



## Leventry, Haschak & Rodkey, LLC Attorneys at Law

1397 Eisenhower Boulevard, Richland Square III, Suite 202, Johnstown, PA 15904  
Telephone: 814-266-1799 Fax: 814-266-5108  
Website: www.lhrklaw.com

### Pennsylvania Legal Update

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#### Drivers' Consent to Alcohol and Drug Testing

Whenever you exercise your privilege to drive or control any vehicle in Pennsylvania, you have implicitly consented to breath, blood, and/or urine testing. The Pennsylvania law that sets out all of the rules regarding breath, blood, and urine testing for drivers is called the Implied Consent Law. No one can force you to submit to testing—you do have the right to refuse. However, in order to preserve public safety and to encourage cooperation in testing, the law punishes those who “revoke” their implied consent by suspending their drivers’ licenses for up to 18 months.

A law enforcement officer who has reasonable grounds to believe you have been driving under the influence (DUI) of alcohol or drugs can require that you submit to testing. Testing is also mandatory for any driver who is caught driving while under suspension for a previous DUI violation. Any driver sentenced to use an ignition interlock device (an electronic device designed to prevent an intoxicated person from starting his or her car) must also submit to breath or blood testing if he or she is caught driving a vehicle without an interlock device. In an accident involving a death or an injury to any person

requiring hospital treatment, all drivers can be required to submit to testing.

Testing used to be required only for drivers of motor vehicles, but the Pennsylvania statute was amended to require testing for drivers of any vehicle. This expands the pool of drivers to include those on bicycles, scooters, skateboards, and similar modes of transportation. The term “vehicle” includes cars, trucks, motorcycles, snowmobiles, dirt bikes, and all-terrain vehicles. Horses are not considered to be vehicles, but horse-drawn carriages and carts are defined as vehicles.

If a law enforcement officer has reasonable grounds to require testing, he or she will request your cooperation in testing. If you decline, the officer will issue a detailed warning that your continued refusal to submit to testing will result in a one-year or longer suspension of your driving privileges. Even if you are completely sober, you will suffer the suspension of your driving privileges if you do not cooperate. Most suspensions for test refusal are for 12 months. An 18-month suspension is imposed on drivers who have a prior record of convictions for DUI and on drivers who have previously refused testing.

You do not have the right to consult with an attorney before breath or blood testing. You do have the right, after submitting to testing, to have your own doctor conduct a separate test. Because the human body constantly metabolizes alcohol and drugs, prompt testing is critical in order to capture the actual levels of alcohol or drugs present at the time you were pulled over. The law recognizes your right to counsel upon your arrest, but it does not give you the right to delay testing until your attorney or doctor arrives.

Several recent Pennsylvania appellate cases shed light on how the courts respond in regard to testing-refusal cases. A woman who ran off the road and severely damaged her car was questioned by a state trooper in a nearby home where she had been taken by local residents. She answered the trooper’s questions about the accident, claiming that she had swerved to avoid a deer. She had a towel over her head and some visible cuts on her face. Because she smelled of alcohol and admitted to drinking two alcoholic beverages, the trooper requested that she submit to testing. She did not respond. As she was being placed into an ambulance, on a gurney, the trooper

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#### Workers' Comp and Notice of Injury

The Pennsylvania Workers’ Compensation Act takes away from employees their right to sue their employer for injuries they suffer in the course and scope of their employment. But the loss of the right to sue is balanced by the strict liability that the Act imposes on employers. With few exceptions, when employees are injured while working, they are automatically entitled to medical and income benefits structured in the Act. The injured employee need not prove that the employer was negligent, and any negligence or fault on the employee’s part does not reduce or eliminate the employee’s entitlement to benefits.

The Act has strict rules regarding how an employee must notify the employer of a work-related injury. In two recent cases, Pennsylvania workers succeeded on appeal when their notice of injury was challenged by their employers.

The first worker was employed at a steel plant, where her job was to run a machine that stretched and leveled steel plates. She was required to wear work boots that had steel through the foot area and up the ankle area of the boot. The steel work boot limited her ability to bend her foot and interfered with her bending down to check gauges on the machine. In 1994 and in 1998, she had foot and ankle surgery to correct nerve compression injuries. During her recovery at home from both surgeries, she received workers’ compensation wage and medical benefits. Several years later, after a third surgery and worsening problems with her feet and ankles, the employee quit. In early 2004, after additional surgery, she filed a claim for a work-

related injury, notifying her employer that she had been diagnosed as suffering from Morton’s neuroma, a nerve injury to her foot.

The Act requires that employees notify employers within 120 days of the occurrence of a work-related injury. However, where an injury goes undiagnosed, a worker can meet the Act’s notice requirements if the worker notifies the employer within 120 days of learning of the injury. Workers must exercise reasonable diligence in securing a diagnosis of a work-related injury. Further, where an ongoing injury is aggravated, or cumulative trauma causes an injury to recur, the 120-day period begins to run on the last day of the aggravation, which is normally the last day of work. Because the woman’s doctors all testified at her hearings that her Morton’s neuroma was work related and that her injury had been aggravated up to her last day of work, the court found that she had given timely notice when she notified her employer within 120 days of her last day of work.

Another employee whose injury notice was challenged also prevailed. The woman worked as an inspector at a factory that produced helmets for the U.S. Air Force. Her job required her to inspect the helmets thoroughly, and she handled hundreds of helmets a day. Each helmet weighed approximately nine pounds. After 45 years on the job, the woman had chronic pain and swelling in her hands. She sought medical treatment, and her doctor issued a note that she could not work due to the swelling in her hands. She applied for short-term

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#### Beauty Culture Law

Pennsylvania’s statutes include the Beauty Culture Law, an Act that regulates the practice of cosmetology. Recently, an unlicensed business challenged the application of the Act to its activities.

The business operated “eyebrow-threading” kiosks at several locations. Eyebrow threading is a process in which facial hair is removed by looping thread around a facial hair and pulling it out. The employees of the business were not licensed cosmetologists.

Under the Act, “[c]osmetology includes any or all work done for compensation,” usually performed by cosmetologists, “which work is for the embellishment, cleanliness and beautification of human hair” and for the “removal of superfluous hair.” The business objected to being regulated by the Board of Cosmetology, claiming that eyebrow threading has not usually been done by cosmetologists. Despite the fact that schools of cosmetology don’t even teach it, the court found that the Act applies to eyebrow threading. Pennsylvania’s eyebrow-threading businesses must be run by licensed cosmetologists and must be licensed.

## Workers' Comp

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disability benefits and described the injury as *not* work related on the disability application. She thought the swelling was from high blood pressure and fibromyalgia. When her doctor cleared her for light-duty work and the factory had none, she was terminated. She did not ask for or receive workers' compensation benefits, because she did not realize that her injuries were serious and work related.

The woman later sought treatment from a specialist who diagnosed her with carpal tunnel syndrome in both wrists, tendonitis in several fingers, and multiple cartilage tears in her hands and fingers. He determined that the multiple injuries were caused by her years of work. The woman testified that when she received the more complete and serious diagnosis, she left multiple voice-mail messages on the telephone of the employer's human resources department. The woman finally filed a workers' compensation claim more than 18 months after her last day at work. On appeal, the Pennsylvania Supreme Court found that the woman had not provided the employer with a perfect notice but that she had accomplished the "humanitarian" goals of the Act when she promptly notified her employer by multiple telephone messages of her condition upon learning of the work-related nature of her injuries.

Employees should protect their interests carefully by promptly no-

tifying their employers in writing of any work-related injury. The notice should describe the date, time, location, and a description, "in ordinary language," of the type of injury suffered. When an employee discovers through medical treatment and diagnosis that an old injury is work related, or that additional injuries exist, the employee

should promptly give the employer additional notice, even if the employee is no longer employed. Employers should follow up on oral notices of injuries; the courts will sometimes find that an oral notice is adequate. Employers can limit claims by making sure that the details of the notice are preserved and documented.

## Losing Real Estate at a Tax Sale

Pennsylvania real estate owners can lose their real estate if they don't pay their real estate taxes. With the exception of the cities of Philadelphia and Pittsburgh, all Pennsylvania counties have a central county Tax Claim Bureau that is responsible for collecting delinquent taxes. The cities of Philadelphia and Pittsburgh also hold tax sales, but they follow different procedures from the statewide Tax Claim Bureaus.

Tax Claim Bureaus sell real estate confiscated from delinquent taxpayers in the fall of each year, at "upset" sales. An upset sale is one where the buyer takes title to the property subject to all existing mortgages and liens. Because most buyers at tax sales don't want properties that are subject to mortgages and liens, many properties don't actually sell at the fall upset sales. The Tax Claim Bureaus then have the authority to petition the court for a "judicial" sale. The judicial

sales are often held in the early months of the following year. At judicial sales, the buyer takes clear title to the property, subject only to certain limited federal and Commonwealth liens.

In a recent case where a homeowner lost a property at a judicial sale, he was able to have the sale reversed, or "set aside," because the Tax Claim Bureau did not precisely comply with the notice requirements of the Real Estate Tax Sale Law (RETSL). The sale was published twice in local newspapers. In addition, the Tax Claim Bureau hired a constable to serve notice on the homeowner at a restaurant that he owned. The constable gave the sale notice paperwork to the homeowner's adult stepson at the restaurant and explained the details about the scheduled sale; the stepson agreed to give the documents to his stepfather. However, the stepson put

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## Consent to Testing

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spoke to her several times, requesting that she submit to testing. She did not respond. In challenging her license suspension, the woman testified that her injuries were serious, requiring 68 stitches and three days' hospitalization. She also testified that she suffered a severe concussion in the accident and was unconscious when the trooper asked her to submit to testing. The trooper testified that she was conscious when he requested the testing and when he warned her of the consequences of her refusal. He testified that she had spoken to him about the accident and that she simply did not answer his repeated requests about the testing. The court found that the trooper's account was more credible, noting that the woman did not present any medical evidence to corroborate her claims that she was too injured to understand the trooper's requests.

In another case, a man's doctor's testimony helped him avoid the penalty of license suspension. The man was arrested on suspicion of DUI after he failed to stop at a stop sign. The arresting trooper smelled alcohol on the man's breath and arrested him and took him to the police barracks for breath testing. The man made four or five attempts to blow into the breathalyzer machine but never provided a sufficient breath sample for the machine to display a result. The man told the trooper that he had asthma. The trooper processed the incident as a refusal to cooperate in the testing, and the man's driver's license was suspended. On appeal from the suspension, the man's doctor testified that he had treated the man for asthma for more than 10 years. The doctor

further explained that the man also suffered from chronic obstructive pulmonary disease for several years and could not produce a breath sample. The court found that once the man had accurately disclosed his asthma, the trooper should have arranged for blood or urine testing. Because the facts supported the man's claim that he could not produce enough breath for the testing, and because his doctor confirmed that he had asthma and other serious respiratory problems, the court refused to uphold the license suspension.

Finally, in a case where a man claimed that he never should have been required to submit to testing, the court found that the police officer involved did have grounds to request testing. The police officer found the man unconscious in the driver's seat of a car parked at a McDonald's restaurant. The car engine was running and the headlights were on. The man was slumped over the center console with his face inside a McDonald's bag on the passenger seat. Three bottles of prescription pills, two bearing the man's name, were spilled over the front seats of the car. The man became belligerent when the officer woke him, spitting food and slurring his speech. He was aggressive with emergency room workers and refused blood testing. The man appealed his license suspension, claiming that he had become impaired from the prescription pills after arriving at the restaurant and that he had not driven the car while impaired. The court found that testing is required when the driver is found in physical control of a vehicle and that it is not necessary that the police officer observe the vehicle moving.

While positive testing can produce solid evidence of a driver's

intoxication, drivers must think carefully before refusing testing. With few exceptions, drivers who refuse testing lose their driving privileges, sometimes for a longer period than would have resulted from a DUI conviction.

## Real Estate Tax Sales

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the documents on a shelf in the restaurant kitchen, never gave them to his stepfather, and simply told his stepfather that someone had come by the restaurant with a back-rent collection claim.

The RETSL requires that the Tax Claim Bureau use the county sheriff's office to serve all notices of judicial sales personally on homeowners. The sale was set aside because the homeowner was not personally served and because the Tax Claim Bureau used an elected constable, rather than the county sheriff's office, to serve the notice.

The stated purpose of the RETSL is "to ensure the collection of taxes, and not to deprive citizens of their property." For this reason, the courts read the notice requirements of the RETSL very strictly. Because many properties don't sell at the annual fall upset sales, some homeowners become careless or casual about the subsequent judicial sale notices. The judicial sales should be taken very seriously; Pennsylvania property owners can lose valuable real estate at judicial sales. If your real estate taxes are delinquent, visit your county Tax Claim Bureau and learn what you can do to save your title to your real estate.

*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.*