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Technical Overview for Lawyers: New York State's Temporary Disability Insurance Program

Temporary Disability Insurance (TDI) provides some wage replacement to workers who become ill or injured off the job. Pregnancy and childbirth-related disabilities are covered under TDI. TDI is sometimes the only maternity-related benefit available to a pregnant or new birth mother in New York State.

Eligibility:

- The employee must work for a New York-covered employer (example: employee who lives in New Jersey but works in New York would be covered).
- The definition of “employer” does not include “the state, a municipal corporation, local governmental agency, other political subdivisions or public authority.” N.Y. WORKERS’ COMP. LAW § 201(4).
 - However, an employer not required by the Workers’ Compensation Law to provide disability benefits can voluntarily elect to become a covered employer and bring itself within the provisions of the disability benefits law. N.Y. WORKERS’ COMP. LAW § 212(1)-(2).
- The definition of “employee” does not include clergy or individuals “engaged in a professional or teaching capacity in or for a religious, charitable or educational institution,” which is defined as “a corporation, unincorporated association, community chest, fund or foundation organized and operated exclusively for religious, charitable or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual.” N.Y. WORKERS’ COMP. LAW § 201(5).
- Certain services are not considered covered “employment” for purposes of the disability benefits law, including the services of golf caddies, farm laborers, certain working students, certain licensed real estate brokers or sales associates, certain licensed insurance agents or brokers, etc. For the full definition of “employment” and its exclusions, see N.Y. WORKERS’ COMP. LAW § 201(6).
- Certain domestic workers and their employers are covered by TDI. Employers are covered by the disability benefits law “after the expiration of four weeks following the employment of one or more personal or domestic employees who work for a minimum of forty hours per week for such employer and are employed on each of at least thirty days in any calendar year.” N.Y. WORKERS’ COMP. LAW § 201(6)(A); § 202(2).
- To be eligible, employees must have worked for “four or more consecutive weeks” for a covered employer. N.Y. WORKERS’ COMP. LAW § 203.
 - Part-time workers are covered. “An employee regularly in the employment of a single employer on a work schedule less than the employer’s normal work week shall become eligible for benefits on the twenty-fifth day of such regular employment.” *Id.*

Benefit Level and Period:

- The benefit rate a disabled employee is entitled to receive under the TDI program has remained the same since 1989: “one-half of the employee’s weekly wage, but in no case shall such benefit exceed **one hundred seventy dollars**; except that if the employee’s average



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weekly wage is less than twenty dollars, the benefit shall be such average weekly wage.”
N.Y. WORKERS’ COMP. LAW § 204(2).

- New York’s TDI benefit level is significantly lower than the maximum benefit in New York for Workers’ Compensation (2/3 of the New York State average weekly wage, with a maximum weekly benefit rate of \$808.65 for the period of July 1, 2014 to June 30, 2015) or Unemployment Insurance (\$420/week in 2014). *See* <http://www.wcb.ny.gov/content/main/onthejob/CashBenefits.jsp>; <http://www.labor.ny.gov/formsdocs/ui/IA318.2.pdf>.
- Employers may provide private disability insurance with a greater weekly benefit level. Beginning in April 2010, the New York State Insurance Fund also extended the option to employers to participate in an Enriched Disability Benefits Insurance program that would provide employees with a greater claim benefit than the statutory requirement. For additional details, see <http://ww3.nysif.com/Home/DisabilityBenefits/PolicyholderServices/EnrichedDisabilityBenefits.aspx>.
- Workers are entitled to TDI benefits for no “more than twenty-six weeks during a period of fifty-two consecutive calendar weeks or during any one period of disability” N.Y. WORKERS’ COMP. LAW § 205(1).
- There is a **one-week waiting period** before disabled workers may begin to collect benefits: “Disability benefits shall be payable to an eligible employee . . . beginning with the eighth consecutive day of disability” N.Y. WORKERS’ COMP. LAW § 204(1).

Definition of Disability:

- To collect disability benefits, an employee must be unable to work. Disability during employment is defined in the law as “the inability of an employee, as a result of injury or sickness not arising out of and in the course of an employment, to perform the regular duties of his employment or the duties of any other employment which his employer may offer him at his regular wages and which his injury or sickness does not prevent him from performing.” N.Y. WORKERS’ COMP. LAW § 201(9)(A).
 - The definition of “disability” in the disability benefits law “also includes disability caused by or in connection with a pregnancy.” N.Y. WORKERS’ COMP. LAW § 201(9)(B).
 - It is our understanding from the Disability Benefits Bureau, which administers TDI, that insurers generally consider someone disabled for six weeks after a vaginal delivery and eight weeks after a Caesarian section. In a healthy pregnancy, a woman may also be considered disabled for a few weeks before her due date if her doctor deems it necessary.
 - Employees may be able to obtain TDI benefits for additional time before or after childbirth if certified by a doctor (see below) for complications or other individual circumstances, such as bed rest or postpartum depression.

Certification of Disability:

- To collect disability benefits, employees must provide their employer with written certification of their condition from a doctor. “Written notice and proof of disability shall be furnished to the employer by or on behalf of the employee claiming benefits . . . within thirty days after commencement of the period of disability. Additional proof shall be furnished thereafter from time to time as the employer or carrier or chair may require but not more often than once each week. Such proof shall include a statement of disability by the employee’s attending physician or [other enumerated health care providers] . . . attending certified nurse midwife, or [certain accredited practitioners for the adherents of certain faiths or church/denominations in accordance with principles of healing upon prayer] . . . containing facts and opinions as to such disability in compliance with regulations of the chair.” N.Y. WORKERS’ COMP. LAW § 217(1). See N.Y. WORKERS’ COMP. LAW § 217(1) for more regarding the effect of a worker’s failure to furnish notice or proof.
- An employer or carrier may request that an employee claiming benefits “submit himself or herself at intervals, but not more than once a week, for examination by a physician or podiatrist or chiropractor or dentist or psychologist or certified nurse midwife designated by the employer or carrier.” N.Y. WORKERS’ COMP. LAW § 217(2). By law, “[a]ll such examinations shall be without cost to the employee and shall be held at a reasonable time and place.” *Id.*

Disability While Unemployed:

- Employees working for a covered employer are eligible for disability benefits “during such employment and for a period of four weeks after such employment terminates” N.Y. WORKERS’ COMP. LAW § 203.
- Individuals may apply for disability insurance while unemployed if they became disabled more than four weeks after termination of employment with a covered employer, and if, within 26 weeks immediately following such termination, they become ineligible for Unemployment Insurance (UI) solely because of disability. On the day the disability commences, the individual cannot be employed or working for remuneration/profit. If the individual would otherwise be entitled to UI benefits and meets the requirements above, he or she is entitled to TDI “for each week of such disability for which week he would have received unemployment insurance benefits if he were not so disabled.” N.Y. WORKERS’ COMP. LAW § 207(1); *see also* N.Y. WORKERS’ COMP. LAW § 207(2).
 - Disability during unemployment is defined as an individual’s inability “as a result of injury or sickness” off the job “to perform the duties of **any** employment for which he is reasonably qualified by training and experience.” N.Y. WORKERS’ COMP. LAW § 201(9)(A) (emphasis added).
- Interaction of TDI and UI: An individual cannot receive both UI and TDI at the same time but can transition from one to the other. N.Y. WORKERS’ COMP. LAW §§ 206(b), 207(1).
 - Note: UI provides a higher maximum benefit level than TDI (\$420/week vs. \$170/week). TDI eligibility requires medical certification, and some doctors may assume that an individual wants to get as much time as possible through TDI to recover. As a result, a doctor may state that an individual is not able to work even if this is not entirely accurate. This often occurs in the context of recovery of childbirth.

However, if an unemployed woman feels able and willing to work (and she has recovered physically and arranged for child care), she may prefer to draw UI benefits instead of TDI, due to UI's higher benefit level. In this case, she should explain to her doctor that it is in her best interest, if medically appropriate, to state that she is able to work.

Protection from Retaliation:

- The TDI law does not protect an employee's job while he or she is collecting disability. It does, however, state that the provisions on retaliation in N.Y. WORKERS' COMP. LAW § 120 (see below) apply to the disability benefits law as well. *See* N.Y. WORKERS' COMP. LAW § 241.
- The Workers Compensation Board has jurisdiction over retaliation claims. A complaint must be filed within two years of the commission of an alleged unlawful discriminatory practice. *Id.*
- The anti-retaliation provision of N.Y. WORKERS' COMP. LAW § 120 states: "It shall be unlawful for any employer or his or her duly authorized agent to discharge or in any other manner discriminate against an employee as to his or her employment because such employee has claimed or attempted to claim compensation from such employer, or because he or she has testified or is about to testify in a proceeding under this chapter and no other valid reason is shown to exist for such action by the employer."
 - A significant challenge to making a retaliation claim is showing that an employer's alleged retaliatory actions were taken *because* the employee claimed or attempted to claim the benefit, rather than representing a legitimate business concern related to the employee's absence itself. It can be especially challenging to show retaliation *because of* claiming disability benefits when the cost to the employer of providing the benefit is minimal.
 - Employees must show a "causal nexus" between their activities in obtaining compensation and their employer's actions. *Matter of Duncan v. New York State Development Center*, 470 N.E.2d 820, 822-23 (N.Y. 1984). Claimants must additionally show that that an employer has made a distinction between groups— for workers' compensation, between those who have taken prolonged leave for work-related injuries and those who have taken leave for other reasons—rather than mere application of a neutral policy. *Id.*
 - A broad range of "valid business reasons" for terminating an employee on disability insurance have been upheld, even where there is little evidence to support their validity. *Rockwood Park Jewish Center*, 1998 WL 991171, *1 (N.Y. Work. Comp. Bd. 1998) ("After six weeks he [the employer] hired someone else to replace the claimant because he needed someone to do the work on a reliable and steady [basis] because of the religious holidays and the special school for slow learners that they were running. Upon review of the entire record, the Board Panel finds that that the employer discharged the claimant because of a valid business reason, and that there is insufficient



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- evidence that the employer terminated the claimant for filing a claim for disability benefits.”).
- In an appellate case, the Third Department stated that “An *employee* claiming retaliation has the burden of proving both a causal nexus between the employee’s activities in obtaining compensation and the employer’s conduct against the employee, so that it clearly appears that the employee attempting to exercise his rights under the compensation or disability status is treated detrimentally when compared to other groups of employees. In the absence of evidence of retaliatory intent, even an employee who is terminated because of lengthy absence from work as a result of injury, whether sustained on or off the job, is not a victim of discrimination within the scope and meaning of Workers’ Compensation Law §§ 120 and 241. The statutes do not serve as a job security clause.” *Johnson v. Moog*, 494 N.Y.S.2d 152, 154 (N.Y. App. Div. 1985) (emphasis added) (internal citations omitted).
 - Below is a sampling of case law regarding the non-retaliation provision in the Workers’ Compensation Law:
 - No discrimination when employer discharged an employee collecting workers’ compensation benefits because she “moonlighted” at another job, as this was an even-handed policy that applied to all employees on leave. *Torrance v. Loretto Rest Nursing Home*, 876 N.Y.S.2d 253 (N.Y. App. Div. 2009).
 - Discrimination found where employer discharged employee whose unsafe practices during a 90-day probationary period caused physical injury, but did not discharge those whose unsafe practices did not result in injury. This policy was found to dissuade employees from reporting their injuries and pursuing workers compensation benefits. *Rodriguez v. C&S Wholesale Grocers*, 968 N.Y.S.2d 728, 730 (N.Y. App. Div. 2013).
 - Discrimination found where employer had a policy of reducing vacation time for employees who missed four weeks or more of work at a time, the vast majority of whom collected workers’ compensation or disability benefits, but did not reduce vacation time for employees who had intermittent absences totaling four weeks. *Asem v. Key Foods Stores*, 628 N.Y.S.2d 874, 875-76 (N.Y. App. Div. 1995). The court found that this policy “appear[ed] to have been carefully fashioned, and differentially applied, so as to detrimentally affect only those who have claimed compensation or disability benefits” *Id.* at 876.
 - Other notable case law quotes:
 - “[T]he mere fact that the employer failed to notify claimant of the underlying violations (or may have failed to consistently follow its own procedures in this regard) does not, standing alone, satisfy claimant’s burden of establishing that she was discharged from her position because she sought workers’ compensation benefits. This is particularly true where, as here, the Board found that the extension of claimant’s probationary period was neither



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- improper nor motivated by her filing for benefits, and the record plainly reveals a valid reason for claimant’s dismissal, to wit, the employer’s dissatisfaction with claimant’s attendance record . . . well before claimant’s first compensable injury . . .” *Morgan v. New York City Dep’t. of Correction*, 834 N.Y.S.2d 342, 344 (N.Y. App. Div. 2007).
- Substantial evidence of retaliation found, as “[t]he record is clear that the employer unilaterally decided to terminate claimant by reason of its determination that he was not disabled, a medical determination not within the province of the employer.” *Matter of Tomlin v. Asplundh Tree Co.*, 645 N.Y.S.2d 612, 614 (N.Y. App. Div. 1996).
 - Remedies for discrimination: Upon finding a violation, “the board shall make an order that any employee so discriminated against shall be restored to employment or otherwise restored to the position or privileges he or she would have had but for the discrimination and shall be compensated by his or her employer for any loss of compensation arising out of such discrimination together with such fees or allowances for services rendered by an attorney or licensed representative as fixed by the board.” N.Y. WORKERS’ COMP. LAW § 120. Employers shall also be liable for a penalty of \$100-\$500. *Id.*
 - Only employers, and not insurance carriers, are responsible for any liabilities incurred by the employers’ discriminatory acts. “All penalties, compensation and fees or allowances shall be paid solely by the employer. The employer alone and not his or her carrier shall be liable for such penalties and payments. Any provision in an insurance policy undertaking to relieve the employer from liability for such penalties and payments shall be void.” *Id.*
 - Appeals are governed by N.Y. WORKERS’ COMP. LAW § 23.

Family and Medical Leave Act:

- TDI may be used concurrently by an employer taking time off under the Family and Medical Leave Act (FMLA) as a way of replacing income while on unpaid leave. “Leave taken pursuant to a disability leave plan would be considered FMLA leave for a serious health condition and counted in the leave entitlement permitted under FMLA if it meets the criteria set forth above in §§ 825.112 through 825.115. In such cases, the employer may designate the leave as FMLA leave and count the leave against the employee’s FMLA leave entitlement.” 29 C.F.R. § 825.207(d).
- To the extent that an employee’s collection of TDI extends beyond the 12 weeks permitted by the FMLA, the TDI law does **not** extend the job protection granted by the FMLA.
 - Example: A woman takes time off under the FMLA to recover from a pregnancy-related illness, and uses up her full 12 weeks of FMLA as of 3 weeks following childbirth. Although she may still be eligible for TDI benefits for additional weeks to recover from childbirth, she lacks job protection under the New York disability benefits law for that additional time taken beyond the FMLA.