

## Amendments to the WDCA Aim to Clarify Law, Limit Liability of Employers



Melissa P. Stewart

On December 19, 2011, Rick Snyder, the Governor of Michigan, signed into law a bill that made substantial changes to Michigan's Workers' Disability Compensation Act (WDCA). Aimed at reducing the number of workers' compensation claims filed in the State and also at limiting certain types of liability for employers, the amendments made changes to the WDCA's definitions of personal injury, disability and weekly wage loss benefits.

By way of background, Michigan is considered a "wage loss state," which means that an employee is entitled to workers' compensation benefits when an injury at work causes a limitation to her wage-earning potential. What this means on a practical level has been the subject of significant litigation since original enactment of the WDCA in 1969. Proponents of the changes hail them as providing comprehensive legislation that reflects the rulings Michigan courts have made in regards to workers' compensation issues. Meanwhile, critics decry the changes as creating additional hurdles for employees injured on the job.

Regardless of their opinions of the amendments, attorneys for both employers and employees agree that a keen understanding of the changes to the WDCA is critical to ensuring that the WDCA is applied as intended by the Legislature. With that in mind, read on for a look at several of the most significant amendments:

- An employee will not be considered disabled, unless she can show a limitation in wage earning capacity, i.e., that she is unable to earn in any job that pay the maximum wage in work suitable for her qualifications and/or training.

- An employee has an affirmative duty to find other work that is compatible with the limitations imposed by her injuries, and in determining whether the employee is eligible for workers' compensation, the magistrate may consider whether she made such efforts in good faith.

- An employee will not be eligible for workers' compensation benefits unless she discloses her qualifications and training and provides evidence that she is qualified and trained to perform in the same salary range of her prior job's maximum wage earning capacity, but as a result of her on-the-job injury, she is unable to perform these other types of jobs.

- An employer may now conduct discovery so as to present a defense and rebut any evidence presented by the employee of her qualifications and training and/or evidence that her workplace injury has precluded her from performing these types of jobs.

- An employee will not be eligible for workers' compensation benefits for pre-existing injuries, unless she can show that the work caused, contributed to or aggravated her injury, so as to create a pathology that is medically distinguishable from any condition that existed prior to the date of the work-related injury.

- An employee may not rely upon a diagnosis of degenerative arthritis as the basis of a workers' compensation claim, unless



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## The Top Ten Estate Planning Mistakes



Linda Davis Friedland

In last month's newsletter we highlighted five of the top ten estate planning mistakes. In this article, we will discuss the remaining estate planning mistakes one should avoid. Please visit our website at [www.cmda-law.com](http://www.cmda-law.com) to view the entire "Top Ten Estate Planning Mistakes" article.

### 6. Failure to Complete the Estate Plan.

This is perhaps the saddest and most frustrating mistake. When one has a trust prepared, and then fails to fund the trust, unintended consequences may result. To fund a trust, one must legally place the desired assets into the trust, by either designating the trust as the owner, naming the trust as a beneficiary or by executing a pour-over will with the appropriate provisions. Tangible assets should be listed in the trust's schedule of assets. Each method of funding has a different purpose and tax consequence. Michigan also allows individuals to execute an "Assignment to Trust" to serve as a catch all, but there are situations and certain assets for which this method of funding will not work.

A failure to fund a trust means that the assets will pass to beneficiaries through probate, or in accordance with the last beneficiary designation on the account or insurance policy. The result could be that the wrong beneficiaries receive the wrong assets, with possible adverse federal estate tax consequences. Expensive litigation would then typically follow.

Equally important to the failure to fund a trust is the funding of a trust with inappropriate assets. For example, it is not always advisable for a married couple to place their primary residence into a trust, because this would alter their ownership as a "tenancy by the entireties." The result could be decreased protection from creditors. While there are circumstances in which it would be appropriate to place a primary residence into a trust, this should never be done without the advice of an experienced estate planning attorney. The same rationale applies to an Individual Retirement Account (IRA). Changing the ownership of an IRA from an individual to a trust creates a "taxable event." Naming a trust as a beneficiary to an IRA will also have tax consequences. While this situation may be unavoidable, an attorney should be consulted before any changes are made.

### 7. Failure to Preserve Homestead Exemption.

If a primary residence is placed into a trust, the correct statutory election should be made with the local municipality, in order to preserve the Homestead Exemption. This is necessary in order to limit the rate at which the local municipality can increase property taxes.

### 8. The Unknown Estate Plan.

All the money, time and effort that one puts into an estate plan will be useless if no one can find it. Fiduciaries and/or beneficiaries should know that an estate plan exists and where the documents are located.

Depending on the bank, beneficiaries may need a court order to gain access to a safe deposit box. Some banks will allow limited, supervised access to a safe deposit box in order to allow family members to view a will. One should be familiar with the bank's policies and procedures regarding access. Other options for storing planning documents include a fire-proof safe at home, the attorney's office or at several locations to ensure someone finds them.

If confidentiality is not an issue, some insurance claims adjusters have recommended that important documents be stored in the refrigerator. If the seal remains intact, the refrigerator may provide better protection from fire and water than a desk drawer.

### 9. Burial Instructions Contained in Wills.

In most cases wills are not reviewed until after the funeral. So, if one wishes to be buried in a Corvette, arrangements should be made outside of the estate plan.

### 10. Unequal Distributions.

An estate plan that provides for unequal distributions among children is not a mistake, per se. However, unequal distributions may cause discord among the children that could lead to probate litigation. Such estate plans should be created only after careful consideration.

Some parents may leave more money to an irresponsible child under the belief that this child "needs the money more." The unintended message, however, could be that the irresponsible child is being rewarded, while the responsible children are being punished. Other parents amend their estate plans often, disinheriting children and then bringing them back, as a form of punishment or reward for particular behavior. When creating an estate plan, one should be mindful that this could be the last word to the children. There may not be time to amend the estate plan after the family fight of the week is resolved.

Our attorneys are available to prepare estate plans, answer questions and review estate plans currently in place to ensure the plans are updated as tax laws and family situations change.

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## COMMUNITY COLLEGE CORNER



Patrick R. Sturdy

individually liable.

A community college employee's first step in avoiding individual liability is to read and understand the college's policies and procedures and follow them as written. Also, many programs within the college have developed program guidelines. Employees must have a working knowledge of these guidelines and make sure that they are uniformly applied as written.

Proper documentation can also help an employee from being held individually liable. The documentation should include specific facts regarding a situation, such as dates, times, names of those involved and the actions of those involved.

Community college employees may be entitled to immunity from liability in the event their actions result in injury to an employee or student. However, immunity does not apply in all circumstances. Community college employees, as public employees, may be held individually liable in some circumstances where private sector employees are not. Accordingly, it is important that employees take steps to avoid being held indi-

The documentation should also reflect the process used to reach a decision, such as what investigation was conducted, who was interviewed and what records were reviewed. The reason for the action taken should also be documented, along with reactions to the discipline. Any policies, procedures or correspondence being relied upon should be referenced and attached.

Another step to avoid individual liability includes handling all disciplines and terminations in a private setting. When meeting with the employee or student, give specific and truthful reasons for the decision being made, focus on the problem behavior and do not criticize personality traits of the employee or student. Explain the steps you have taken to reach your decision. Also, show compassion about the impact of the decision, without showing remorse for the decision. If the employee or student becomes explosive or aggressive, stay calm, remain polite and listen carefully. No matter what the employee or student says, do not embarrass or insult them and do not argue the issue with them. Finally, avoid any kind of physical contact with the employee or student.

While following these steps may not guarantee that a community college employee will not be held individually liable, they go a long way in helping one avoid liability.

## Amendments to the WDCA (cont.)

she can demonstrate that her employment aggravated or accelerated the condition in a significant manner.

- The period of time in which an employer can mandate that an employee see a physician of the employer's choosing has been expanded from ten days to 28 days.

As this snapshot of the amendments to the WDCA clearly demonstrates, determining availability of workers' compensation benefits is more complex than ever before. Accordingly, it is advisable to consult with an attorney to ensure that your rights as an employer or as an employee are protected.

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### EXCEPTION FOR MUNICIPALITIES

Perhaps one of the most controversial amendments to the Workers' Disability Compensation Act addresses a change to the definition of the term "wage earning capacity." As it is now codified, the WDCA defines the term as the "wages the employee earns or is capable of earning in a job reasonably available to the employee, whether or not the wages are actually earned."

However, for police officers and firefighters injured on the job, the definition remains unchanged, such that in determining whether a police officer or firefighter qualifies for workers' compensation benefits, the magistrate will only consider, "wages the employee earns or is capable of earning at a job reasonably available to that employee."

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On Law is a monthly publication from Cummings, McClorey, Davis & Acho, P.L.C.

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