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ATTORNEYS AT LAW

LAW FOR LABOR

Newsletter backed by Experience, Over 50 Years in the Labor Movement

As you are undoubtedly aware, those looking to avoid unionization have become more informed, better funded and more aggressive than ever before. Although New York remains a heavily unionized state, Lipsitz, Green recognizes the importance of remaining committed to helping you respond and react to the growing threats to your union and its membership. Beyond the increasing demands of defeating the anti-union movement, even the day-to-day tasks of organizing and running today's Union have become more complex and demanding. Members expect and deserve more from their Union and its leadership. As we have done for over 50 years, Lipsitz, Green wants to help Unions respond to these greater demands and changing times. This newsletter is a small part of our efforts in this regard.

In each edition of *Law for Labor*, our aim is to cover topics you find useful and informative. For example, included in this issue is an article about the debate over Labor Law 240 and 241, a topic that has recently been in the news. The next time an employer or contractor complains to you about this Law, we hope you will be able to draw upon some of the information contained in the newsletter when you pick apart his/her complaints. Can you imagine what the work safety record would be like if the owners and general contractors could turn their backs on job safety issues and avoid responsibility?

This newsletter is also intended to provide you with a voice. *Law for Labor* offers you the opportunity to contribute articles that will reach the entire community. In our next issue, labor leader **Richard Lipsitz Jr.** will



Lipsitz, Green works tirelessly, lead by the experience and expertise of labor law pioneer Richard Lipsitz.

provide his insights into the local labor movement. Our next issue will also feature an interview with First Vice President of UAW Local 774, **Pete Masich**. Mr. Masich will share his views on pending labor legislation and its potential impact. Further, we offer space in *Law for Labor* to any Union that would like to make an announcement to the Labor Community, like the reminder about the UAW Region 9's Tom Fricano Scholarship Golf Tournament being held on September 5, 2002. We expect that this newsletter and its succeeding issues will reach hundreds of unions throughout Upstate New York.

We hope you find *Law for Labor* to be helpful and informative for you and your membership. If you have any comments, suggestions, or would like to contribute an article or make an announcement, please do not hesitate to call me at (716) 849-1333 at extension 343, or send me an email at rboreanaz@lipsitzgreen.com.

Best regards,

Robert L. Boreanaz

PREMIERE ISSUE

Volume 1, Issue 1

August, 2002

Inside this issue:

Worker's Comp: Do you know what you're entitled to?	2-3
Health Care: Are you on your own?	4-5
Who's responsible for Job Site Safety?	6
Additions to the Lipsitz, Green Team	7
In the News & Notable Numbers	7

WE WANT TO HEAR FROM YOU!

Law for Labor is a newsletter for you. If there are comments, questions, issues, or announcements you would like to share with the labor community at large - please contact us. Use the contact information found on the back page to reach us, then look for your name in our next issue.

**YOUR
THOUGHTS AND
IDEAS COULD
BE IN OUR NEXT
ISSUE!**

Labor Relations • Employee Benefits • Personal Injury • Worker's Compensation • Social Security Benefits • Estate Planning • Toxic Tort Litigation

Medicaid Planning • Real Estate • Matrimonial & Family Law • Criminal Defense • Business & Corporate • Taxation • Civil & Criminal Appeals • Civil & Commercial Litigation

LIPSITZ, GREEN: MEETING ALL YOUR LEGAL NEEDS FOR MORE THAN 50 YEARS

What You Need to Know About Workers' Comp Benefits

by: Rob Voltz
rvoltz@lipsitzgreen.com

When a person is injured or contracts an illness from his or her work activities, s/he is often entitled to receive benefits under the Workers' Compensation Law. An injured worker cannot sue his or her employer. Thus it is important that the worker understand the benefits available under the Worker's Compensation Law. Many workers miss out on benefits that they may be entitled to because they are simply uninformed. Generally, the benefits in a Workers' Compensation claims fall into two categories - medical treatment and lost wages.

MEDICAL BENEFITS

Can I choose my own doctor? Most workers know that they are entitled to receive medical care when they get hurt at work. However many don't realize that they have the right to see a doctor of their own choosing, as long as that health care provider is licensed to treat Workers' Compensation patients. Often an employer will tell an injured worker who to see, but this is improper unless the worker is part of a collective bargaining agreement that specifically limits the choice of medical care. Additionally, most injured workers do not realize that they are entitled to get a second opinion paid for under the Workers' Compensation Law.

Can I get reimbursed for mileage or prescriptions?

Another benefit commonly overlooked by injured workers is the right to receive reimbursement for mileage traveled to their health care providers. Injured workers are also entitled to reimbursement for co-pays or direct payments that they may make for medical care related to their injury. The current reimbursement rate is 36.5 cents per mile for trips to health care providers. With a quick call to the workers' compensation department at Lip-

sitz, Green, your members can receive the proper reimbursement forms for their claim.

LOST WAGE BENEFITS

There are many misconceptions about lost wage benefits that can be paid in a Workers' Compensation claim. Most people think that a worker who is unable to work due to an injury or illness is automatically entitled to the maximum rate of compensation or two-thirds of his/her average weekly wage. While this is sometimes the case, often it is not. The Workers' Compensation Law provides for many different types and levels of wage reimbursement to an injured or ill worker.

How do they compute my lost wage benefits? First, all lost wage claims are based on the worker's average weekly wage for the year before his or her injury. The average weekly wage of an injured worker is computed using

“Many workers miss out on benefits that they are entitled to because they are simply uninformed.”

his/her earnings over the entire year prior to the injury or the onset of the worker's illness. Teachers, outside workers, and other employees who have seasonal breaks in their work schedule cannot be assured that their benefits will be measured against their gross weekly wages when they are working. The second factor that is reviewed in determining lost wage benefits is the medical report showing disability. Often a doctor will state that a person cannot perform their own job, but will suggest that s/he is able to perform some light duty work.

Can I get comp and unemployment benefits at the same time? A common misconception is that a person is entitled to the total disability rate if s/he cannot do his/her own job. If there are any jobs that a person can perform (even for a different company) then the injured worker will likely only collect a partial rate of compensation.

What You Need to Know About Workers' Comp Benefits

Continued from previous page.

However, if this is the case, that person may be entitled to unemployment benefits as well as partial disability benefits. Is the person ready, willing and able to work? Is s/he looking for a job so as to meet the criteria for unemployment and workers compensation benefits? If so, both benefits can be claimed.

What if I return to work but make less money due to my injury? Frequently, a person is able to return to work in a light duty status, but must take a lower paying job or miss out on overtime hours because of medical restrictions. If that person loses money because of his/her restrictions (as compared to the average wage before injury) s/he may be entitled to two-thirds of this amount as compensation.

For example, if a worker who earned \$900.00 per week before an injury is partially disabled, and the employer brings the individual back to work making only \$600.00 per week because of medical restrictions, the worker would be entitled to two thirds of the difference in compensation or \$200 per week ($\$900 - 600 = 300 \times 2/3 = 200$). This benefit encourages employers to take injured workers back at light duty positions and at the same time does not penalize a worker for returning to work as soon as medically possible. Addi-

tionally, since Workers' Compensation benefits are not taxable, the injured worker is taking home approximately the same amount that s/he was making before the injury.



Anonymity of Prevention is a sculpture that depicts a construction worker wearing proper safety equipment chiseling a message on the granite wall: "Remembering Our Past... Building a Safe Future"

The Workers' Compensation Law was enacted to provide injured workers with speedy medical care and a safety net for those times when they cannot work. It also provides employers with an incentive to create a safe workplace and bring workers back to the job with the least amount of risk to that worker or his/her co-workers. Many workers miss out on benefits that they may be entitled to because they are just uninformed. The attorneys and staff at Lipsitz, Green's workers' compensation department assist thousands of injured workers in their claims every year. Often a simple phone call can make the difference to an injured worker who is struggling to make it through the difficult times after an injury or illness.

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On Your Own For Health Care?

by: Mark Stulmaker, mstulmaker@lipsitzgreen.com
& Colleen Wood, cwood@lipsitzgreen.com

On June 26, 2002, the IRS and the Treasury Department issued guidance clarifying the tax treatment of Health Reimbursement Arrangements (“HRAs”). Such arrangements are accounts created by employer contributions that can be used by an employee to receive reimbursement for medical expenses not covered by the employer’s group insurance policy. The guidance will likely increase the use of Defined Contribution Health Plans (“DCHPs”) which are a new form of health plan that employers are implementing in an effort to control health care insurance costs.

The rise of DCHPs parallels the increase in popularity of 401(k) plans in the retirement plan market. Both forms of plans shift control of dollars committed to the benefit to the employee while capping the amount of that commitment.

1. How Does the Defined Contribution Health Plan Work?

The term “Defined Contribution Health Plan” refers to a program in which the employer commits to a specified dollar contribution for each employee’s healthcare. The employee can then select the plan most suited to

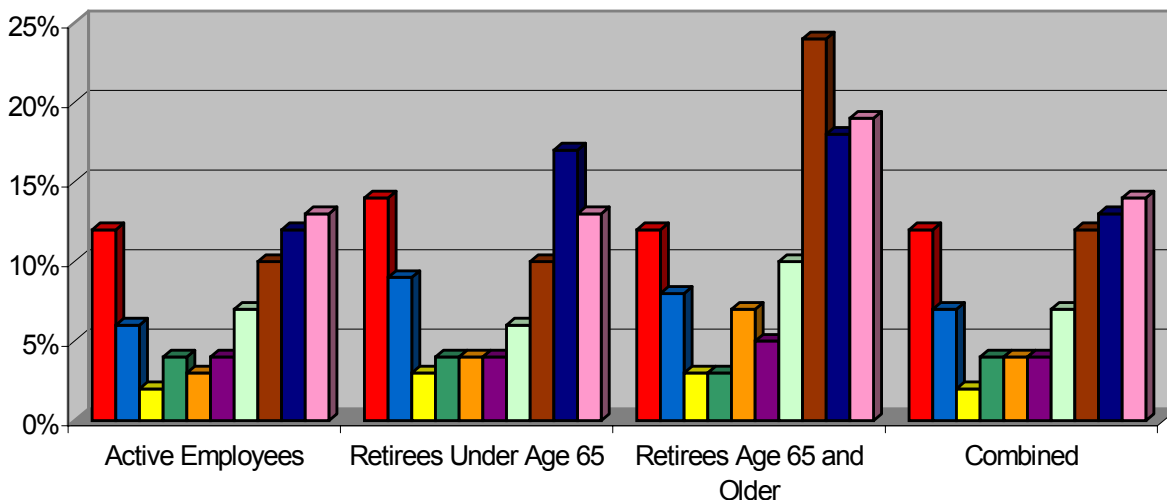
his/her needs. If the cost of the worker’s selection exceeds the employer’s contribution for healthcare, then the employee becomes responsible for paying the difference. It is believed that by putting the responsibility on the employee to manage health care costs, the employee will be more active in controlling how much medical services s/he actually receives.

In the most common form of defined contribution health plan, the employer combines a high deductible insurance contract with an account that can be used to reimburse employees for their out of pocket medical expenses. The amounts in the account can then be used to pay for medical services not covered by the low premium coverage.

However, this particular DCHP structure creates some difficult issues, particularly with respect to what happens to the employees’ account balance at the end of the year if it isn’t used. The current regulations governing Flexible Spending Accounts (“FSAs”) under a cafeteria plan prohibit rolling over account balances from year to year. It was not clear whether these rules would apply to an account created solely

Continued on following page.

Average Cost Increases of Health-Care Plans



*Projected
Source: Towers Perrin

■ 1993 ■ 1994 ■ 1995 ■ 1996 ■ 1997 ■ 1998 ■ 1999 ■ 2000 ■ 2001 ■ 2002*

On Your Own For Health Care?

Continued from previous page.

with employer contributions.

The recent IRS guidance clarifies that so long as employer contributions are being used solely for substantiated medical costs, amounts not used can be carried over to future years.

2. How Does Recent Health Care Legislation Affect DCHPs?

Employer sponsored health plans must comply with the Consolidated Omnibus Budget Reconciliation Act of 1985, better known as COBRA, and the Health Insurance Portability and Accountability Act of 1996, or HIPAA. COBRA imposes a duty on employers to provide continuation of group health coverage to employees, spouses, and dependents of employees under certain circumstances, such as if the employee is terminated for reasons other than gross misconduct, dies, or becomes divorced. Continuation must be offered for a period of at least eighteen months at a rate of 102% of the employer's cost for coverage. Failure to follow the COBRA requirements puts an employer at serious risk for sanctions and other penalties.

HIPAA is a complex statute encompassing an array of legislative policies. It regulates the dissemination of private health information, it limits exclusions by health plans for preexisting medical conditions, and it prohibits discrimination against individuals on the basis of certain health factors. It will be extremely complicated to apply HIPAA's limitations on discrimination against certain pre-existing health conditions if the employee is allowed to choose any policy s/he wants.

Recent IRS guidance indicates that HRAs will be subject to COBRA, but it does

not clarify how the applicable premium will be determined. Further, the notice indicates that any amount remaining under the HRA at the time of retirement may continue to be used irrespective of whether or not COBRA is elected.

3. Additional Tax Consequences of Implementing a DCHP

Generally, when an employer purchases health insurance on behalf of their employees, it may take a deduction for the amount paid. In addition, the value of the health insurance is not includible in the employee's taxable income.

If the employer instead sets up a separate welfare fund, it is typically only allowed to take a deduction when amounts are actually paid out to employees to reimburse their medical costs. It may also take a deduction for contributions to a separate reserve for retiree health coverage.

Collectively-bargained Funds have an advantage over non-union Funds. Employer contributions used solely for health benefits are not subject to any limitations on deductibility.

Contributions that are set aside solely for medical reimbursements are not taxed to the employee when paid out for medical expenses. However, the IRS will not allow this favorable tax treatment when employer contributions can be later received as a taxable benefit, such as a severance payment.

DCHPs will more than likely proliferate as the IRS guidance clarifies a number of tax issues. You should expect to see employers proposing these types of plans in the near future.

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Who's Responsible for Job Site Safety?

by: James Scime
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Today, the safe place to work laws for individuals involved in construction work, place responsibility for work-site safety on owners, contractors, and their agents under New York's Labor Law Sections 240 and 241. These laws reflect the determination that over-all compliance with safety standards is best achieved by placing responsibility on owners and general contractors. These individuals are in the best position to make sure that safety measures are put in place and carried out. By holding owners liable for job site injuries, these laws encourage owners to make sure they hire contractors who pay attention to *safety*. Likewise, holding contractors liable for injuries helps to insure they, in turn, choose safety conscious subcontractors.



However, these laws are under fire by owners, contractors and insurance companies who complain that these safety responsibility laws cost them money. Yet, imagine the costs to the workers whose health and life will be at an even greater risk if safety takes a backseat to profits. Allowing businesses to avoid financial responsibility for worker injury will only cause such injuries to increase, as there will be limited financial incentive for owners and contractors to make sure the workplace is safe. If owners and contractors succeed in their present effort to convince the legislature to shift the burden of safety on to the back of the worker (who is not in a position to control the environment of the worksite), the number of injuries will certainly increase. *Instead of looking for ways to avoid paying for worker injuries, why aren't businesses focusing their efforts on eliminating the dangerous conditions that cause the harm? The answer to curbing rising costs is getting busi-*

nesses to concentrate on increased job site safety so that accidents are reduced.

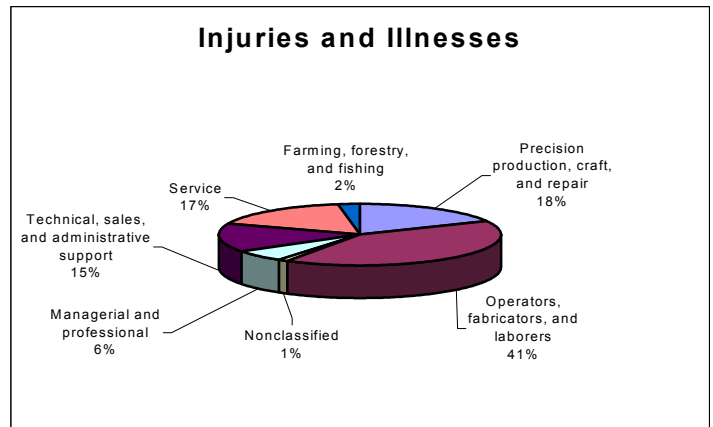
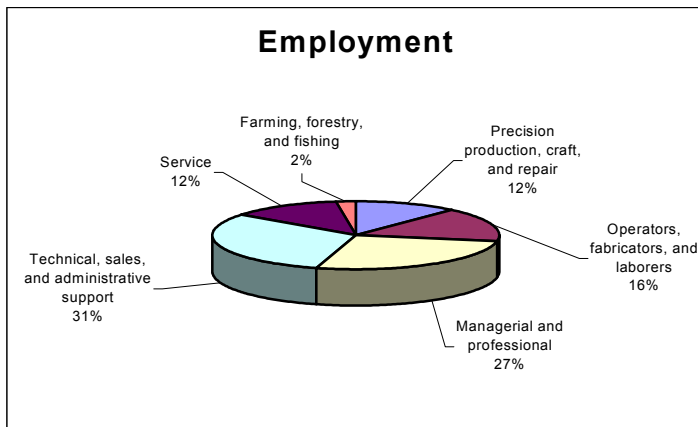
Over the course of the past 100 years and after many hard fought battles in the workplace, as well as in the courts and legislature, workers have made great strides in job site safety. Owners and contractors have been forced to look at more than just profits. Even with these safety laws in place, workers are injured at an alarming rate.

As a former construction worker (I was a member of the building trades union while I went to school), I can recall days when construction sites were run with very little regard for the safety of the workers. That has improved although there is still a long way to go. The improvements did not come as a result of government regulations. Clearly the maximum OSHA fine is not enough to make any recalcitrant contractor change their practices. It was only after insurance companies or careless owners and contractors were made to pay for the true losses sustained by injured workers and their families that changes started to be made. Let's not go back to the days when great numbers of workers were killed or maimed on skyscraper and bridge jobs. Keep responsibility for taking care of the injured where it belongs, with those who have the ability to control the construction site.

Isn't it reasonable to conclude that if we let owners and contractors avoid liability for worker injuries the number of those injuries will skyrocket? Shouldn't insurance rates for workers' compensation and liability insurance go down dramatically if workers are kept safe at work?

The solution to the problem of rising insurance costs is not shifting liability for worker injuries from the owners and contractors to the workers. The answer lies in making sure the injuries don't occur in the first place!

Employment & Nonfatal Injury/Illness by Occupation, 2000



Operators, fabricators, and laborers accounted for 4 out of every 10 injuries and illnesses, well above their employment share of 16%.

SOURCE: Bureau of Labor Statistics, U.S. Department of Labor, Survey Occupational Injuries and Illnesses

New Faces Added to the Winning Line-Up

by: Robert Boreanaz
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We are pleased to take this opportunity to introduce three individuals who have recently joined the Lipsitz, Green team and who you may bump into at upcoming labor events or at our offices.



John Walsh, a graduate of the School of Industrial and Labor Relations at Cornell and UB Law School, joins us after working with Delaware/North, where he was labeled: "a little too friendly with the Unions." John has negotiated over fifty Collective Bargaining Agreements in twenty different states. He is proud of his established relationships with people at H.E.R.E, SEIU, UFCW, the Machinists, the Carpenters, and the Teamsters Unions. There are very few people that have this type of experience negotiating and administering Collective Bargaining Agreements and we are fortunate to have him on board.



Our latest addition comes to us by way of Washington, D.C. Timothy Jennings is a UB Law graduate who worked as a Presidential Cabinet Staffer in the Clinton Administration from 1993 to 2000. Tim served United States Secretaries of Labor, Robert B. Reich and Alexis M. Herman as an Intergovernmental Affairs Officer and National Grants Liaison in the U.S. DOL's Office of Congressional and Intergovernmental Affairs. His job also entailed reviewing new Federal Laws, and making recommendations to the Secretary of Labor and other Senior Government officials. We are fortunate to be able to add the strength of Tim's experience to our department.

Colleen Wood is a recently admitted attorney who received her law degree from UB, cum laude. Colleen is currently working with us in the employee



benefits arena. We are absolutely thrilled to have her at Lipsitz, Green and are confident you will be impressed with her work.

These three new faces have joined the three "not so new" faces in the Labor Department at Lipsitz, Green. Richard Lipsitz continues to be available to clients nearly everyday (except during fishing season). He is not only available to the clients, but constantly provides our attorneys with guidance and experience unmatched by anyone in the Labor Community. Our Labor Department Chairperson, Eugene W. Salisbury, continues to work tirelessly on behalf of Unions. His latest success involved a Court Challenge to the Erie County Executive's attempt to avoid the County's obligation under a Project Labor Agreement. For the past eight years, I (Robert L. Boreanaz) have been very fortunate to work with the highest caliber of lawyers here at Lipsitz, Green. Gene's son, Scott Salisbury, is expected to join us soon as well.

In the News....

The first of its kind in fourteen years, hearings were conducted on June 20th, 2002 regarding employers shameful tactics to keep American workers from exercising their freedom to form Unions. United States Senator, Edward Kennedy, chaired the hearing of the Senate Health, Education, and Labor Pension's Committee, which featured the testimony of AFL-CIO president, John Sweeney. Sweeney testified that 30 to 40 million workers' say they would form a Union if given the chance, yet more than 90% of the employers fight their workers efforts to improve their lives with Unions. Half threaten to shut-down and a quarter illegally fired workers who stood up for Unions. Senator Hillary Clinton is a member of the Committee.

Notable Numbers to Know

- In the year 2001, 13.5% of the wage and salary workers in the United States were Union members, unchanged from the year 2000.
- In 2001, fulltime wage and salary Union members had median weekly earnings of \$718.00 (\$143.00 more than their non-Union counterparts).
- New York State has the highest percentage (27%) of employed individuals represented by Unions.

SOURCE: Bureau of Labor Statistics

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UAW Region 9

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Scholarship Golf Tournament**

Thursday, September 5th at Chestnut Hill Country Club

\$100 per Person (includes Greens Fees, Cart, and Steak Dinner) - Call 632-1540 for details

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