Maintenance of Income for Injured Workers: An Inquiry Relating to the Maintenance of Family Economies and the Marketplace

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The issue of maintenance of family economies is often seen through a feminist or woman-centered lens, focusing on the tension between the fundamental need to earn income and demands outside the workplace. Seen in this way, the eye often turns to the ways in which workers, particularly women, are permitted to maintain employment (and wages and benefits) while balancing time obligations at home.

In this paper, I turn my focus elsewhere, to the problem of income maintenance when a worker becomes disabled as a result of injuries or illnesses that are caused at work. This is a critical and common aspect of maintenance of family economies, particularly if one or more of the family wage earners works in a dangerous industry.

What are the dangerous industries? Today, construction, agriculture and basic manufacturing continue to show high rates of injury. But many women work in industries with high levels of unrecognized hazards. Most particularly, the health care and hospitality industries show even higher rates of injuries. In 2008, for example, the injury rates per 100 full time equivalent workers in the U.S. were as follows:

Injury rates in selected industry groups[1]		
Industry group	Total reportable injury cases	Cases with days away from work, job transfer, or restriction (total)
Private industry (all)	4.2	2.1
Agriculture	5.3	2.9
Construction	4.7	2.5
Manufacturing	5.0	2.7
Selected service industries		
Private hospitals	7.6	3.0
Private nursing & residential care facilities	8.4	5.0
Public hospitals	11.9	5.8
Public nursing facilities	12.5	7.8
Hospitality / accommodations	5.6	2.8

The question of work injuries and wage continuation is often seen as a simple inquiry into the availability of workers' compensation benefits for injured workers, and then relegated to a backwater of both labor and social security concerns. Given the prevalence of injury and the struggles of injured workers to maintain their income, this may be shortsighted.

In all developed countries, there is some system of compensation that provides cash benefits to workers who are disabled from work as a result of a work-related injury or illness, and a number

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[1] Bureau of Labor Statistics, U.S. Department of Labor, *Workplace Injuries and Illnesses – 2008* (2009), *available at* http://www.bls.gov/news.release/pdf/osh.pdf (last visited March 15, 2010).

of Conventions of the International Labour Organization are applicable to this area.[2] These compensation systems generally provide care and assistance to injured workers, attempting to replace the uncertainties of litigation with a no-fault system that places limits on monetary benefits. In general, this is a locally regulated matter, although international treaties and ILO conventions set some parameters for participating countries. The precise organization of these systems varies, from inclusion of these benefits within a broader social security or sickness scheme to specifically designed systems for work-based injuries.[3]

But there is a more complex web of legal, social and economic issues that surround work injuries that goes beyond the mere provision of these benefits. Are the cash benefits for an injured worker adequate while she or he cannot work? Is there any compensation to make up for longer term loss of income that may be the result of the injury? Does the injured worker have additional legal rights to obtain damages from a negligent employer or third party who has contributed to the injury or illness? Is medical care provided? Is the worker protected from discharge while he or she is off work? Does the worker have a right to return to his or her pre-injury job, or an equivalent job? If not, is there effective protection against discrimination based on disability when the disabled worker seeks alternative employment?

In the discussion below, these questions are grouped into three critical areas: the availability of cash benefits; the guarantee of medical care; and the right to retain a position. In view of the brevity of this article, the focus here is on U.S. law. Even within this, it is impossible in an article of this length to provide a full range of references.[4]

Before addressing the questions listed above, it is also important to note that in the U.S. the law may be more complex and confusing than elsewhere due to five important characteristics of the domestic U.S. legal system: first, the employment-at-will rule still persists as the basic default rule governing private sector workers; second, there is a very low level of unionization, particularly in the private sector, at least in part due to the laws governing collective activity[5]; third, there is a lack of a broad social security system[6] or social safety net that might provide basic sustenance irrespective of the cause of an individual's economic need; fourth, there is no legal articulation of

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[2] *See e.g.* the following Conventions of the International Labour Organization: Workmen's Compensation (Agriculture) Convention, 1921 (No.12); Workmen's Compensation (Accidents) Convention, 1925 (No. 17); Workmen's Compensation (Occupational Diseases) Convention, 1925 (No.18); Sickness Insurance (Industry) Convention, 1927 (No.24); Sickness Insurance (Agriculture) Convention, 1927 (No. 25); Medical Care and Sickness Benefits Convention, 1969 (No. 130). All ILO Conventions are available at http://www.ilo.org/ilolex/english/convdisp1.htm (last visited March 15, 2010).

[3] For a full international and comparative discussion of these systems, *see* Terence G. Ison, *Workers' Compensation Systems in* III JEANNE MAGER STELLMAN , INTERNATIONAL ENCYCLOPEDIA OF OCCUPATIONAL SAFETY AND HEALTH (4th ed. 1998), §§25.1-25.24.

[4] For a comprehensive review of U.S. workers' compensation systems, s*ee* LEX LARSON, LARSONS' WORKERS' COMPENSATION LAW (2009). For a review of the relationship between occupational safety and health and workers' compensation, the Family and Medical Leave Act, and the Americans with Disabilities Act, *see* RANDI RABINOWITZ , OCCUPATIONAL SAFETY AND HEALTH LAW (2nd ed. 2002 and 2009 Cumulative Supplement), 845-910.

[5] In 2009, the rate of union membership overall in the U.S. was 12.3%. The rate for private industry workers (7.2 percent) was substantially lower than the rate for public sector workers (37.4 percent). Bureau of Labor Statistics, U.S. Department of Labor, *Union Members Summary,* USDL-10-0069 (2009), *available at* http://www.bls.gov/news.release/union2.nr0.htm (last visited March 15, 2010).

[6] I use this term in the international sense of all programs designed by the state to provide support for those in need. In the U.S., "social security" refers to a single social insurance program that provides cash benefits to people of retirement age and those who are fully disabled from working and can meet prior work requirement tests.

a human or constitutional right to economic survival[7]; and fifth, workers' compensation and other actions for legal damages, as well as many employment-based actions, are largely governed by states and vary substantially from one state to another. Federal laws are superimposed on this web of state-based private and public law, with varying levels of preemptive effect. Moreover, the U.S. is not signatory to key international treaties that may impact this area, including the Convention on the Rights of Persons with Disabilities.

Monetary benefits and damages: In the U.S., every state except Texas has a state statute that requires provision of cash benefits to injured workers through a mandated insurance system. These benefits are generally divided into three categories: temporary total disability benefits, which are available until the worker reaches "maximum degree of medical improvement"; permanent partial disability benefits, for the long term effects of the injury; and permanent total disability benefits, for those workers who are incapable of returning to work. The worker must prove that the injury or illness arose in the course of and out of employment. No showing of negligence is required. The systems are generally financed through mandatory private insurance which is paid directly by the employer (presumably resulting in a reduction in actual wages). In return, the employer receives immunity from common law actions for damages in almost all situations.

The adequacy of these benefits varies considerably, and adequacy has been questioned on a number of levels. First, many workers are not covered at all by these statutes, including independent contractors and, often, domestic workers. Second, not all conditions are covered, and states have created barriers to collection of benefits, depending on the nature of the injury or illness. These barriers range from specific exclusions (e.g. total exclusion of mental health and stress related claims) to requirements that any impairment meet a threshold (e.g. work must be the predominant cause of the impairment) to procedural rules that result in exclusions (e.g. statutes of limitation that bar claims for diseases with latency periods). In general, these systems work best for simple traumatic injuries in which the cause was clear and the recovery is swift. Third, the weekly amount of benefits also varies considerably. Because there is a maximum level of weekly benefits tied to the wages in a state, higher wage earners (those whose incomes are above their state's average weekly wage) have the least adequate income replacement. Fourth, the majority of statutes set limits on the length of time for which temporary total benefits are provided. Fifth, the permanent partial disability system varies considerably from one state to another, and the adequacy of these benefits in terms of actual replacement for lost wages is disputed.[8] Sixth, workers' compensation benefits do not compensate for pain and suffering. And seventh, workers' compensation systems are notoriously poor at providing compensation for occupational diseases, particularly diseases with long latency periods or those that can be caused by non-occupational as well as workplace exposures (e.g. lung cancers).

The exclusivity provisions of workers' compensation generally protect employers from civil law suits, even if the injury was the result of the employer's gross negligence or an intentional bad act.

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[7] Economic rights other than property rights have consistently been rejected as judiciable under the U.S. Constitution. *See e.g. Dandridge v. Williams*, 397 U.S. 471 (1970). The issue in this case was enforcement of regulation of a state welfare program that put an absolute limit of $250 per month on amount of a grant regardless of size of family and its actual need. The U.S. Supreme Court upheld the state law, stating, "the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." 397 U.S. at 487.

[8] For a study of workers' compensation benefit adequacy in the U.S., see ALLAN HUNT ET AL., ADEQUACY OF EARNINGS REPLACEMENT IN WORKERS' COMPENSATION PROGRAMS (2004).

This is true in most jurisdictions, both inside the U.S. and internationally.[9] This means that an injured worker may not be 'made whole' by any available cause of action. There have been many attempts to challenge this exclusivity in the U.S., but the exclusivity bar continues to be the majority rule.

Law suits against third parties are not barred, however. Thus injured workers may sue manufacturers of defective equipment or purveyors of toxic substances if negligence can be proved.

In the U.S., seriously disabled workers who have exhausted (or been denied) workers' compensation benefits can qualify for benefits under the federal Social Security system, assuming that they have met this program's work duration requirements. Disability Income (DI) benefits are then paid until the worker reaches retirement age. There has been considerable concern expressed that the adequacy of workers' compensation benefits is declining, particularly in some large states like California and New York. Interestingly, recent research has shown that the disability of many beneficiaries of the federal DI program is rooted in occupationally-caused injury and disease, suggesting that workers' compensation systems are externalizing costs to other social systems in the U.S.[10] Since the threshold for eligibility for DI is quite high, there is also concern that injured workers are finding it increasingly difficult to obtain adequate long term income maintenance support.

Medical care: In countries that have comprehensive health care systems, the issue of medical coverage for occupational injuries and illnesses is not as important as it is in the U.S. Since there is no comprehensive health care coverage in the U.S., injured workers without alternative sources of health insurance have to depend solely on the workers' compensation system for assistance in paying for the costs of medical services associated with the injury. All U.S. workers' compensation systems provide this coverage, as long as the injury itself is deemed compensable. But if the injury is not viewed as compensable, a U.S. worker may be without any health care coverage for the injury.

Retention of position: The issues involved here implicate both the ability to return to work following a period of absence due to an injury, as well as the ability of an injured worker to find alternative work with a new employer. The question of return-to-work is one that has been widely studied, both in the U.S. and internationally, and it is generally accepted that legal, social, economic, health and psychological factors will all impact the ability and the willingness of an individual to return to work after an injury. Labor market demand, including the attitude of employers toward individuals with disabilities or toward those who have filed claims for benefits, also has significant impact on whether a worker will successfully return to work.

As a legal matter in the U.S., there is no universal job retention protection right for injured workers. Because the basic common law retains the employment-at-will doctrine as the default rule, employers may discharge employees with or without cause.

There are, of course, a myriad of exceptions to this general rule.

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[9] The rules in other countries do vary. See Stellman, *supra* n. 3, at §§23.16-23.17.,

[10] Of course, in countries with seamless social security systems, this movement from one program to another does not present a problem.

Under either evolved common law principles or statutory provisions, the majority of states now forbid retaliation against a worker for the act of filing a workers' compensation claim. But most of these states do not extend this protection to discharges that are based on the employee's absence from work, even if the absence is due to an occupational injury.

There is some protection from other sources, however. The federal Family and Medical Leave Act (FMLA) [11] guarantees 12 weeks of unpaid leave to qualifying employees. To qualify for this right, the employee must either suffer from a serious health condition (including work-caused or work-related conditions) or be needed to care for a young child or a person with a health condition, and must meet the other specific requirements in the statute.[12]

The Americans with Disabilities Act (ADA)[13] was initially heralded by many worker advocates as a powerful new vehicle for protecting employment rights of workers with occupationally-caused impairments and disabilities. But the ADA has been remarkably ineffective in protecting these workers from adverse employment actions. In the years following its passage, courts refused to include workers with common disorders within the category of "disabled" under a range of theories. Most commonly, the courts found that the individual worker was not a qualified person with a disability, either because the worker was not sufficiently disabled (in the court's view) or because the worker was unable to perform the essential functions of the job in question. The litigation under these provisions represents a remarkably arcane and perplexing period in American jurisprudence.[14]

In 2008, the U.S. Congress enacted changes to the ADA, explicitly rejecting the restrictive judicial interpretations of the 1990 law and directing the courts to utilize a more expansive approach to the statutory provisions, stating specifically that "[t]he definition of disability …shall be construed in favor of broad coverage."[15] If the ADA is indeed read broadly, injured workers may have a range of legal claims involving workplace discrimination if they are discharged or a subsequent employer refuses to hire them because of the injury and resulting impairments. It is, however, too early to tell whether these provisions will have significant impact, as no final decisions have yet been rendered on relevant claims under these new provisions.

Conclusion: Workers with occupational injuries and illnesses in the U.S. face significant challenges: there is no basic safety net to provide health care or sustenance; initial weekly and long term benefits often do not provide full income maintenance; and the employment laws have not yet provided a strong tool for job retention. Outside the U.S., similar concerns have been raised about the adequacy of these systems. It is as yet unclear whether globalization and harmonization trends will affect these local rules in the near future.

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[11] Family and Medical Leave Act, 29 U.S.C. §2612 *et seq*.; 29 C.F.R.§825.100.

[12] Qualifying employees must work for firms with more than 50 employees or in the public sector and must themselves have been employed by the firm for a minimum of 12 months and have worked at least 1250 hours in the preceding 12 months. Thus, employees of small establishments, new employees and part-time employees are rarely covered by the FMLA.

[13] 42 U.S.C. §§12101 – 12213 (amended by P.L. 110-325, effective January 1, 2009) (providing comprehensive federal provisions prohibiting discrimination based on disability). The regulations can be found at 29 C.F.R. Part 1630.

[14] *See* Rabinowitz, *supra* n.4, at 876-888 (describing the treatment of common occupationally-caused disabilities under the ADA).

[15] 42 U.S.C. §12101(4)(A).