that "in order for a willful tort to be outside the exclusivity of the [MWCA], the employe[r]'s action must be done with an actual intent to injure the employee."[61]
- **New Jersey:** "Exceptions where employees may bring a private action for damages against the employer include where the employer committed an intentional wrong. The injured worker must prove both that the employer engaged in conduct that it knew was substantially certain to cause injury; and the injury and the circumstances surrounding the injury were not part and parcel of everyday industrial life or plainly outside of the legislative grant of immunity.[62]
- **South Carolina:** The exclusivity doctrine does not apply when an employer acts with deliberate or specific intent to injure an employee.[63]

V. Civil Rights Acts

Often suits alleging sexual harassment and sexual assault are brought under non-tort legislation, such as the Federal Title VII statute, state civil rights statutes, and state statutes specifically drafted to address sexual harassment and sexual assault in the workplace. [64] A number of jurisdictions have adopted the policy rationale set forth by Florida:

> "There can be no doubt at this point in time that both the state of Florida and the federal government have committed themselves strongly to outlawing and eliminating sexual discrimination in the workplace, including the related evil of sexual harassment. The statutes, case law, and administrative regulations uniformly and without exception condemn sexual harassment in the strongest possible terms. We find that the present case strongly implicates these sexual harassment policies and, accordingly, may not be decided by a blind adherence to the exclusivity rule of the workers' compensation statute alone. Our clear obligation is to construe both the workers' compensation statute and the enactments dealing with sexual harassment so that the policies of both are preserved to the greatest extent possible."[65]

Sometimes these separate statutes create their own basis for exclusivity.

Colorado: "[S]exual harassment claims are appropriately brought under the Colorado Anti Discrimination Act and Title VII of the Civil Rights Act, rather than under the Workers' Compensation Act, since these statutes were designed to address workplace harassment."[66]

Illinois: Sexual harassment claims are considered a civil right violation and the Illinois Human Rights Act has the exclusive "jurisdiction over the subject of an alleged civil rights violation." [67] In *Geise v. Phoenix*, the employee who was sexually harassed attempted to bring her claim against her employer under tort. However, the court saw her negligence claims as truly being civil rights violations because "the Human Rights Act provides that it is a "civil rights violation" for "any employer, employee, agent of any employer, employment agency or labor organization to engage in sexual harassment."[68] Therefore, even though the employer failed to raise the workers compensation exclusivity, she could not recover for her tort because of the bar under the Human Rights Act.[69]

Indiana: Indiana's workers' compensation act allows for "an injured employee [to] file a private right of action under Indiana's Compensation for Victims of Violent Crimes Act."[70]

Maine: Courts in Maine have reasoned that many sexual harassment claims are similar to non-sexual assault claims, and would fall under the Act if they are the result of 1) "a personal injury, 2) that arises out of and 3) in the course of the employment."[71] However, claimants have brought civil actions under the Maine Human Rights Act and Title VII of the Civil Rights Act.[72]

VI. Where the workers' compensation statute is the only means of recovery for sexual assault and sexual harassment injuries.

The states least favorable to sexual harassment and sexual assault civil actions provide no statutory or judicially created exception to their workers' compensation exclusivity, thereby barring tort claims.

- **Arizona:** Arizona's workers' compensation statute does not exclude mental injuries due to sexual harassment because such injuries are the result of "unexpected, unusual, or extraordinary" stress related to employment which is greater than day-to-day mental stresses and tensions.[73]

- **Delaware:** Sexual harassment clearly does not fall within the exclusion provided for an act "... not directed against the employee as an employee or because of the employee's employment."[74]

VII. Conclusion

Few states permit double recovery for sexual harassment and sexual assault in tort and workers' compensation. Hawaii, New York, and Washington have created either explicit or implied paths of recovery for both workers' compensation claims and civil actions. On the other end of the spectrum, Arizona and Delaware have interpreted workers' compensation exclusivity strictly, allowing only for the workers' compensation system to address these types of workplace injuries no matter their motivation.

The majority of jurisdictions exist somewhere in the middle. A number of state legislatures have included specific language for intentional acts in their statute, and absent that, courts have interpreted the legislative intent to protect plaintiffs' means of recovery for these sexually motivated actions in the workplace. Where legislatures have not acted, judges have acted to enforce what they view as a policy inherent in either their state's legislative body as a whole, or just within the workers' compensation exclusivity provision. These jurisdictions ensure that there is some path to recovery. Finally, those states who have not specifically addressed sexual harassment or sexual assault in their workers' compensation legislation or in their case law address the claims on a case-by-case basis, assessing whether the defenses raised by the employer work as a bar to the claim, or whether there is a more appropriate forum within which to bring a claim of sexual harassment or sexual assault that occurs in, but may not "arise out of" or "in the course of" employment.

The take-away is that one should educate oneself as to the defenses available and claims that may be covered by the exclusive remedy versus claims that may be raised or perhaps may only be raised using civil rights or tort actions. Different Statutes of Limitations will apply to the various forums, as well, and a wise practitioner must be well informed to best represent his or her client.

Endnotes

1 The authors express their appreciation to law student Clare McKeown for her substantial contribution to this article.

2 See *Suarez v. Dickmont Plastics Corp.*, 639 A.2d 507 (Conn. 1994) (holding there was sufficient evidence for a jury to determine the employer's actions were intentional and would fall under the intentional tort exception to workers' compensation exclusivity).

3 See *McCracken v. Wal-Mart Stores E., LP*, 298 S.W.3d 473, 478 (Mo. 2009) (reasoning that exclusive jurisdiction under the Workers' Compensation Act is traditionally treated as an affirmative defense and not an issue of subject matter jurisdiction, therefore the defense if not raised is waived).

4 See *Geise v. Phoenix Co. of Chicago, Inc.*, 159 Ill.2d 507, 514–15 (1994) (holding that the employer waived the affirmative defense of workers' compensation exclusivity by first raising it at the appellate level).

5 See *Downer v. Detroit Receiving Hosp.*, 191 Mich.App. 232, 235–36 (1991) (holding the employee's negligent hiring claim against her employer did not fall under the intentional tort exception and therefore workers' compensation exclusivity barred her civil suit).

6 HI Rev Stat § 356-5 (2017); see *Nelson v. Univ. of Hawaii*, 97 Haw. 376, 393–94, 38 P.3d 95, 112–13 (2001) ("HRS § 386–5 was amended in 1992 to include an exception to the exclusive remedy provision of the workers' compensation law for certain claims related to sexual harassment and sexual assault.").

7 See *Nelson v. Univ. of Hawaii,* 97 Haw. 376, 395, 38 P.3d 95, 114 (2001) (holding the intentional emotional distress exception to exclusivity applied to plaintiff's claim related to sexual harassment from her co-employees).

8 Hse. Stand. Comm. Rep. No. 766, in 1991 House Journal, at 1107.

9 See *Doe v. State*, 89 A.D.3d 787, 788, 933 N.Y.S.2d 688, 690 (2011) (allowing sexual harassment tort claim as assault and battery).

10 See *Id.*

11 See *Randall v. Tod-Nik Audiology, Inc.*, 270 A.D.2d 38, 39, 704 N.Y.S.2d 228, 229–30 (2000) (permitting sexual assault and battery and intentional infliction of emotional distress claims).

12 M.C.L.A. 418.131 (1).

13 *Id.*

14 See also *Downer v. Detroit Receiving Hosp.*, 191 Mich. App. 232, 235, 477 N.W.2d 146, 148 (1991) (finding exclusivity applied for claims of negligent hiring related to sexual harassment because plaintiff did not assert employer acted intentionally but negligently).

15 See *Corcoran v. N.Y. Power Auth.*, 202 F.3d 530, 541 (2d Cir. 1999) (applying New York law) (allowing executrix of estate of deceased employee to bring negligence and tort claims).

16 See *Handford v. Plaza Packaging Corp.*, 811 e.E.2d 30, 31–32 (N.Y. 2004) (holding plaintiff's claims for intentional infliction of emotional distress, discrimination and sexual harassment as prima facie tort fell under the intentional tort exception to exclusivity).

17 R.C. 2745.01(A).

18 See *Kerans v. Porter Paint Co.*, 575 N.E. 2d 428, 431 (Ohio 1991) (finding sexual harassment claims resulting in purely psychological injuries not compensable under the Ohio Workers' Compensation Act, therefore exclusivity did not apply).

19 Okla. Stat. tit. 85A, § 5(B)(2) (portion of the law carving out exceptions for owners and operators or oil and gas wells found unconstitutional under Strickland v. Stephens Production Co., 411 P.3d 369 (Okla. 2018).

20 See *Pursell v. Pizza Inn Inc.*, 786 P.2d 716, 717 (Okla.Civ. App. 1990) (holding exclusivity did not apply for sexual battery and negligent hiring).

21 SDCL 62-3-2. See also *Benson v. Goble*, 1999 S.D. 38, ¶ 19, 593 N.W.2d 402, 406 (noting the intentional tort exception is narrow and that an "actor must know or believe that the harm is a substantially certain consequence of his act before intent to injure will be inferred").

22 See *Ruschenberg v. Eliason*, 850 N.W.2d 810, 820–21 (S.D. 2014) (citing the alter ego rule from *Benson v. Globe*, 593 N.W.2d 402, 406 (S.D. 1999), but ultimately finding the issue moot due to other resolved issues in the case).

23 TX Labor § 408.001 (b).

24 *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 803 (Tex. 2010) (holding that sexual harassment claim was not barred under the Workers' Compensation Act but the exclusivity of the Texas Commission on Human Rights Act).

25 Cal. Lab. Code § 3602 (West).

26 *Jones v. Dep't of Corr. & Rehab.*, 152 Cal. App. 4th 1367, 1382, 62 Cal. Rptr. 3d 200, 212 (2007) (holding that plaintiff's claims of emotional distress and assault and battery tied to sexual harassment at work was barred by exclusivity). Jones also addresses civil suits brought against co-employees a "willful and unprovoked physical act of aggression." Id. The term "aggression" suggests intentional harmful conduct . . . and a "willful and unprovoked physical act of aggression includes an intent to injure requirement." Id.

27 LA R.S. 23:1032(B).

28 See *Adams v. Time Saver Stores, Inc.*, 615 So. 2d 460, 461–62 (La. Ct. App.), writ denied, 617 So. 2d 910 (La. 1993) (holding that questions of negligence for an employee sexually assaulted while working the graveyard shift were not sufficient to constitute an intentional act under the statute). In determining intentional acts, "terms such as 'reasonably foreseeable', 'likely to occur' and 'should have known' may raise issues of negligence, or gross negligence but do not amount to 'intentional' as that term is used in the Worker's Compensation Act." Id.

29 Mont. Code Ann. § 39-71-413 (1)(a) (West).

30 *Id.* at (2).

31 See *Vainio v. Brookshire*, 258 Mont. 273, 280, 852 P.2d 596, 601 (1993) (holding that plaintiff's remedy was not exclusively under the Workers' Compensation Act because "[s]exual harassment is an intentional act not arising from an accident").

32 NV ST 41.745 (1).

33 See *Wood v. Safeway, Inc.*, 121 Nev. 724, 737–38, 121 P.3d 1026, 1035 (2005) (holding exclusivity applied because the employee's "sexual assault of Doe was an independent venture outside the course and scope of his employment").

34 See *Wood v. Safeway, Inc.*, 121 Nev. 724, 733, 121 P.3d 1026, 1032 (2005) ("[I]njuries that fall within the ambit of the NIIA's coverage are those that both arise out of the employment and occur within the course of that employment.")

35 N.D. Cent. Code Ann. § 65-01-01.1 (West).

36 See *Richard v. Washburn Public Schools*, 809 N.W.2d 288, 296 (N.D. 2011) (holding the employer liable for the employee's civil suit not because the employee proved intention but because the sexual harassment was non-compensable under the workers' compensation act as a physical-mental injury).

37 RCW 51.24.020.

38 See *La Rose v. King County*, 437 P.3d 701, ¶ 96 (Wash. Ct. App. 2019) (finding the plaintiff did not present enough specific facts to show her employer's conduct fell under the deliberate intention exception).

39 WYO. STAT. ANN. § 27-14-104(a).

40 See *Baker v. Wendy's of Montana, Inc.*, 687 P.2d 885, 889 (Wyo. 1984) (holding the plaintiff's claims for sexual assault and intentional infliction of emotion distress were covered under the Workers' Compensation Act because they were in the course of employment).

41 See *Hanford v. Plaza Packaging Corp.*, 2 N.Y.3d 348, 351, 811 N.E.2d 30, 32 (2004) ("[T]he Workers' Compensation Law does not bar an employee who has accepted compensation benefits from suing a coemployee who has committed an intentional assault upon him."); see also supra note 37.

42 See *Advanced Countertop Design, Inc. v. Second Judicial Dist. Court of State ex rel. Cty. of Washoe*, 115 Nev. 268, 271, 984 P.2d 756, 759 (1999) (noting double recovery was not permitted for an intentional tort where the plaintiff had already recovered under the workers' compensation act), Tex. Lab. Code Ann. § 406.034(a) ("To retain a common law right of action to recover damages for personal injuries or death, a covered employee must notify the employer in writing that the employee waives coverage and retains all rights of action under common law."), *Bias v. E. Associated Coal Corp.*, 220 W. Va. 190, 196, 640 S.E.2d 540, 546 (2006) ("An employee who is precluded . . . from receiving workers' compensation benefits for a mental injury without physical manifestation cannot, because of the immunity afforded employers . . ., maintain a common law negligence action against his employer for such injury.").

43 *Orr v. Holiday Inns, Inc.*, 6 Kan. App. 2d 335, 339, 627 P.2d 1193, 1196–97, *aff'd*, 230 Kan. 271, 634 P.2d 1067 (1981) (finding bartender sexual assaulted in the bathroom during her break qualified as arising out of and in the course of employment, thus exclusivity applied).

44 *Brogan v. Value City Furniture, Del Supr.* C.A. No. 01A-06-002 (2002) (unpublished) (holding the Industrial Accident Board properly deems an attack by a supervisor's wife was personal and therefore not compensable under the Act).

45 *Dawson v. Wal-Mart Stores, Inc.*, 324 Ga.App. 604 (2013) (finding plaintiff's personal injury action against her employer was barred under the exclusivity of the Workers' Compensation Act).

46 *Meerbrey v. Marshall Field & Co.*, 139 Ill.2d 455, 463, 151 Ill.Dec. 560, 564 N.E.2d 1222 (1990) (holding the Workers' Compensation Act barred the employee's action against his employer for false imprisonment, false arrest, and malicious prosecution, but it did not bar the action against his co-employee).

47 *Crowe v. Blum*, 9 F.3d 32, 34 (7th Cir. 1993) (holding a physical assault by a co-worker was compensable under the Act because it was accidental and arising out of her employment).

48 *Orr v. Holiday Inns, Inc.*, 6 Kan. App. 2d 335, 339, 627 P.2d 1193, 1196–97, aff'd, 230 Kan. 271, 634 P.2d 1067 (1981) (finding bartender sexual assaulted in the bathroom during her break qualified as arising out of and in the course of employment, thus exclusivity applied).

49 *Id.* at 1197.

50 *Brown v. Nutter, McClennen & Fish*, 45 Mass. App. Ct. 212, 214–15, 696 N.E.2d 953, 955 (1998) (holding the emotional repercussions the employee suffered after her employer forced her to commit offensive and improper acts on his behalf were barred under exclusivity because they arose out of and in the course of her employment).

51 *Fernandez v. Ramsey Cty.*, 495 N.W.2d 859, 861 (Minn. Ct. App. 1993) (remanding Plaintiff's claims of sexually motivated assault and battery by her supervisors because the issue of whether the action was personal or arising out of and in the course of employment was a question of fact).

52 Minn. Stat. §176.011 (1990).

53 *Id.* at 862.

54 *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶ 24, 127 N.M. 47, 52, 976 P.2d 999, 1004 (holding that injuries caused by sexual harassment do not arise out of employment).

55 *Anderson v. Save-A-Lot, Ltd.*, 989 S.W.2d 277, 281 (Tenn. 1999) (holding that sexual harassment was personal in nature and did not arise out of employment and was therefore not barred under Workers' Compensation Act).

56 *Id.*

57 *Truman Arnold Companies v. Miller Cty. Circuit Court*, 2017 Ark. 94, 5, 513 S.W.3d 838, 841 (2017) (holding the employee's sexual harassment-based claims of negligent supervision, retention, and hiring were barred by exclusivity because the inquiry should be addressed by the Workers' Compensation Commission).

58 *Id.*

59 *Id.* (remanded the case because the question of whether a sexual harassment-based injury arises out of and in the course of employment was a question of fact not law).

60 *Estate of Underwood v. Nat'l Credit Union Admin.*, 665 A.2d 621, 634 (D.C. 1995) (holding that the Plaintiff's sexual harassment and intentional infliction of emotional distress claims were not barred by the Worker's Compensation Act because Plaintiff's sexual harassment and related emotional distress did not arise out of her employment).

61 *Bowden v. Young*, 120 So. 3d 971, 976 (Miss. 2013) (finding plaintiffs failed to state claims for battery, intentional infliction of emotional distress, and conspiracy and aiding and abetting, therefore the original dismissal under exclusivity was upheld).

62 *Laidlow v. Hariton Machinery Co., Inc.*, 170 N.J. 602, 612-15 (2002) (removing a safety device from a dangerous machine which injured the employee could support a finding of intent for the intentional tort exception to exclusivity).

63 *Peay v. U.S. Silica Co.*, 437 S.E.2d 64, 65 (S.C. 1993) (holding employer did not rise to deliberate or specific intent to injury where employer knew of dangerous sand and silica dust exposure for employees but did provide a specific employee with respirators or medical screenings).

64 See *Vainio v. Brookshire*, 258 Mont. 273, 280, 852 P.2d 596, 601 (1993) (Montana Human Rights Act) and *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 803 (Tex. 2010) (Texas Commission on Human Rights Act), *Roe v. Albertson's Inc.*, 141 Idaho 524, 530, 112 P.3d 812, 818 (2005) (Idaho Human Rights Act); see also *Byrd v. Richardson-Greenshields Sec., Inc.*, 552 So. 2d 1099, 1102 (Fla. 1989) ("The court looked to Title VII and Florida's Human Rights Act of 1977 as the policy sources of Florida's attitudes towards sexual harassment.").

65 *Byrd v. Richardson-Greenshields Sec., Inc.*, 552 So. 2d 1099, 1102 (Fla. 1989). See also *Kerans v. Porter Paint Co.*, 61 Ohio St. 3d 486, 490, 575 N.E.2d 428, 431 (1991) (applying Florida's reasoning that to preempt claims protected under statutes other than the Workers' Compensation Act such as sexual harassment would subvert legislative intent).

66 *Horodyskyj v. Karanian*, 32 P.3d 470, 479 (Colo. 2001) (holding sexual harassment from a co-employee was inherently private and did not preclude the employee from bringing sexual harassment and related tort claims).

67 *Geise v. Phoenix Co. of Chicago, Inc.*, 159 Ill.2d 507, 516 (1994) (identifying plaintiff's tort claims as disguised sexual harassment claims with exclusive jurisdiction under the Illinois Human Rights Act).

68 *Id.*

69 *Id.*

70 Ind. Code §§ 5-2-6.1-0.2 to 5-2-6.1-49.

71 *Knox v. Combined Ins. Co. of Am.*, 542 A.2d 363, 365–66 (Me. 1988) (holding plaintiff's claims for mental injuries caused by sexual assault and harassments committee by her co-worker were the exclusive jurisdiction of the Workers' Compensation Act).

72 See *Bond Builders, Inc. v. Commercial Union Ins. Co.*, 670 A.2d 1388 (Me. 1996) (holding workers' compensation did not bar plaintiff's discrimination claim brought under the Maine Human Rights Act).

73 See *Irvin Investors, Inc. v. Superior Court In and For County of Maricopa*, 166 Ariz. 113, 115 (Ariz. 1990)

74 *Konstantopoulos v. Westvaco Corp.*, 690 A.2d 936, 939 (Del. 1996) (citing *Spielberg v. State, Del.Supr.*, 558 A.2d 291 (1989) which holds that if the intent of the legislature is clearly reflected in the statute the text of the statute controls).

Workplace Stress... Continued from page 7

Everyone has different stress triggers and, according to surveys, work stress tops the list. Forty percent of U.S. workers admit to experiencing office stress, and one-quarter say work is the biggest source of stress in their lives.

Some causes of work stress include:

- Having a heavy workload or too much responsibility
- Working long hours
- Having poor management, unclear work expectations, or no say in the
- decision-making process
- Working under dangerous conditions
- Being insecure about one's chances for advancement or risk of termination
- Having to give speeches in front of colleagues
- Facing discrimination or harassment at work

Moving forward in time, the events that took place on September 11, 2011 are something that all who lived through the experience will never forget. Within two hours, approximately 15,410 of the estimated World Trade Center occupants had to evacuate the towers before the towers collapsed. Although they survived the events of 9/11, many WTC survivors were indelibly exposed to a number of potentially traumatic events, which were intensified by several factors: Many individuals encountered evacuation problems (*e.g.*, intense fires, blocked stairwells), experienced serious injury, and witnessed the deaths of their colleagues. Over a decade later, these individuals continue to endure varying degrees of psychological distress including Posttraumatic Stress Disorder (PTSD).

Stress Associated with Pandemic. As this is being written in September 2020, concern with the spread of the Coronavirus (COVID-19) has workers, along with the general public, elevating their level of stress and fear as they come to grips with a pandemic.

At the current time, the Centers for Disease Control (CDC) is responding to an outbreak of respiratory disease caused by the new Coronavirus (COVID-19) that first originated in December 2019 in Wuhan, China and which has affected virtually every country around the world. As of May 1, 2020, the United States had more than one million confirmed cases of COVID-19 and more than 61,000 recorded deaths. This compared with 60 confirmed cases and a single death as of March 4, 2020. At the current time, those numbers can be compared with the 960,000 deaths around the world, and the more than 31 million cases globally.

"Modern-day stress is said to cause accidents, illness, disease, and death; incite marital distress and contribute to the dysfunction of families; promote job dissatisfaction; and create other organizational ills."

II.

The law of mental stress causing mental disability, and its compensability under workers' compensation laws (the law of the "mental-mental stress") has been the subject of considerable study. The topic is treated in encyclopedias published for lawyers, most famously in the multi-volume treatise originally authored by Arthur Larson. And, when mental-mentals constituted a crisis area of workers compensation, the academic law journals were full of pro and con analyses of whether coverage of such claims was proper and, if so, under what conditions.

Our book examines anew this still-controversial aspect of workers' compensation. It does so in a period when, after several decades during which many states withdrew or limited coverage, legislatures are enacting or considering presumptions and other laws to ease the ability of first responders (police, fire and emergency medical professionals) to secure coverage for mental injury and disability, particularly Post-Traumatic Stress Disorder (PTSD). The present day is also marked by a seeming parallel trend: at least some state courts are reading their traditional laws in the mental-mental area liberally so as to award compensation to such traumatized workers.

Our book seeks to predict how mental-mental claims have been, are now, and will in the future be treated by agencies and courts around the country. Our book also features tables in which the laws of the states and federal programs are identified and specifically referenced by statute and/or important caselaw.

Currently, among the 50 states, 33 permit recovery, under various tests, for mental-mental injuries. Seventeen, meanwhile, exclude such claims. The District of Columbia, the Longshore Act and FECA also allow recovery for mental-mentals. Generally bright lines are in place. Still, it is difficult, in this realm, to speak in absolutes. Nuance attends some state laws.

III.

"Identifying and Addressing Workplace Stress. Solutions, Prevention and Mitigation," is the last chapter of the book. Of course, everyone who has ever held a job has, at some point, felt the pressure of work-related stress. Any job can have stressful elements, even if one enjoys what they are doing. In the short-term, a person may experience pressure to meet a deadline, conduct a meeting or to fulfill a challenging task. But when work stress becomes chronic, it can be overwhelming and harmful to both the physical and emotional health of a person.

- According to the United Nations International Labour Organization, a majority of Americans consider their jobs to be stressful. We have referenced the

causes of job stress above, but let's consider some others. Job stress may be caused by one or more of the following:

- Inadequate earnings
- Intense pressure to perform at peak levels all the time
- Harassment or any other traumatic event
- Politics
- Conflict with coworker(s)
- Unclear job responsibilities
- Technology

In addition, problems in one's personal life can cause significant stress on the job. Financial trouble, marital difficulties, grief, and other family or personal issues can cause distraction and stress throughout the day, impacting an individual's job performance and setting the stage for a possible work-related injury.

Research indicates that many medical problems stem from stress. These medical problems are costly, in the form of lost wages, increased medical costs, and decreased productivity. In addition, on-the-job accidents occur more frequently with stressed employees. Stress can cause shorter attention spans and fatigue, both of which heighten the risk for workplace injuries. Also, when workers are feeling pressured to complete more work in less time, they are more likely to engage in more risky shortcuts.

Our book, after having defined and analyzed the problem, takes the topic to the next logical step: consideration of potential solutions. The question of who is ultimately responsible for employee mental health is complex. Generally, people are taught to take responsibility for their own-health – learning to recognize the signs that they are not functioning well, to seek help when needed, and to modify their own behavior to improve their life. But businesses can also act in several ways to assist employees in being relieved of much unnecessary needed stress.

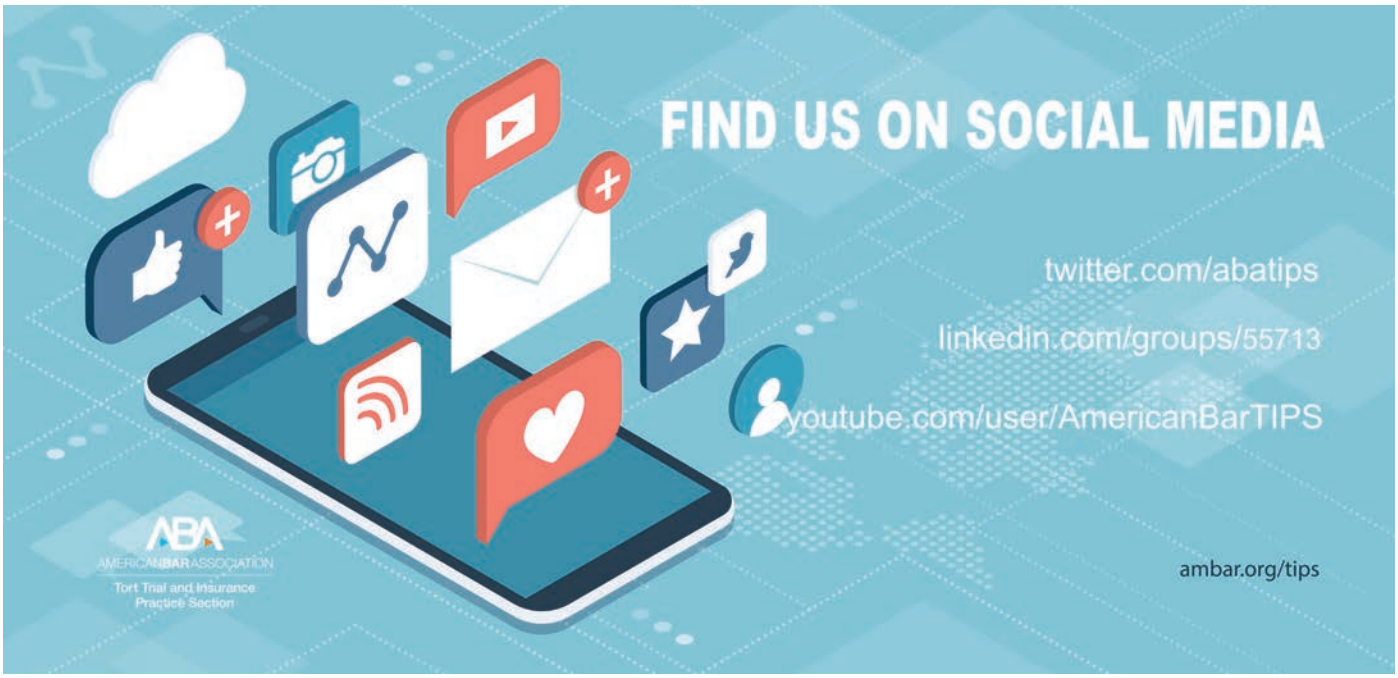
Indeed, the subject of stress management is complex, and a robust industry exists dedicated to helping people cope. Stress management enterprises range from medical professionals, stress consultants, self-help books, mobile applications, podcasts, and seminars. One will also find something related to stress management conveyed in whatever medium one prefers to consume. Not surprisingly, workers' use of self-care or self-help products has increased, and the associated industry is now valued at $10 billion. According to Market Watch, the self-help market is estimated to grow to $13.2 billion by 2022 with 5.6% average yearly gains. The success of the self-help industry reflects on how pervasive and commonplace stress has become.

Those living with high levels of stress are putting their entire well-being at risk. Stress wreaks havoc on one's emotional equilibrium, as well as affecting one's physical health. It narrows the ability to think clearly, function effectively, and enjoy life. Effective stress management, whether undertaken through an employer-sponsored employee assistance program, through some other wellness program, or through individual efforts such as exercise or meditation, helps to break the hold stress has on one's life in order for one to become happier, healthier, and more productive. The ultimate goal is a balanced life, with time for work, relationships, relaxation, and fun – and the resilience to hold up under pressure and meet life's challenges head on. As noted above, our book reviews many strategies for individuals to meet this goal.

IV.

In conclusion, it is best stated by **Merton E. Marks, Esq., of Counsel, Gordon Rees Scully Mansukhani LLP**. ***Workplace Stress: Past, Present, & Future*** "is a reference that every lawyer and insurance executive will want to keep within reach. In a single volume, the authors provide an analysis of the most-timely type of workplace claims with which every business has been or will be faced."

The book will be available late October - early November 2020.
Pre-Order @ https://www.amcomp.org/workplace-stress



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December 7, 2020	**Preparation, Risks, and Controls of Reopening in a Covid World: It's a Small World After All** Contact: Danielle Daly – 312/988-5708	Virtual Programing
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January 12, 2021	**Animal Shelter Law Symposium 2021** Contact: Theresa Beckom – (312) 988-5672	Virtual Programing
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February 10-14, 2021	**Insurance Coverage Litigation Midyear Conference** Contact: Janet Hummons – 312/988-5656 Danielle Daly – 312/988-5708	TBD
February 17-22, 2021	**ABA Midyear Meeting** Contact: Janet Hummons – 312/988-5656	TBD
March 10-12, 2021	**Transportation Mega Conference XV** Contact: Janet Hummons – 312/988-5656	TBD
March 12-13, 2021	**Admiralty Maritime Law Conference** Contact: Danielle Daly – 312/988-5708	TBD
March 19-20, 2021	**Workers' Compensation** Contact: Danielle Daly - 312/988-5708	TBD
April 8-9, 2021	**Motor Vehicle Products Liability Conference** Contact: Janet Hummons – 312/988-5656 Danielle Daly – 312/988-5708	Hotel Del Coronado Coronado, CA

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