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## Pennsylvania Legal Update

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### Workers' Compensation Update

#### Employer Responsible for Shoddy Home Renovations

A man whose work-related injuries left him paraplegic recently succeeded in his workers' compensation petition for repairs to his home bathroom.

*If the employer hires a contractor whose work is not completed properly, the employer is responsible for paying to correct the mistakes.*

The Workers' Compensation Act puts the responsibility on employers and their insurers for compensating injured workers for wage losses and medical benefits for work-related injuries. The Act's requirement that employers provide injured employees with "orthopedic appliances" has been interpreted to require items such as wheelchairs and canes, as well as handicapped vans, and, now, renovated bathrooms.

The man's paraplegia left him without bladder control. The em-

ployer paid for renovations to his home bathroom to make it accessible and usable for him. Unfortunately, the contractor that the employer hired did a poor job, leaving the injured worker with a leaking and moldy bathroom. The worker returned to the workers' compensation court and demanded that the

employer pay to repair the shoddy construction.

The court acknowledged that in-home ramps, safety bars, and bathroom modifications are "devices" that are necessary for injured workers who must use wheel-

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### Drug Company May Be Liable for Teenager's Suicide

Following their 16-year-old son's suicide, a Pennsylvania couple brought a federal lawsuit against the manufacturer of the antidepressant drug Paxil. The parents claimed that the manufacturer knew of the specific risks of teen suicides from Paxil but neglected to warn doctors, parents, and teens about the risks.

The family doctor had initially treated the teenager for acne, prescribing a strong prescription drug, Accutane, that has been linked to mood changes and suicides in teenagers. The teenager returned to the

family doctor for further treatment, complaining of nausea and redness of his skin. The family doctor then diagnosed the teenager with body dysmorphic disorder, a psychological condition where a "normal-appearing" person is preoccupied with some imagined defect in appearance.

#### Paxil Prescribed

Concerned that the boy's body dysmorphic disorder could worsen into depression and lead to suicidal

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### Sales Tax Exemption for Construction Items

A Pennsylvania medical center recently sued the state to recover sales taxes and won. The medical center purchased and installed MRI and PET/CT scan equipment in connection with the reconstruction of a building. An MRI device is imaging equipment used to identify disease and damage to soft tissue; a PET/CT scan device is equipment that uses radioactive substances to make images of cross-sections of the human body. Both systems are large and expensive, and the construction contractor added over \$362,000 in sales tax to the invoice for the equipment. The medical center paid the invoice, including the sales tax, and then challenged the sales tax.

#### Personal Property or Fixture?

The medical center argued that the two devices were not personal property or merchandise but were fixtures in the building and should be exempt from sales tax. The structural changes needed to accommodate the equipment included specialized flooring, heating, plumbing, and ventilation. The medical center had to strengthen its floors and ceilings to support the equipment. The installation took more than three weeks, and the devices were connected to various cooling, electrical, heating, and plumbing systems and were bolted to the floors.

The Pennsylvania Commonwealth Court agreed with the medical center, finding that the Pennsylvania Department of Revenue should have excused the sales tax. The court noted that construction contracts are specifically exempted from sales tax. The court also ob-

served that whether an item is part of the construction contract is not always clear:

- Furniture is never part of the construction;
- Permanently affixed items, such as roof shingles and skylights, are always part of the construction; and
- Other, removable fixed features may or may not be part of the construction.

The court found that the two pieces of imaging equipment were removable equipment that had become part of the construction be-

cause they were thoroughly physically attached to the building, they were essential to the use of the building, and they were intended to be permanent. According to the court, the size and weight of the items do not define whether they are part of the construction; instead, the focus must be on the function and use of the items.

Pennsylvania residents and businesses are not obliged to pay sales tax on items that are part of a construction contract if those items qualify as permanent fixtures essential to the real estate.

### Lie-Detector Tests

Polygraph tests, often called "lie-detector" tests, are not admissible in court in Pennsylvania. While the science of polygraph testing is solid and reputable, the testing is considered by the courts to be "inherently unreliable" in determining guilt or innocence. Some people can successfully lie without detection, and some people are labeled dishonest when they are giving truthful responses.

Recently, the Pennsylvania Superior Court relaxed the ban on lie-detector testing in a probation violation hearing. The defendant, a convicted child molester, failed a "therapeutic" lie-detector test that was a routine part of his sex-offender therapy. The test was designed to reveal the motives and behavior underlying the defendant's sexual offenses.

When the prosecution tried to introduce the test result at a probation revocation hearing, the defendant objected. The court disagreed and reviewed the test results. The court held that once the determination of guilt or innocence is complete, lie-detector testing is sufficiently reliable in later proceedings. The court observed that when a probation program becomes ineffective due to a probationer's failure to cooperate or achieve rehabilitation goals, the court needs to know and has a responsibility to remove the offender from the probationary program.

The defendant's failing the lie-detector test was relevant and competent evidence to justify his expulsion from the program and result in

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## Weapon Laws in Pennsylvania

Pennsylvania's Crimes Code makes it a crime to possess any "instruments of crime." Instruments of crime include all weapons used in planning or committing crimes. They also include body armor worn or possessed during the commission of a crime and any item "specially made or specially adapted for criminal use." Even gun parts and guns that do not work but are used in criminal activity qualify as instruments of crime.

The Crimes Code also absolutely prohibits the possession of certain specific weapons designated as "prohibited offensive weapons." These are items determined to be so dangerous that their mere possession is a crime. It is illegal to own or possess a bomb, grenade, machine gun, sawed-off shotgun with a barrel less than 18 inches long, or any firearm specially made or specially adapted for concealment or silent discharge.

Also illegal are blackjacks, "sandbags," and metal knuckles—items used to hit or strike someone with lethal force. Any knife or cutting instrument the blade of which can be exposed in an automatic way by a switch, a push-button, or a spring mechanism is illegal. It is illegal to own or possess any stun gun, stun baton, Taser or other electronic or electric weapon, or other implement for the infliction of serious bodily injury.

Many of these items are available for purchase in small retail stores or through catalogs but are

nevertheless illegal. Certain law enforcers and licensed individuals can qualify to possess some prohibited offensive weapons. The Crimes Code includes a catchall prohibited weapon, defined as any "other implement for the infliction of serious bodily injury which serves no common lawful purpose."

*A Pennsylvania man recently failed to convince the court that his folding knife was not a prohibited offensive weapon.*

A Pennsylvania man recently failed to convince the court that his folding knife was not a prohibited offensive weapon. The elaborate folding pocket dagger did not open automatically by a spring mechanism but was designed to lock the open blade in a 90-degree position. A knife expert who had sold sporting knives for over 30 years testified that the knife had no common lawful or useful purpose. The jury agreed, and the man's conviction was upheld on appeal.

Criminals who brandish, display, possess, or use firearms in the commission of a crime are sentenced to a minimum of five years in jail, based on the "weapons enhancement" provisions of the

Crimes Code. Even nonworking guns can trigger the five-year weapons enhancement provisions, since the use of a broken or unloaded gun in the commission of a crime has the same intimidating effect on victims as a working gun.

In another case, a man robbed a retail clerk, using an air pistol that looks like a real gun but that only shoots small plastic pellets by air action. The appeals court upheld the five-year weapons enhancement provisions, noting that real or replica weapons can be potentially deadly.

Before purchasing any weapon or incendiary device, make sure that it is legal. Many defensive items commonly sold in Pennsylvania are illegal.

## Lie-Detector Tests

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his incarceration. The court cautioned that lie-detector testing cannot be used in probation programs to investigate whether the defendant has committed other crimes or to reveal any past criminal history. But where lie-detector testing is part of a structured probation program with clear goals and requirements and where it is focused on the offender's progress in rehabilitation, the testing results are admissible in revocation proceedings in court.

## Dangerous Drugs

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or hostile behavior, the family doctor prescribed the antidepressant Paxil, despite the fact that it is not approved for use by children and teenagers. The teenager took Paxil for several months, stopped for several months, and then resumed taking Paxil without ever telling the family doctor of his having stopped. Three days after resuming the Paxil, the boy committed suicide by a self-inflicted gunshot. At the time the doctor prescribed Paxil, the package insert did not include any warnings of increased risk of suicide and did not include any pediatric dosage recommendations.

The drug company denied any liability and claimed that since the Food and Drug Administration (FDA) did not require suicide warnings on Paxil packaging, no warnings were necessary. The company denied that Paxil caused or contributed to the teen's suicide.

## Adult Use Only

But the teenager's parents based their claims on the fact that the FDA has never approved Paxil for children or teenagers, so the FDA warnings cover only adult usage. In refusing to dismiss the lawsuit, the federal judge noted that, while the FDA firmly dismissed any links between Paxil and *adult* suicides, the FDA had not addressed warnings for children and teenagers because Paxil simply is not FDA-approved except for adult use. The judge decided that if the drug manufacturer "indeed possessed information, not available to the FDA, upon which it could have unilaterally added a warning to its labeling," a jury could find the manufacturer liable for the teenager's death.

## "Black Box" Warnings

Following the teenager's death and the lawsuit and based on the increased national public inquiries and concerns, the FDA issued a broad statement warning that there may be an increased risk of suicide in pediatric use of many antidepressants, including Paxil. In addition, the FDA has revised "black box" warnings that now headline the package insert for many mental health drugs, cautioning that children and teenagers may be at risk for suicide.

The FDA developed the new black box warning because it cannot prohibit or prevent "off-label" use by doctors. Doctors often discover effective off-label uses for prescription drugs and are free to prescribe drugs for purposes other than those approved by the FDA. Doctors can legally prescribe adult

## Workers' Comp

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chairs. Employers are responsible for paying for modifications to injured employees' homes if the living space is not usable without the modifications, but employers are not required to commit to a course of upgrades.

Employees who require home modifications must propose a reasonable plan, and all the work must be completed as a single project. If items wear out, employers are responsible for replacing them—for example, the workers' compensation court has required employers to pay for the maintenance and repair of stair lift chairs. In this case, the

court held that if the employer hires a contractor whose work is not completed carefully and properly, the employer is responsible for paying to correct the mistakes and for completing the work properly.

Injured workers who need home construction to make their living space handicapped-accessible and handicapped-usable must plan carefully for their one-time entitlement to home renovations. Injured workers would also be well advised to leave the choice and supervision of the contractor to the employer and the insurance company in order to effectively shift the responsibility to them for ensuring that the work is completed properly.

Adults, children, or teenagers who are discontinuing the use of an antidepressant must manage doing so carefully and with the active involvement of a qualified physician.

*Resolution of legal issues depends upon many factors, including variations of facts and interpretations of Pennsylvania law. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.*