

## Winter 2007

### Highlights:

- Alert! New Legislation (see page 4)
- New faces and arrivals at SBH (see page 10)

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## New Legislation Alert!

Regardless of how you celebrate the holiday season, you may have some trepidation concerning the rapid approach of a new year—and new laws. On January 1, 2008, a surprising number of new laws impacting employment will go into effect. To prepare you for these changes, SBH has compiled a special section focusing on legislation enacted this past year.

Please turn to Page 4 for The SBH Guide to Legislation.

## Dealing with the “Laundry List” of New or Omitted Condition Claims

By Steve Verotsky

Unfortunately, it is becoming a common occurrence for injured workers and their attorneys to submit a “laundry list” of new or omitted condition claims after claim closure. An inadvertent failure to accept or deny each and every condition may create liability for penalties and attorney fees for a *de facto* denial or unreasonable claim processing. In addition, if a new condition is found compensable after claim closure, the carrier must reopen the claim for processing. This creates additional exposure for temporary and permanent disability benefits. Expansion requests create a number of processing headaches, which are magnified when an injured worker’s laundry list of conditions includes items that do not appear to be conditions at all, such as a body part (low back) or a medical procedure (cervical disc fusion).

To initiate an omitted or new condition claim, a worker “must clearly request formal written acceptance of a new medical condition or an omitted medical condition from the insurer or self-insured employer.” ORS 656.267(1). This statute indicates carriers are only required to accept medical conditions, as opposed to symptoms or medical procedures. Accepting a symptom is a dangerous proposition because all underlying conditions are then accepted. ***Georgia Pacific v. Piowar, 205 Or 494 (1988)***. The distinction between a medical condition and symptom can be difficult to ascertain. In ***Francisco G. Rodriguez, 59 Van Natta 2422 (2007)***, the Board acknowledged this difficulty and ultimately concluded this was an issue to be resolved by a medical expert when determining compensability.

In *Rodriguez*, the injured worker had an accepted chest wall contusion and 8<sup>th</sup> rib fracture. He requested acceptance of “chronic chest wall pain as a result of the fracture condition.” In response, SAIF issued a “no perfected claim” letter stating that, because the worker had requested acceptance of a symptom rather than a medical condition or diagnosis, he had not yet perfected a claim for a new or omitted medical condition. Originally, the Board disagreed and explained the distinction between symptoms and conditions must be decided when determining compensability. The Board, at SAIF’s request, has withdrawn the order to reconsider its decision.

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*When presented with request to accept something obviously not a condition, obtain a medical opinion confirming alleged condition is a symptom.*

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In *Rodriguez* case, the Board suggested expert medical opinion rather than common sense must be relied upon to determine whether a claim is for a symptom or condition. In other words, carriers are allowed to argue whatever is claimed as a new or omitted condition is not a condition, but this contention must be supported by medical evidence at hearing. As a practical matter, when presented with a request to accept something that is obviously not a condition, such as “foot pain,” we recommend you obtain a medical opinion confirming the purported condition is actually a symptom. Once you have obtained medical support, such a request can be responded to as follows: “Foot pain is a symptom, not a medical condition, and therefore we have no obligation to accept or deny.”

*If you wish to discuss this matter with Steve Verotksy, he can be reached at sverotksy@sbhlegal.com.*

## Oregon Workers' Compensation

### Oregon Court Decisions

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#### **Return to modified work ends entitlement to TTD.**

You no longer need to obtain the attending physician’s approval of a modified job to which the worker has actually returned to continue paying TPD after the worker is terminated from (or, by implication, quits) the modified job. The court held a return to modified work ends the worker’s entitlement to TTD under ORS 656.268(4)(a) and termination of the modified work for reasons unrelated to the compensable injury without a change in work restrictions does not revive the worker’s entitlement to TTD. Rather, it allows the continuation of TPD at the rate the worker was earning at the time of the termination. ***SAIF v. Fidel Vivanco*, \_\_ P3d \_\_ (November 28, 2007).**

#### **Occupational disease claims difficult to deny as untimely.**

The court affirmed an occupational disease claim is timely if it is filed within one year of the latest of any of the four events listed in ORS 656.807(1): the date the worker first discovered; in the exercise of reasonable care should have discovered the occupational disease; the date the claimant becomes disabled; or date worker is informed by a physician that he/she is suffering from an occupational disease. Therefore, to deny an occupational disease claim as untimely, one year must have passed from the latest event. ***SAIF v. Sherrel R. Hawkins*, \_\_ P3d \_\_ (November 28, 2007).**

*If filed within one year of the latest of any of the four events listed in ORS 656.807(1), occupational disease claim is timely.*

*There have been no significant Oregon Workers’ Compensation Board Decisions this quarter.*

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## Washington Workers' Compensation

*There were no significant decisions this quarter.*

Visit our website at [www.sbhlegal.com](http://www.sbhlegal.com) for a complete schedule of upcoming SBH-sponsored events.

## State Employment Law Update

### Washington Courts

#### Refusal to hire applicant due to pregnancy violates Washington Law Against Discrimination (WLAD).

In *Hegwine v. Longview Fibre Company, Inc.*, 2007 WL 4200418, the Supreme Court of Washington, en banc, held a pregnancy-related discrimination claim requires analysis as sex discrimination and not a disability claim.

Ms. Hegwine was offered a job contingent upon completion of physical exam. The job ad did not designate any lifting requirements, although the interviewer stated the job required lifting to 25 pounds. Responding to a questionnaire during the physical exam, Ms. Hegwine disclosed her pregnancy. She was instructed to have her personal physician outline any physical limitations. Her doctor complied, limiting lifting to 20 to 30 pounds. When told this was insufficient, Ms. Hegwine received a new opinion allowing lifting of up to 40 pounds.

Upon receipt of the releases, the employer ordered a job analysis of the position, which revealed that lifting up to 60 pounds was occasionally necessary. Finding Ms. Hegwine unable to meet this requirement, the employer revoked the job offer.

The court held a "reasonable accommodation" analysis did not apply to pregnancy. Rather, a claim for pregnancy discrimination is founded in sex discrimination, requiring the employee to show the employment action was motivated by her pregnancy. The court explained that pregnancy is not a "disability" under the law. Inquiring as to the pregnancy status was an inappropriate medical inquiry. The court noted an employer can only make such inquiries when based upon a bona fide occupational qualification—an essential part of the job.

This case included several instructional points for employers spanning beyond just pregnancy in the workplace. Inquiring about pregnancy and/or assuming a pregnant individual has restrictions may be discriminatory. An inconsistency in the given reason for an employment action casts doubt on a legitimate employment action. Absence of a well-defined job description, especially when requiring a physical exam, can hinder efforts to exclude those who truly cannot perform the job. An after-the-fact evaluation (such as the job analysis performed in the *Hegwine* case) creates an inference of discrimination.

*Inquiring about pregnancy and/or assuming a pregnant individual has restrictions may be discriminatory.*

*Absence of a well-defined job description, especially when requiring a physical exam, can impede hiring the best candidates and excluding those who truly cannot perform the job.*

## SBH Guide to New Legislation

### All Employers

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#### **New I-9 form required**

As of December 27, 2007, all employers must use the new I-9 form created by the US Citizen and Immigration Services. Both English and Spanish versions are available at [www.uscis.gov/i-9](http://www.uscis.gov/i-9).

### Washington Employers: Workers' Compensation

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#### **Increased vocational services**

Effective January 1, 2008, Washington employers will pay more for vocational services. At present, vocational costs may cost up to \$4,000 and last up to one year. In 2008, workers will be able to participate in training programs that cost up to \$12,000 and last for up to 2 years. Covered costs such as tuition, books, fees, supplies, equipment, tools, mileage reimbursement, and childcare remain unchanged. You will need to change your reserves on files to reflect the changes and significant increase in potential timeloss exposure. The \$12,000 figure will be adjusted every July based on the percentage change in tuition for the next fall quarter for all Washington state community colleges.

The amendment gives an employer a new option of settling the vocational services and closing the claim. Workers who do not want retraining can now receive an amount equal to six months of time loss compensation. However, tuition funds of \$12,000 remain available to workers, with some limits, for five years after claim closure. Consequently, this scenario is not a guarantee your claim will stay closed.

### Washington Employers

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#### **New definition of disability**

The legislature has revised the definition of disability in the Washington Law against Discrimination (WLAD) this year. The revision brings the definition more closely in line with the federal ADA. A disability equals a diagnosis or, history of or perception of sensory, mental or physical impairment. One substantial difference exists between the federal and state definitions: In Washington, mitigating measures are not considered in defining disability.

#### **Limits on using credit checks**

**SB 5827** has imposed two new requirements for using credit checks as part of hiring or otherwise evaluating employees. First, the employer must show the credit check is required by law or substantially related to the job. Second, the employer must give the employee advance notice that a credit check will be conducted and used for employment purposes. If a credit check will be used for an adverse action, the employee must let the employee know, provide contact information of the reporting agency, and give the employee a reasonable chance to dispute the report. An employer cannot blindly rely on outside agencies or vendors to comply with this law. This law was effective July 2007.

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**Paid family leave on the horizon**

As of October 2009, Washington employees will be entitled to five weeks of paid leave for the birth of a child. The implementation details are still being worked out.

**SB 5659.**

## Oregon Employers: Workers' Compensation

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*Nurse practitioners—authorized to provide compensable medical services up to 90 days and authorize time loss up to 60 days;*

*Chiropractic physicians, podiatrists, naturopaths and physician assistants authorized to serve as attending physicians up to 60 days or 18 visits, whichever comes first, and authorize time loss for up to 30 days;*

*Emergency room physicians that refer worker to primary care physician are excluded from definition of attending physician and can only authorize time loss up to 14 days.*

**Who can be attending physician or authorize time loss**

**HB 2247** cements a nurse practitioner's authority to provide compensable medical services for up to 90 days, authorize time loss for up to 60 days, release the worker to work, and manage the worker's return to work in that time period. This legislation does not change the status quo; it simply makes the changes permanent.

**HB 2756** allows chiropractic physicians, podiatrists, naturopaths, and physician assistants to act as attending physicians for 60 days or 18 visits, whichever occurs first. In addition, these providers can authorize time loss for 30 days and manage the worker's return to work during that period. The bill does not grant these providers authority to determine permanent impairment at claim closure, and it requires all four provider types to certify they have reviewed informational materials developed by the department. HB 2756 became effective June 1, 2007; however, attending physician authority does not begin until January 2, 2008.

**SB 504** excludes emergency room physicians, who refer a worker to a primary care physician for follow up, from the definition of attending physician. An emergency room physician can authorize time loss for a maximum of 14 days. An exception exists for a physician who maintains an independent practice in addition to emergency room treatment.

**SB 676** aims to define which medical providers trigger statutory obligations on the part of employers/carriers. An employer may not refuse a claim solely on the grounds that the claim was submitted by a physician assistant.

**Determining permanent impairment**

**HB 2244** makes permanent partial disability laws permanent. While previously the laws had a sunset provision, the changes are now here to stay.

**HB 2218** removes the need for adoption of a temporary rule to address permanent disability when not addressed by the disability rating standards. The department now simply determines impairment in an Order on Reconsideration. The legislation also eliminates the requirement that the department seek the advice of a physician when approving a change in attending physician. In addition to other housekeeping measures, this bill gives department authority to issue civil penalties against managed care organizations that fail to comply with laws or rules.

**Changes impacting IME providers**

**HB 2943** requires the department to adopt rules outlining the standard of conduct for IME providers who do not have conduct guidelines from their own regulatory board. This change is not likely to impact many claims, as most providers are subject to established conduct guidelines. HB 2943 was effective June 5, 2007.

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*The department now simply determines impairment in an Order on Reconsideration.*

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**Further definition of subject workers**

Under **HB 3362**, the Home Care Commission is required to elect coverage on behalf of all Department of Human Services clients who employ home care workers, making the home care workers “subject workers” if they are paid by the state on behalf of the client. This limited change is not likely to impact many claims.

**SB 688** specifies operators of taxis and non-emergency transport vehicles having an ownership or leasehold interest in those vehicles are non-subject workers. This is a limited provision unlikely to shake up the workers’ compensation community.

**Changes making settlement easier**

**SB 253** allows the ALJ mediating a workers’ compensation dispute resulting in a CDA to approve that CDA.

**SB 268** makes timely service of Petitions for Judicial Review on all parties jurisdictional and adds ORS 656.298(9), allowing the Board to approve settlement during pendency of a Petition for Judicial Review. Additionally, the court has authority to dismiss a Petition for Judicial Review or limit the scope of judicial review to unsettled issues.

*Employers should anticipate many claimants’ attorneys will arrange for independent examinations to generate evidence in support of claim and then attempt to pass the cost on to the employer.*

**Costs now awarded to claimants for prevailing at hearing**

**SB 404** allows for reimbursement of reasonable costs for records, expert opinions, and witness fees when a claimant prevails over a denied claim. Reimbursement is capped at \$1,500 unless upon demonstration of extraordinary circumstances. It also allows an attorney who represents an injured worker to establish a lien against additional awarded compensation or the proceeds of a claim settlement if the worker signs an attorney fee agreement for representation and the attorney was instrumental in obtaining the outcome of the claim—even if the attorney did not continuously represent the claimant. This is a potentially significant change in workers’ compensation. Employers should anticipate many claimant’s attorneys will arrange for independent examinations to generate evidence in support of a claim and then attempt to pass the cost on to the employer.

**Employer-paid medical benefits**

**SB 762** increases the threshold amount for employer-paid medical benefits to \$1,500 per non-disabling claim and directs the department to establish a yearly increase in allowed employer-paid medical benefits, based on change in the medical services consumer price index.

## Oregon Employers

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**Domestic partners recognized**

2007 Legislature enacted a pair of laws prohibiting discrimination on basis of sexual orientation and providing for civil unions. The ripple effects of this change will be seen in many subsequent rule changes.

**HB 2007** provides for "domestic partnerships" for same-sex couples and grants the rights and obligations attached to marriage. A Certificate of Domestic Partnership will legally recognize such status.

*"Domestic partnerships" for same-sex couples grants the rights and obligation attached to marriage.*

*Employers may need to revise benefits plans, such as spousal health benefits.*

**SB 2** includes sexual orientation among the list of characteristics that cannot be the basis for employment decisions. It has the same protections as race, sex, disability, etc. and open to the same causes of actions. Exceptions can apply for bona fide dress code requirements and for religious organizations.

Since sexual orientation is now a protected class, employers may need to revise benefit plans. For example, domestic partners may now be entitled to spousal health benefits coverage similar to married couples.

**Protection for "color" characteristics**

**SB 2** also added "color" to the list of protected characteristics. Similar to race and national origin, color evokes racial discrimination. The addition of "color" recognizes discrimination can occur by an actor of the same race based on skin tone.

**New bases for retaliation claims**

In addition to adding retaliation claims for sexual orientation, the 2007 legislature expanded the use of retaliation claims for OFLA and wage claims.

**HB 2635** added a retaliation clause under the Oregon Family Leave Act (OFLA), securing the employee's right to bring a suit against an employer who terminates or otherwise takes negative action against that employee for invoking the right to OFLA leave. In a practical sense, this amendment has little impact. A similar provision exists in the FMLA and Oregon courts already allow such claims.

**HB 2255** amended ORS Chapter 652 to recognize a cause of action for employees discriminated or retaliated against for opposing or inquiring about a wage matter. Such claims can be brought before the Oregon Bureau of Labor & Industries and in court.

**Breaks and meal periods**

Unless it creates an "undue hardship," employers must grant breastfeeding employees a 30 minute break every 4 hours to express milk for a child 18 months or younger (60 minutes in an 8 hour day). Under **HB 2372**, the employer must also take suitable measures to provide a location for this activity other than a bathroom. This break can be arranged to coincide with regularly established breaks, if reasonable. If the employee regularly receives a shorter paid break, the additional time needed up to 30 minutes is unpaid and the employee must be allowed to make up that time within the same day.

In **SB 403**, the legislature adopted provisions allowing the waiver of meal periods by employees in the food and restaurant services. However, the legislation also sets out civil penalties for coercing employees to waive their meal periods.

**Changes to wage laws**

**HB 2256** allows employers and employees to agree to direct deposit of wages, as long as that option or another provided option can be accomplished without cost to the employee either in deposit or withdrawal of funds. Such a written agreement must be presented in the language the employee uses to communicate in the workplace.

**HB 2674** acts as a housekeeping amendment, clarifying that when deductions are legally made from employee's wages, the employer must timely pay those amounts to the intended recipient. Employees must receive an itemization of deductions with each paycheck. Any deductions beyond those authorized by law (taxes, garnishment, etc.) can only occur if a written agreement with the employee exists.



New arrivals at SBH!  
Read about them on  
Page 10.

*Personnel records defined as those "used to determine the employee's qualification for employment, promotion, additional compensation or employment termination or other disciplinary action."*

### **Penalties for failing to timely provide copy of personnel file**

ORS 652.750 gives employees a right to a certified copy of the personnel file. Up to now, no enforcement mechanism for that right existed. With the enactment of **HB 2254**, the employer has 45 days to furnish a copy or faces a possible civil penalty of up to \$1,000. The civil penalty goes to the state and not the employee, which may lessen the impact of this provision. It may be difficult to determine what constitutes the personnel file when medical files, performance files, and payroll files all exist. The statute defines personnel records as those "used to determine the employee's qualification for employment, promotion, additional compensation or employment termination or other disciplinary action." This may include emails or supervisor's notes about performance, even if those notes have not been physically placed in the personnel file.

### **Leave for crime victims**

**SB 946** requires employers with six or more employees to allow leave for employees who are victims or parents of victims of domestic violence, sexual assault or stalking. This law bears some resemblance procedurally to OFLA. Eligibility, in addition to meeting one of these categories as defined under criminal law, is 180 days of employment at 25 hours per week. The new statutory provisions grant "reasonable leave" unless it creates "undue hardship" for the employer. The eligible reasons for leave include to seek law enforcement or legal action, seek counseling, medical treatment or victim assistance, or to relocate or secure the existing home. The employee can elect to use paid leave for any portion of this leave. The employer can require certification but of course any such documentation must be maintained as confidential. Denying leave or retaliating against an employee for taking leave is prohibited.

The vagueness of this provision will be difficult to implement for employers. What is reasonable leave and what is an undue hardship? Supervisors and HR specialists must be trained to recognize this new form of leave.

### **Workers' compensation leave cannot be tracked as OFLA leave**

**HB 2460** amends OFLA and the two statutes governing injured worker reinstatement and reemployment rights. The amendment redefines "family leave" in OFLA to exclude leave for a compensable work injury; it effectively prohibits counting leave for a work injury against the twelve-week entitlement to OFLA leave.

At the same time, the bill modifies ORS 659A.043 and 659A.046, the statutes governing the employee's right to return to work after an on-the-job injury. Previously, a rejection of a bona fide modified job offer would end an injured employee's right to reinstatement. The amendment qualifies that provision by confirming the employee's right to available OFLA leave notwithstanding rejection of the modified job.

As a general rule under these new amendments, OFLA leave cannot be tracked concurrently with workers' compensation leave. Only after the injured employee rejects a modified job offer can leave for a compensable injury be counted against the OFLA entitlement. In most situations, an employee will retain twelve weeks of protected leave regardless of how long he or she is absent from work due to an on-the-job injury. Federal law continues to allow counting workers' compensation leave against the FMLA entitlement.

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*OFLA leave cannot be tracked concurrently with workers' compensation leave.*

*OFLA "family member" definition expanded to include grandparents and grandchildren.*

*Workers now have the right to substitute paid sick leave during any type of OFLA leave.*

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**Expansion of protections under OFLA**

**HB 2635** expands the OFLA definition of "family member" to include grandparents and grandchildren. Note: the recognition of domestic partnership will also extend to OFLA coverage. This creates a new difference between OFLA and FMLA leave for employers subject to both. OFLA leave to care for a grandparent or grandchild will not count against FMLA entitlement.

**HB 2485** changes the employee's entitlement to use paid sick leave under OFLA. Previously, the employer had discretion to determine when paid sick leave could be substituted for unpaid OFLA leave when leave was taken for reasons other than the birth or adoption of a child. Under the new amendment, that discretion has been removed. The employee has the right to substitute paid sick leave during any type of OFLA leave.

**Noncompete/arbitration clauses**

**SB 248** creates new limitations for enforceable arbitration clauses in employment contracts and noncompete agreements.

Both types of employee agreements will only be enforceable if entered into at the beginning of employment or upon a bona fide promotion. Those entered into at hire must be provided to potential employees two weeks before the first day of employment.

For noncompete agreements, a protectable interest such as trade secrets or confidential information must exist. Additionally, such agreements can only be used for persons receiving annual salaries above the median income for a four-person family unless the agreement outlines payment to the employee during the noncompete period. No enforceable noncompete agreement can exceed two years.

*All public and private employers must have a safety committee or hold safety meetings.*

**Required safety committees**

**HB 2222** changes the requirements for safety committees for Oregon employers. Perhaps in an attempt at simplification, all public and private employers must have a safety committee or hold safety meetings, regardless of size. An additional provision allows for "alternate forms" of safety committees for small employers, agricultural employers, and employers with mobile workplaces. While the statute provides no details of how this new structure will be implemented, Oregon OSHA will soon promulgate rules to provide further clarification.

Happy Holidays from Sather, Byerly & Holloway!



Brian Perko and Ron Holloway spreading holiday cheer!

## SBH HAPPENINGS

## For More Information

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## General Newsletter Comments

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SBH is pleased to welcome  
Nancy Watts!

**Nancy Watts** recently joined the firm as our receptionist and legal secretary to Rebecca Watkins. Born in Portland, Oregon, Nancy comes to us with eight years of experience in the legal field, as well as experience in manufacturing and publishing. She is married to Terry Watts, has two cats—Opal and Boo—and a dog named Niko. Outside of work, Nancy enjoys singing, as well as playing the guitar, flute and any other instrument she can get her hands on.

## It's a boy!



SBH paralegal, **Kelly Williams**, welcomed Weston on October 15, 2007 (8 lbs., 5 oz., 20 ½ inches)

Legal secretary, **Maureen McCormick**, recently retired from SBH to spend more time with her family. We are going to miss her!



## It's a girl!



SBH secretary, **Jenni Miller**, welcomed Madeline on August 29, 2007 (5 lbs, 11 oz., 18 inches)

Happy Holidays from SBH!

## About our Newsletter ...

The information contained within this newsletter is not legal advice, but a resource to help you stay informed about legal developments affecting your job. If you have a specific issue or concern, please contact your attorney for advice. SBH is a specialized firm offering comprehensive litigation and consultation services to employers, insurers, and adjusters in the Pacific Northwest. SBH assists with workers' compensation, employee policies & records, return to work programs, leave administration, osha compliance, discrimination, longshore, claims processing, hiring & firing, wage & hour, and more.