



NEW JERSEY LAW REVISION COMMISSION

Draft Final Report Concerning the Scope of the Recreational or Social Activities Defense in N.J.S. 34:15-7

March 6, 2023

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.

Please consult the New Jersey statutes in order to determine the law of the State.

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Project Summary

In New Jersey, the Workers' Compensation Act (WCA), authorizes an employer to assert certain defenses to compensation claims, including that “the natural and proximate cause of the injury or death” was participation in “recreational or social activities.”¹ That defense is not applicable when an activity satisfies the two-pronged exception set forth in the statute: the activity (1) is “a regular incident of employment” and (2) it “produce[s] a benefit to the employer beyond improvement in employee health and morale.”²

In *Goulding v. N.J. Friendship House, Inc.*,³ the New Jersey Supreme Court addressed whether an injury sustained by an employee who volunteered to cook at an employer-sponsored event was compensable.⁴ Her employer asserted the “recreational and social activities” defense pursuant to N.J.S. 34:15-7.⁵ Relying on the plain language of the statute, its legislative history, and prior decisions interpreting its scope, the *Goulding* Court held that the employee was entitled to compensation for her injuries.⁶

Outreach was conducted to interested and knowledgeable individuals and organizations following the release of a Tentative Report in November 2022.⁷ Comments on the proposed modifications to N.J.S. 34:15-7 included both support and opposition, and one commenter proposed alternative language.⁸ Modifications to the draft language in response to the comments received are set forth in the Appendix. The Appendix recommends adding language to N.J.S. 34:15-7 to clarify the scope of the “recreational or social activities” defense, as discussed by the New Jersey Supreme Court in *Goulding*, and in a prior New Jersey Supreme Court case, *Lozano v. Frank DeLuca Constr.*⁹

Statute Considered

N.J.S. 34:15-7 provides, in relevant part, that:

When employer and employee shall by agreement, either express or implied . . . accept the provisions of this article compensation for personal injuries to, or for the death of, such employee by accident arising out of and in the course of employment shall be made by the employer without regard to the negligence of the employer . .

¹ N.J. STAT. ANN. § 34:15-7 (West 2022).

² *Id.*

³ 245 N.J. 157 (2021).

⁴ *Id.* at 161.

⁵ *Id.*

⁶ *Id.* at 161-162.

⁷ N.J. Law Revision Comm'n, *Tentative Report Concerning the Scope of the Recreational or Social Activities Defense in N.J.S. 34:15-7*, Nov. 17, 2022, www.njlrc.org (last visited Feb. 15, 2023).

⁸ See *infra* at pp.12-13. The commenter's proposed language appears in Option #2 of subsection (b)(4)(B) in the Appendix. See *infra* at p.16.

⁹ 178 N.J. 513 (2004).

. in all cases except . . . when recreational or social activities, unless such recreational or social activities are a regular incident of employment and produce a benefit to the employer beyond improvement in employee health and morale, are the natural and proximate cause of the injury or death.¹⁰

History of the “Recreational or Social Activities” Defense

New Jersey’s workers’ compensation program was enacted in 1911, as a response to the insufficiency of common law remedies available to injured workers in a period of rapid industrialization.¹¹ Prior to the availability of workers’ compensation, most claims were defeated in the courts by the exercise of the common law principles of “assumed risk,” “fellow servant negligence,” and “contributory negligence.”¹² The “small percentage of injured workers who succeeded in winning court awards often would receive very large amounts of compensation.”¹³

When the workers’ compensation program was enacted, compensation was required for “personal injuries [or death] by accident arising out of and in the course of . . . employment.”¹⁴ The original statute set forth only two defenses — that the injury or death was intentionally self-inflicted or proximately caused by intoxication.¹⁵ As a result, for many years it was left to the courts to “determine whether accidents arose ‘out of and in the course of employment’ and were thus compensable.”¹⁶

In early cases, courts denied claims “for injuries sustained during employer-sponsored recreational and social activities at which attendance was not required and from which the employer did not receive a clear business benefit.”¹⁷ This was based on the “common concern that employers should not bear the cost of injuries sustained during recreational activities that have no work connection, aside from an employer’s financial contribution . . . which employees engage [in] voluntarily for their own personal benefit.”¹⁸ With respect to non-voluntary participation in recreational or social activities, however, courts “embrac[ed] the principle that . . . compulsion is the *sine qua non* of work-relatedness.”¹⁹

¹⁰ N.J. STAT. ANN. § 34:15-7 (emphasis added).

¹¹ New Jersey Department of Labor and Industry, *A Report On The Workers’ Compensation Amendments of 1979 (Chapters 283 and 285 of the Laws of 1979)*, at 13 (Jul. 1, 1981).

¹² *Id.* at 13.

¹³ *Id.* at 14.

¹⁴ L. 1911, c.95, §7, p.136 (“Compensation under agreement”).

¹⁵ L. 1911, c.95, §7, p.136 (“Exceptions”) (“when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury”).

¹⁶ *Goulding*, 245 N.J. at 168.

¹⁷ *Id.*, quoting *Lozano v. Frank DeLuca Const.*, 178 N.J. 513 (2004).

¹⁸ *Lozano v. Frank DeLuca Const.*, 178 N.J. at 524–25, citing *Stevens v. Essex Falls Country Club*, 136 N.J.L. 656, 659 (Sup. Ct. 1948).

¹⁹ *Lozano*, 178 N.J. at 527 (“In *Harrison v. Stanton*[, 26 N.J. Super. 194 (App. Div. 1953) *aff’d o.b.*, 14 N.J. 172 (1954)], an employee sought coverage under the [WCA] for an injury suffered while driving his child’s babysitter home [who was] hired . . . so that he and his wife could attend an event sponsored by an organization that his employer

To determine whether the recreational and social activities defense was applicable, courts considered the following five factors:

(a) the customary nature of the activity; (b) the employer’s encouragement or subsidization of the activity; (c) the extent to which the employer managed or directed the recreational enterprise; (d) the presence of substantial influence or actual compulsion exerted upon the employee to attend and participate; and (e) the fact that the employer expects or receives a benefit from the employee’s participation in the activity.²⁰

In *Tocci v. Tessler & Weiss, Inc.*,²¹ and in *Complitano v. Steel & Alloy Tank Co.*,²² the New Jersey Supreme Court “departed from [the five-factor test] and expanded the scope of coverage for voluntary recreational and social activities.”²³ In both decisions, the Supreme Court found that claims for injuries sustained during employee softball games were not barred by the recreational or social activities defense and were compensable under the WCA.²⁴

In 1979, the Legislature codified the recreational or social activities defense, as well as other defenses to compensation, in N.J.S. 34:15-7.²⁵ The Joint Statement accompanying the bill indicated that the “provision was added to reduce costs for employers by ‘declaring injuries sustained during recreational or social activities sponsored by the employer to be noncompensable.’”²⁶

The New Jersey Supreme Court has explained that the “carve-outs from coverage...[that N.J.S. 34:15-7]...contains – including . . . for injuries sustained in the course of recreational and social activities . . . – have been interpreted as a legislative attempt to reverse the judicial trend toward expansive interpretation that began in *Tocci* and *Complitano*.”²⁷

Background

The Plaintiff in *Goulding v. N.J. Friendship House, Inc.* was a cook at Friendship House,

had directed him to join. . . . Noting that the employee's attendance at the event ‘was expected, if not directed’ by the employer, the Appellate Division described the activity as an ‘assigned duty’ and held that the accident arose out of and in the course of employment.”)

²⁰ *Goulding*, 245 N.J. at 168, quoting *Harrison*, 26 N.J. Super. at 199.

²¹ 28 N.J. 582, 587 (1959).

²² 34 N.J. 300 (1961).

²³ *Lozano*, 178 N.J. at 525.

²⁴ *Goulding*, 245 N.J. at 169-70.

²⁵ *Id.* at 168.

²⁶ *Lozano*, 178 N.J. at 529.

²⁷ *Goulding*, 245 N.J. at 170. See also *Cotton v. Worthington Corp.*, 192 N.J. Super. 467, 471 (App. Div. 1984) (“[i]t is clear, however, that the Legislature intended to overcome the holdings in *Complitano* and *Tocci*, which broadened the test for compensability from that which had once prevailed in this State.”), citing *Stevens v. Essex Fells Country Club*, 136 N.J.L. 656 (Sup. Ct. 1948); *Konrad v. Anheuser-Busch, Inc.*, 48 N.J. Super. 386 (Cty. Ct. 1958); *Padula v. Royal Plating & Polishing Co.*, 14 N.J. Super. 603 (Cty. Ct. 1951).

a non-profit entity providing services to individuals with developmental disabilities.²⁸ She volunteered to work as a cook during the organization’s first annual “Family Fun Day,” and filed a compensation claim for injuries that she sustained in a fall at the event.²⁹ The *Goulding* Court described the purpose of Family Fun Day as providing “a safe and fun environment with recreational activities, including games and music, for the clients of Friendship House and their families.”³⁰ Although Friendship House asked its employees to volunteer to work at the event, there were no consequences for those who did not volunteer.³¹

Friendship House opposed the compensation claim, asserting the recreational or social activities defense in N.J.S. 34:15-7.³² The Workers’ Compensation Court denied the claim, finding that “Family Fun Day” qualified as a social or recreational activity that was not a “regular incident of employment”³³ and did not produce a benefit to Friendship House “beyond an improvement to employee health and morale.”³⁴

The Appellate Division affirmed, determining that the event was “recreational or social” because it was intended to celebrate Friendship House clients and “included food, games and music.”³⁵ The New Jersey Supreme Court granted certification.³⁶

Analysis

In *Goulding*, the New Jersey Supreme Court considered the legislative history of the recreational or social activities defense contained in N.J.S. 34:15-7,³⁷ the plain language of the statute, and the common law interpretation of the statute’s scope.³⁸ The Court determined that Plaintiff’s role as a cook facilitated Family Fun Day so that while her participation in the event

²⁸ *Goulding*, 245 N.J. at 161.

²⁹ *Id.*

³⁰ *Id.* at 163.

³¹ *Id.*

³² *Id.* at 164.

³³ *Id.* (relying on the fact that “this was the ‘first and only’ Family Fun Day Friendship House had sponsored, and the incident in question was not the cooking activity [Appellant] volunteered for, but her attendance at the event generally,” and “that [Appellant] volunteered to help at the event, was not compelled to do so, and could have volunteered for a position other than the one she held at her job”).

³⁴ *Id.* (explaining “there was no fundraising or marketing associated with the event”).

³⁵ *Id.* With respect to whether the event “was a regular incident of employment,” the Appellate Division relied on the following facts: “[t]his was the first Family Fun Day;” it was held outside normal working hours; employees were not required to volunteer or attend; if an employee did volunteer, she could do so in any capacity; and [Appellant] could have chosen to help with games or prizes, she did not have to cook.” *Id.* at 164-165. Furthermore, although concluding that an analysis of the second prong was unnecessary, the Appellate Division noted “there was a ‘lack of support in the record [to show] that there was any benefit to [Friendship House] in the form of positive public relations.” *Id.* at 165.

³⁶ 241 N.J. 66 (2020).

³⁷ *See supra* at pp. 3-4.

³⁸ *Goulding*, 245 N.J. at 167 (emphasizing that courts have “long stressed that [the WCA] is humane social legislation designed to place the cost of work-connected injury upon the employer who may readily provide for it as an operating cost”).

was voluntary, her claim was not barred by the recreational or social activities defense.³⁹

The *Goulding* Court considered first “whether the activity was, in fact, ‘recreational or social’ within the meaning of the statute.”⁴⁰ The Court then explained that the injury was *still* compensable if the activity was “(1) . . . a ‘regular incident of employment,’ and (2) . . . ‘produce[d] a benefit to the employer beyond improvement in employee health and morale.’”⁴¹

- *Meaning of “Recreational or Social Activities”*

The WCA does not define “recreational” or “social.” In *Goulding*, the Court emphasized “the ambiguity of that label” because “from the perspective of an employee” its meaning “is not self-evident.”⁴² As a result, the Court’s inquiry into the meaning of the term “extend[ed] beyond the plain language” of the statute.⁴³

- *Lozano v. Frank DeLuca Constr.*⁴⁴

The Supreme Court referred to its decision in *Lozano*, which concerned an employee injured while driving a go-cart.⁴⁵ After an employer and his employees finished installing a wall on a customer’s property, the customer allowed them to use his go-cart track.⁴⁶ Although one of the employees, Lozano, initially refused because he did not have a license or know how to drive, his employer “assured him it was easy and told him to ‘get in.’”⁴⁷

The Court recognized that employers “retain[] the power to expand the scope of employment,” and concluded that the phrase “recreational or social activities as it appears in N.J.S.A. 34:15-7 . . . encompass[es] only those activities in which participation is not compulsory.”⁴⁸ The Court held that “when an employer compels an employee to participate in an activity that ordinarily would be considered recreational or social in nature, the employer thereby renders that activity a work-related task as a matter of law.”⁴⁹

The *Lozano* Court developed “the standard that courts should apply when assessing an employee’s allegation of compulsion.”⁵⁰ Recognizing that compulsion can be “indirect or implicit”

³⁹ *Id.* at 174-75.

⁴⁰ *Id.* at 171.

⁴¹ *Id.*

⁴² *Id.* at 172, quoting *Lozano v. Frank DeLuca Constr.*, 178 N.J. 513, 522 (2004) (“[T]here is a question whether employees would describe a company event as ‘recreational or social’ and consider it noncompensable if the employer required attendance.”).

⁴³ *Goulding*, 245 N.J. at 172, quoting *Lozano*, 178 N.J. at 522.

⁴⁴ *Lozano v. Frank DeLuca Constr.*, 178 N.J. 513 (2004).

⁴⁵ *Id.* at 517.

⁴⁶ *Id.* at 518-519.

⁴⁷ *Id.* at 519.

⁴⁸ *Id.* at 531.

⁴⁹ *Id.* at 518.

⁵⁰ *Id.* at 534.

due to the “imbalance of power between the employer and employee,” the Court held that an “employee must demonstrate an objectively reasonable basis in fact for believing that the employer had compelled participation in the activity.”⁵¹

Acknowledging that Plaintiff’s participation in Family Fun Day was voluntary, the *Goulding* Court observed that “compulsion is not the only instance in which an activity can be removed from the social or recreational activity label.”⁵² The Court found that the Legislature did not limit compensation “based on the broad category of event involved.”⁵³ Rather, it is the “nature of [the employee’s] activities at the event that determine compensability. . . not the character of the event.”⁵⁴

Therefore, because Plaintiff “was facilitating [the event] by cooking and preparing meals for clients of Friendship House,” the Court held that “Family Fun Day, as to [Plaintiff], was not a recreational or social activity,”⁵⁵ and the injury she sustained during the event was compensable.⁵⁶

- *Two-Pronged Exception to the “Recreational or Social Activities” Defense*

Although the *Goulding* Court held that Plaintiff’s injury was compensable solely based on her role in Family Fun Day, the Court found that she “would also be entitled to compensation under N.J.S. 34:15-7 if her volunteer work at Family Fun Day could be deemed a recreational or social activity.”⁵⁷

Family Fun Day was a “regular incident of employment” based on the event’s relationship to the Appellant’s employment at Friendship House.⁵⁸ With respect to whether Friendship House received a benefit beyond improving employee health and morale, the Court stated that Friendship House received “the ‘intangible benefits’ of promoting itself and fostering goodwill in the

⁵¹ The *Lozano* Court listed the factors to consider:

whether the employer directly solicits the employee's participation in the activity; whether the activity occurs on the employer's premises, during work hours, and in the presence of supervisors, executives, clients, or the like; and whether the employee's refusal to attend or participate exposes the employee to the risk of reduced wages or loss of employment. The absence of one factor is not fatal. As noted, that list is not exhaustive and other fact patterns may suggest compulsion. However, an employee's mere subjective impression of compulsion standing alone will not bring an activity within the scope of employment.

Id. at 534–35.

⁵² *Goulding*, 245 N.J. at 174.

⁵³ *Id.*

⁵⁴ *Id.* (an event that an employee “volunteers to help facilitate [is not] a social or recreational activity as to that employee” because although the event “as a whole” was social or recreational, the employee “did not participate . . . in a social or recreational role”).

⁵⁵ *Id.*

⁵⁶ *Id.* at 174-175.

⁵⁷ *Id.* at 175.

⁵⁸ *Id.* at 175-176 (finding that Friendship House had “complete control” of Family Fun Day, and it was held with the intent that it would be a “recurring ‘annual’ event,” demonstrating its “customary” nature).

community.”⁵⁹

- *Ryan-Wirth v. Hoboken Board of Education*⁶⁰

Since *Goulding* was decided,⁶¹ the Appellate Division has addressed the recreational or social activities defense in *Ryan-Wirth v. Hoboken Board of Education*, an unpublished decision concerning injuries sustained by a school nurse (Petitioner).⁶² Petitioner began working extra shifts during the school’s A.M. Care Program, which involved supervising students in various locations before school.⁶³ On her second morning, she joined in the school’s Cardio Club, “where students, parents and staff engage in cardiovascular exercise in the gym,” and was injured.⁶⁴

The compensation court denied Petitioner’s claim, finding that Cardio Club was “a recreational activity that did not ‘produce a benefit to the employer beyond improvement in employee health and morale.’”⁶⁵ Furthermore, the court held that the injury “did not ‘arise out of’ her employment and [did not] have the requisite ‘work connection’” to warrant compensation under the WCA.⁶⁶

The Appellate Division disagreed that improving employee health and morale was the only benefit to the employer, because Cardio Club “was ‘designed with the purpose of benefitting’ the participating students academically.”⁶⁷ As a result, the Court found “that the recreational and social activity exception is not applicable.”⁶⁸

Citing to *Goulding*, the *Ryan-Wirth* Court observed that “[t]he nature of [P]etitioner’s activities at Cardio Club determines compensability.”⁶⁹ The Appellate Division emphasized that Petitioner “did not ‘volunteer[] to help facilitate’ the Cardio Club” nor did she provide services similar to her regular employment at Cardio Club.⁷⁰

Therefore, the Court concluded that “Petitioner’s voluntary participation in the Cardio Club

⁵⁹ *Id.* (receiving also “a separate benefit in and of itself” arising from the “experience enjoyed . . . by clients [of Friendship House] and their families”).

⁶⁰ 2021 WL 5816722 (N.J. Super. Ct. App. Div. Dec. 8, 2021), *cert. denied*, 250 N.J. 510 (2022).

⁶¹ The Appellate Division also addressed the recreational and social activities defense in *Regalado v. F&B Garage Door*, 2021 WL 2325311 (N.J. Super. Ct. App. Div. June 8, 2021), *cert. denied*, 249 N.J. 81 (2021), which involved injuries sustained in a car accident after a company holiday party. However, the issue in *Regalado* involved only the application of the implicit compulsion standard developed in *Lozano*, as there was no dispute that the annual holiday party was a “recreational or social” activity. *Id.* at *3.

⁶² *Ryan-Wirth*, 2021 WL 5816722, at *1.

⁶³ *Id.* at *1.

⁶⁴ *Id.*

⁶⁵ *Id.* at *4.

⁶⁶ *Id.* at *6.

⁶⁷ *Id.* at *5.

⁶⁸ *Id.* at *4.

⁶⁹ *Id.* at *5.

⁷⁰ *Id.*

was not a ‘regular incident of employment’ as a school nurse.”⁷¹ However, given that Cardio Club provided a benefit beyond improving employee health and morale, the *Ryan-Wirth* Court determined that it could not “be deemed a social or recreational event as to [Petitioner].”⁷²

Ultimately, the Appellate Division affirmed the compensation court’s denial, holding that the “findings that petitioner’s injury did not ‘arise out of’ her employment and ‘failed to have the requisite work connection’ are adequately supported by credible evidence in the record and consonant with the [WCA].”⁷³

The *Ryan-Wirth* decision is consistent with the decision in *Goulding* in holding that the recreational or social activities defense in N.J.S. 34:15-7 was inapplicable because Petitioner’s participation in Cardio Club failed to satisfy the two-prong exception.⁷⁴ The Court found that Cardio Club provided a benefit beyond improving employee health and morale, but it was not a “regular incident of [Petitioner’s] employment.”⁷⁵ While analyzing whether the recreational or social activities defense applied, the Appellate Division emphasized that, unlike in *Goulding*, Petitioner’s participation did not “facilitate” Cardio Club nor was she “performing her job duties as a nurse.”⁷⁶

- *Other State Statutes*

Twenty-five states have codified a recreational or social activities defense to workers compensation coverage.⁷⁷ Most of these statutes are structured similarly to the New Jersey statute, although the location of the defense in the statutory scheme varies across states. For instance, some states include the recreational or social activities defense in the statutory definitions of

⁷¹ *Id.* at *5 (observing that Cardio Club “was not part of her job duties, did not involve performing services as a nurse, and was not compulsory”).

⁷² *Id.* at *4.

⁷³ *Id.* at *7.

⁷⁴ *Goulding*, 245 N.J. at 178 (“We further hold that, even if her volunteering for Family Fun Day were social or recreational [pursuant to] N.J.S.A. 34:15-7, [Appellant] would still have satisfied the two-part exception . . . because her participation was a regular incident to her employment and it produced a benefit to Friendship House beyond improvement to employee health and morale.”).

⁷⁵ *Ryan-Wirth*, 2021 WL 5816722, at *4-5.

⁷⁶ *Id.* at *5.

⁷⁷ ALASKA STAT. ANN. § 23.30.395 (West 2022); ARK. CODE ANN. § 11-9-102 (West 2022); CAL. LAB. CODE § 3600 (West 2022); COLO. REV. STAT. ANN. § 8-40-301 & 201 (West 2022); CONN. GEN. STAT. ANN. § 31-275 (West 2022); FLA. STAT. ANN. § 440.092 (West 2022); 820 ILL. COMP. STAT. ANN. 305/11 (West 2022); KAN. STAT. ANN. § 44-508 (West 2022); MASS. GEN. LAWS ANN. CH. 152, § 1 (West 2022); MICH. COMP. LAWS ANN. § 418.301 (West 2022); MO. ANN. STAT. § 287.120 (West 2022); MONT. CODE ANN. § 39-71-407 (West 2022); NEV. REV. STAT. ANN. § 616A.265 (West 2022); N.D. CENT. CODE ANN. § 65-01-02 (West 2022); N.H. REV. STAT. ANN. § 281-A:2 (West 2022); OHIO REV. CODE ANN. § 4123.01 (West 2022); OKLA. STAT. ANN. TIT. 85A, § 2 (West 2022); OR. REV. STAT. ANN. § 656.005 (West 2022); 28 R.I. GEN. LAWS ANN. § 28-33-2.1 (West 2022); TENN. CODE ANN. § 50-6-110 (West 2022); TEX. LABOR CODE ANN. § 406.032 (West 2022); VT. STAT. ANN. TIT. 21, § 618 (West 2022); VA. CODE ANN. § 65.2-101 (West 2022); WASH. REV. CODE ANN. § 51.08.013 (West 2022); WYO. STAT. ANN. § 27-14-102 (West 2022).

“employment,”⁷⁸ or “injury,”⁷⁹ while others include the defense in the section articulating the scope of insurance carrier liability.⁸⁰

Like New Jersey’s exception for activities that are a “regular incident of employment” that “produce a benefit . . . beyond improvement in employee health and morale,” every state qualifies the term “recreational or social activities” with additional requirements.⁸¹

- *Voluntariness of Activity*

Unlike N.J.S. 34:15-7, the most common additional requirement in other states is that employee participation is not, or does not reasonably appear to be, mandatory. New Jersey is one of only five states that does not explicitly require that an employee’s participation is voluntary.⁸²

Most common among the statutes that expressly address the issue is the use of the word “voluntary” to describe either the activity,⁸³ or the employee’s participation in the activity.⁸⁴ The Kansas and Wyoming statutes apply the defense when an employee is “under no duty to attend.”⁸⁵

⁷⁸ ALASKA STAT. ANN. § 23.30.395(2); COLO. REV. STAT. ANN. § 8-40-201(8); KAN. STAT. ANN. § 44-508(f)(3)(C); WASH. REV. CODE ANN. § 51.08.013(2)(b).

⁷⁹ ARK. CODE ANN. § 11-9-102(4)(B)(ii); CONN. GEN. STAT. ANN. § 31-275(16)(B)(i); MASS. GEN. LAWS ANN. CH. 152, § 1(7A); N.D. CENT. CODE ANN. § 65-01-02(11)(b)(6); N.H. REV. STAT. ANN. § 281-A:2(XI); OHIO REV. CODE ANN. § 4123.01(C)(3); OKLA. STAT. ANN. TIT. 85A, § 2(9)(b)(2); OR. REV. STAT. ANN. § 656.005(7)(b)(B); VA. CODE ANN. § 65.2-101(1); WYO. STAT. ANN. § 27-14-102(xi)(H).

⁸⁰ VT. STAT. ANN. TIT. 21, § 618(a)(2); TEX. LABOR CODE ANN. § 406.032(1)(D).

⁸¹ In some states, the defense applies only to those activities that occur when an employee is “off-duty.” *See* CAL. LAB. CODE § 3600(a)(9); TEX. LABOR CODE ANN. § 406.032(1)(D); VA. CODE ANN. § 65.2-101(1). Some states exclude activities that are unrelated to employment, *see e.g.* CAL. LAB. CODE § 3600(a)(9) (“activity not constituting part of the employee’s work-related duties”); COLO. REV. STAT. ANN. § 8-40-301(1)(a) (“is not performing any duties of employment”); KAN. STAT. ANN. § 44-508(f)(3)(C) (“did not result from the performance of tasks related to the employee’s normal job duties”); TENN. CODE ANN. § 50-6-110(a)(6) (unless “during employee’s work hours and . . . part of the employee’s work-related duties”); TEX. LABOR CODE ANN. § 406.032(1)(D) (“did not constitute part of the employee’s work-related duties”); VT. STAT. ANN. TIT. 21, § 618(a)(2) (“part of the employee’s regular duties”); VA. CODE ANN. § 65.2-101(1) (“activities which are not part of the employee’s duties”); WASH. REV. CODE ANN. § 51.08.013(2)(b); WYO. STAT. ANN. § 27-14-102(xi)(H) (“tasks related to the employee’s normal job duties”), or unpaid. *See* MO. ANN. STAT. § 287.120(7) (“paid wages or travel expenses”); N.D. CENT. CODE ANN. § 65-01-02(11)(b)(6) (“nonpaid participation”); NEV. REV. STAT. ANN. § 616A.265(1) (“renumeration”). Other states provide unique limitations on eligible activities. *See e.g.* ALASKA STAT. ANN. § 23.30.395(2) (limiting the defense to “recreational league activities”); VT. STAT. ANN. TIT. 21, § 618(a)(2) (excluding only recreational activities “available . . . as part of the employee’s compensation package or as an inducement to attract employees”); OHIO REV. CODE ANN. § 4123.01(C)(3) (requiring coverage unless “the employee signs a waiver of the . . . right to compensation or benefits . . . prior to engaging in the . . . activity”).

⁸² Three statutes exclude “any recreational or social activities for the employee’s personal pleasure,” ARK. CODE ANN. § 11-9-102(4)(B)(ii); OKLA. STAT. ANN. TIT. 85A, § 2 (9)(b)(2); OR. REV. STAT. ANN. § 656.005 (7)(b)(B), while Michigan’s statute declines coverage for injuries sustained “in the pursuit of an activity the major purpose of which is social or recreational.” MICH. COMP. LAWS ANN. § 418.301(3).

⁸³ CAL. LAB. CODE § 3600(a)(9); CONN. GEN. STAT. ANN. § 31-275(16)(B)(i); MASS. GEN. LAWS ANN. CH. 152, § 1(7A) (“purely voluntary”); N.D. CENT. CODE ANN. § 65-01-02(11)(b)(6); OHIO REV. CODE ANN. § 4123.01(C)(3); 28 R.I. GEN. LAWS ANN. § 28-33-2.1; TENN. CODE ANN. § 50-6-110(a)(6); TEX. LABOR CODE ANN. § 406.032(1)(D); VA. CODE ANN. § 65.2-101(1).

⁸⁴ COLO. REV. STAT. ANN. § 8-40-201(8); 820 ILL. COMP. STAT. ANN. 305/11

⁸⁵ KAN. STAT. ANN. § 44-508(f)(3)(C); WYO. STAT. ANN. § 27-14-102(xi)(H).

Some states permit the defense to be asserted *unless* participation was “required,”⁸⁶ “ordered,”⁸⁷ “directed,”⁸⁸ or “assigned”⁸⁹ by an employer or as a condition⁹⁰ or “incident”⁹¹ of employment. Finally, six states permit coverage if an employer “request[ed]” employee participation⁹² or the mandatory nature of the activity was implied⁹³ or a “reasonable expectancy” of employment.⁹⁴

In light of the common inclusion of a voluntariness requirement, and the holding in *Lozano* that “recreational or social activities as it appears in N.J.S.A. 34:15-7 . . . encompass[es] only those activities in which participation is not compulsory,”⁹⁵ the proposed modifications contained in the Appendix add language to N.J.S. 34:15-7 to clarify that the defense applies when an employee’s participation in a recreational or social activity is voluntary.

○ *Facilitation of Activity*

In addition, the statutes of some states employ language consistent with the holding in *Goulding* – that an employee’s facilitation of an otherwise recreational or social event takes the resulting injury outside the scope of the recreational or social activities defense.⁹⁶

Montana, for example, provides that the recreational or social activities defense does not apply when an “employer asked the employee to assume duties for the activity so that the employee’s presence is not completely voluntary and optional.”⁹⁷ In Nevada, there is an exception to the social and recreational activities defense for school district employees⁹⁸ who are injured “while engaging in [certain school-related] athletic or social event[s].”⁹⁹ The statute requires that the employee’s participation was either “at the request of or with the concurrence of supervisory

⁸⁶ ALASKA STAT. ANN. § 23.30.395(2); CAL. LAB. CODE § 3600(a)(9); FLA. STAT. ANN. § 440.092(1); MONT. CODE ANN. § 39-71-407(2)(b); N.H. REV. STAT. ANN. § 281-A:2(XI); TENN. CODE ANN. § 50-6-110(a)(6); TEX. LABOR CODE ANN. § 406.032(1)(D).

⁸⁷ MO. ANN. STAT. § 287.120(7); WASH. REV. CODE ANN. § 51.08.013(2)(b); 820 ILL. COMP. STAT. ANN. 305/11.

⁸⁸ WASH. REV. CODE ANN. § 51.08.013(2)(b).

⁸⁹ 820 ILL. COMP. STAT. ANN. 305/11.

⁹⁰ ALASKA STAT. ANN. § 23.30.395(2); CAL. LAB. CODE § 3600(a)(9) (“activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment”); N.H. REV. STAT. ANN. § 281-A:2(XI).

⁹¹ FLA. STAT. ANN. § 440.092(1).

⁹² MONT. CODE ANN. § 39-71-407(2)(b); NEV. REV. STAT. ANN. § 616A.265(3); VT. STAT. ANN. TIT. 21, § 618(a)(2).

⁹³ N.H. REV. STAT. ANN. § 281-A:2(XI) (“unless the employee reasonably expected, based on the employer’s instruction or policy, that such participation was a condition of employment or was required for promotion, increased compensation, or continued employment”); TENN. CODE ANN. § 50-6-110(a)(6) (“expressly or impliedly required”), WASH. REV. CODE ANN. § 51.08.013(2)(b) (“reasonably believed”).

⁹⁴ CAL. LAB. CODE § 3600(a)(9); TEX. LABOR CODE ANN. § 406.032(1)(D).

⁹⁵ *Lozano*, 178 N.J. at 531.

⁹⁶ *Goulding*, 245 N.J. at 174-75.

⁹⁷ MONT. CODE ANN. § 39-71-407(2)(b) (excluding from the scope of the defense employees whose presence at the activity [was] requested by the employer” and defining “requested” to mean “the employer asked the employee to assume duties for the activity so that the employee’s presence is not completely voluntary and optional”).

⁹⁸ NEV. REV. STAT. ANN. § 616A.265(1) (“[e]xcept [for school district employees], any injury sustained by an employee while engaging in an athletic or social event sponsored by his or her employer shall be deemed not to have arisen out of or in the course of employment unless the employee received remuneration for participation”).

⁹⁹ NEV. REV. STAT. ANN. § 616A.265(3)(a).

personnel,”¹⁰⁰ and allows recovery if “[t]he employee participated . . . to enable the event to take place or to ensure the safety and well-being of . . . students.”¹⁰¹

The Montana statutory language excluding participation that “is not completely voluntary and optional,”¹⁰² is consistent with the New Jersey Supreme Court’s reasoning that it is the “nature of [the employee’s] activities at the event that determine compensability. . . not the character of the event.”¹⁰³ Similarly, the language in the Nevada statute allowing coverage when an employee’s participation “enable[s] the event to take place,”¹⁰⁴ aligns with the *Goulding* Court’s conclusion that an employee who “volunteers to help facilitate” an event or activity is entitled to workers’ compensation.¹⁰⁵

Outreach

Outreach regarding the proposed modifications to N.J.S. 34:15-7 was conducted to interested and knowledgeable individuals and organizations, including: NJM Insurance Group, the New Jersey Council on Safety and Health, the New Jersey State Bar Association, the New Jersey Compensation Association, the Department of Workforce and Development in the New Jersey Department of Labor, New Jersey Self-Insurers Association, the Insurance Council of New Jersey, New Jersey Business and Industry Association, and private practitioners, including the attorneys for the *Goulding* and *Lozano* appellants.

- *Support*

Support for the modifications to N.J.S. 34:15-7 was received from Raquel Romero, Esq., counsel for the *Lozano* Appellant. Ms. Romero indicated that she generally agreed with the proposed modifications to the statute, stating that codifying the language would reduce the need to litigate obvious issues that sometimes are not resolved without recourse to the appellate courts.¹⁰⁶

She expressed concern, however, regarding the language added to subsection (b)(4)(B).¹⁰⁷ Ms. Romero indicated that the word “enjoyment” does not reflect the range of activities which an employee could facilitate, and noted, for instance, that “social” activities may not be universally *enjoyed* by participants.¹⁰⁸ Instead, she suggested that the employee’s role facilitate the “purpose

¹⁰⁰ NEV. REV. STAT. ANN. § 616A.265(3)(b).

¹⁰¹ NEV. REV. STAT. ANN. § 616A.265(3)(c). *See also* Nevada Assembly Committee Minutes, 5/12/2003 (explaining that the amendment extends coverage to employees “exercising the duty of [their] office”).

¹⁰² MONT. CODE ANN. § 39-71-407(2)(b).

¹⁰³ *Goulding*, 245 N.J. at 174.

¹⁰⁴ NEV. REV. STAT. ANN. § 616A.265(3)(c).

¹⁰⁵ *Goulding*, 245 N.J. at 174.

¹⁰⁶ Memo re: phone call between Raquel Romero, Esq., Raquel Romero Law Offices, and Whitney G. Schlimbach, Counsel, NJLRC (Jan. 10, 2023) (hereinafter “Memo re: Romero Phone Call”) [on file with NJLRC].

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

of the activity” or others’ “engagement in the activity.”¹⁰⁹

Ms. Romero also questioned whether the phrase “even if the employee volunteers to take such a role,” is necessary.¹¹⁰ She expressed concern that this language might be too detailed, and could potentially be too narrow, particularly in factual scenarios different from *Goulding*.¹¹¹

- *Opposition*

Opposition to the modifications came from Richard Rubinstein, Esq., a longtime practitioner in the area of workers compensation.¹¹² Mr. Rubinstein explained that “[t]he Lozano and Goulding decisions are consistent with the idea that compulsion by an employer is a concept best decided by the Trial Court, after hearing all of the evidence.”¹¹³ He noted that “[e]very workplace culture is different, and every relationship between supervisor, manager, and owner and their workforce is different.”¹¹⁴

As a result, Mr. Rubinstein opined that “[n]o statute can adequately capture” the vast array of nuance in the workplace, whether in terms of “how a worker might feel about their obligations after their last review or raise or bonus, or how things like facial expressions, body language, the relative tone of an email, or the application of progressive discipline might be perceived,” or with respect to “differentiat[ing] between a company softball game as a regular, non-compensable recreational event, or one against a competitor, suitor, or merger candidate that is viewed by an owner as part of a business strategy.”¹¹⁵

Mr. Rubinstein “therefore question[ed] whether any alteration in the Statute would fairly and adequately protect injured workers from injury genuinely traceable to employer compulsion.”¹¹⁶

Pending Bills

There is one bill currently pending that concerns N.J.S. 34:15-7, but the bill does not

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See Richard B. Rubinstein Bio, “Our Firm” page, Rubenstein Berliner & Shinrod, LLC, website, available at <<https://www.rbslawnj.com/about/richard-b-rubenstein/>> (last visited Feb. 2, 2023).

¹¹³ E-mail from Richard B. Rubinstein, Esq., Rubenstein Berliner & Shinrod, LLC, to Whitney G. Schlimbach, Counsel, NJLRC, at *1 (Dec. 6, 2022, 11:35 AM EST) (hereinafter “Rubinstein E-mail”) [on file with NJLRC].

¹¹⁴ *Id.*

¹¹⁵ *Id.*, citing *McCarthy v. Quest Intern. Co.*, 285 N.J. Super. 469 (1995) (analyzing whether injury arising from employee’s arguably compelled participation in tug-of-war at mandatory employer-sponsored picnic fell within the two-pronged recreational or social activities exception in N.J.S. 34:15-7).

¹¹⁶ Rubinstein E-mail, *supra* note 112, at *1.

involve the recreational or social activities defense, or the exception to it.¹¹⁷

Conclusion

The New Jersey Supreme Court held, in *Lozano* and *Goulding*, that certain employee activities do not fall within the recreational or social activities defense in N.J.S. 34:15-7. The proposed modifications to the statute add language clarifying that compulsory activities and activities facilitated by employees are not subject to the defense.

Since the response to the Commission outreach was mixed, two options are set forth in the Appendix proposing language that reflects the holding of *Goulding*.¹¹⁸ Staff seeks guidance from the Commission regarding whether further modifications to N.J.S. 34:15-7 are appropriate before the Final Report is released.

¹¹⁷ A.B. 712 (identical to S.B. 1693), 220th Legislature, 1st Sess. (Jan. 11, 2022) (“[p]revents intoxicated employees from receiving workers’ compensation”).

¹¹⁸ The alternatives are set forth in subsection (b)(4)(B) in the Appendix as Option #1, reflecting the November 2022 Tentative Report, and Option #2, reflecting the language proposed by Ms. Romero. *See* Memo re: Romero Phone Call, *supra* note 105.

Appendix

The recommended modifications to N.J.S. 34:15-7 (shown with ~~strikethrough~~, *italics* (to reflect changes made in response to a commenter's suggestion),¹¹⁹ and underlining), follow:

a. When employer and employee shall, by express or implied agreement, ~~either express or implied, as hereinafter provided~~, accept the provisions of this article, compensation for personal injuries to, or ~~for~~ the death of, such employee by accident arising out of and in the course of employment shall be made by the employer without regard to the negligence of the employer, according to the schedule contained in sections 34 :15-12 and 34 :15-13 of this Title.

b. Subsection a. shall apply in all cases except when the injury or death is intentionally self-inflicted, or the natural and proximate cause of the injury or death is:

(1) intoxication; ~~or~~

(2) the unlawful use of controlled dangerous substances as defined in the "New Jersey Controlled Dangerous Substances Act," P.L.1970, c. 266 (C. 24:21-1 et seq.);
~~or~~

(3) a willful failure to make use of a reasonable and proper personal protective device or devices furnished by the employer, which has or have been a clearly made a and uniformly enforced requirement of the employee's employment by the employer and uniformly enforced and which an employer can properly document that despite repeated warnings, the employee has willfully failed to properly and effectively utilize, is the natural and proximate cause of injury or death provided, however, this latter provision shall not apply where unless there is such imminent danger or the need for immediate action which does not allow for appropriate use of the personal protective device or devices, and the burden of the proof of such fact shall be upon the employer; or

(4) when recreational or social activities, unless such recreational or social activities are a regular incident of employment and produce a benefit to the employer beyond improvement in employee health and morale, are the natural and proximate cause of the injury or death. This subsection does not apply to a recreational or social activity that is the natural and proximate cause of the employee's injury or death if:

(A) the employee has an objectively reasonable basis in fact for believing that participation in such activities is required by the employer; or

Option #1

¹¹⁹ Italicized language indicates the language was proposed by a commenter. See Memo re: Romero Phone Call, *supra* note 105.

(B) the employee’s role in the recreational or social activity is primarily to facilitate other participants’ of the activity, even if the employee volunteers to take on such a role.

Option #2

(B) the employee’s role in the recreational or social activity is primarily to facilitate [the purpose of the activity] [other participants’ engagement in the activity] enjoyment of the activity, even if the employee volunteers to take on such a role.¹²⁰

c. The burden of proof of the facts supporting each exception contained in subsection b. shall be on the employer.

COMMENT

There are two alternatives with respect to the proposed language in subsection (b)(4)(B). The proposed language set forth in Option #1 is identical to the proposed modifications contained in the November 2022 Tentative Report.¹²¹ The proposed modifications set forth in Option #2 were provided by a commenter and set forth two alternatives.¹²²

The statute has been divided into lettered and numbered subsections to improve accessibility, consistent with modern drafting practices.

Subsection a.

Newly labeled subsection a. encompasses the language in N.J.S. 34:15-7 describing an employer’s obligation to compensate employees for injuries or death “by accident arising out of and in the course of employment,” regardless of the employer’s negligence. The additional proposed modification eliminates seemingly unnecessary language but does not alter the substance of this subsection.

Subsection b.

The remainder of N.J.S. 34:15-7, now labeled subsection b., sets forth the defenses to compensation. Subsection b. excludes from coverage injury or death that is “intentionally self-inflicted,”¹²³ and the subsection is subdivided again to address the four defenses that involve employee conduct that is “the natural and proximate cause”¹²⁴ of the employee’s injury or death.

Subsection (b)(1)-(3)

¹²⁰ In addition to Ms. Romero’s proposal that “enjoyment of the activity” be replaced with either (1) “engagement in the activity” or (2) “purpose of the activity,” she also suggested eliminating the final clause “even if the employee volunteers to take on such a role.” See Memo re: Romero Phone Call, *supra* note 105.

¹²¹ N.J. Law Revision Comm’n, *Tentative Report Concerning the Scope of the Recreational or Social Activities Defense in N.J.S. 34:15-7*, at 13, Nov. 17, 2022, www.njlrc.org (last visited Feb. 15, 2023).

¹²² See *id.*

¹²³ N.J. STAT. ANN. § 34:15-7.

¹²⁴ *Id.*

The first two defenses to compensation are contained in subsection (b)(1) and (2). These two defenses exclude injuries or death caused by the employee’s “(1) intoxication” or “(2) the unlawful use of controlled dangerous substances.”¹²⁵ There are no modifications proposed with respect to the substance of these provisions.

Subsection (b)(3) provides a defense to compensation when injury or death is caused by a “willful failure” to use “a reasonable and proper personal protective device.”¹²⁶ The proposed modifications are intended to streamline the language without changing the substance of the provision.

Subsection (b)(4)

Subsection (b)(4) sets forth the recreational or social activities defense as it appears in the original statute, with proposed modifications that eliminate repetitive language.¹²⁷ In addition, the proposed language indicates that the phrase “recreational or social activities” excludes certain activities that might otherwise fall into those categories.¹²⁸

Subsection (b)(4)(A)-(B)

Subsections (b)(4)(A)-(B) set forth the types of activities excluded from the recreational or social activities defense, consistent with the determinations of the New Jersey Supreme Court in *Lozano*¹²⁹ and *Goulding*.¹³⁰

Subsection (b)(4)(A) excludes activities in which an employee is compelled by the employer to participate, incorporating the holding in *Lozano* that “the employee must demonstrate an objectively reasonable basis in fact for believing that the employer had compelled participation in the activity.”¹³¹

In both Options, Subsection (b)(4)(B) excludes activities in which an employee’s role is to facilitate the event. In Option #1, the proposed language is identical to the proposed language set forth in the November 2022 Tentative Report.¹³² It is derived from the *Goulding* decision, which held that it is the “nature of [an employee’s] activities at the event that determine compensability. . . not the character of the event.”¹³³

In Option #2, the italicized language replaces the proposed language contained in the November 2022 Tentative Report (and shown in Option #1) and was proposed by a commenter.¹³⁴ Two alternative language options are contained in Option #2: the employee’s role facilitated “the purpose of the activity,” or “other participants’ engagement in the activity.”¹³⁵

Subsection (c)

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ The proposed modifications structure the statute similarly to the Missouri statute, which states that “benefits or compensation otherwise payable under this chapter for death or disability shall be forfeited” when “participation in a recreational activity or program is the prevailing cause of the injury.” MO. ANN. STAT. § 287.120(7). The statute continues that “forfeiture of benefits or compensation shall not apply” when one of the three listed factors is present. MO. ANN. STAT. § 287.120(7)(1)-(3).

¹²⁹ *Lozano v. Frank DeLuca Constr.*, 178 N.J. 513 (2004).

¹³⁰ *Goulding v. N.J. Friendship House, Inc.*, 245 N.J. 157 (2021).

¹³¹ *Lozano*, 178 N.J. at 534.

¹³² N.J. Law Revision Comm’n, *Tentative Report Concerning the Scope of the Recreational or Social Activities Defense in N.J.S. 34:15-7*, at 13, Nov. 17, 2022, www.njlr.org (last visited Feb. 15, 2023).

¹³³ *Goulding*, 245 N.J. at 174 (“[when] an employee volunteers to help facilitate the event, the event cannot be deemed a social or recreational activity as to that employee”); *see also Ryan-Wirth*, 2021 WL 5816722, at *5.

¹³⁴ *See* Memo re: Romero Phone Call, *supra* note 105.

¹³⁵ *Id.*

Subsection (c) is proposed to clarify the burden of proof associated with the exceptions set forth in subsection (b). Prior to the 1979 amendments to N.J.S. 34:15-7, the language “the burden of the proof of such fact shall be upon the employer” immediately followed the defenses of intentional self-infliction of harm and intoxication. It seems clear from the history of the statute that the language was intended to place the burden of proving a defense to compensation on the employer.¹³⁶

¹³⁶ See L.1911, c. 95, §7, p.136.