NEW JERSEY LAW REVISION COMMISSION

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

November 17, 2022

The New Jersey Law Revision Commission is required to "[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it" and to propose to the Legislature revisions to the statutes to "remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions." *N.J.S.* 1:12A-8.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **January 16, 2023**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

Whitney G. Schlimbach, Counsel
New Jersey Law Revision Commission
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07102
973-648-4575
(Fax) 973-648-3123
Email: wgs@njlrc.org
Web site: http://www.njlrc.org

Project Summary

In New Jersey, the Workers' Compensation Act (WCA), authorizes an employer to assert certain defenses to compensation claims, including that "recreational or social activities . . . [we]re the natural and proximate cause of the injury or death."[1] That defense is not applicable, however, when the activity satisfies the two-pronged exception in the statute: the activity (1) is "a regular incident of employment" and (2) "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, although her employer asserted the "recreational and social activities" defense pursuant to N.J.S. 34:15-7.[4] 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.[5]

Proposed modifications to the statute are set forth in the Appendix. The modifications add language to N.J.S. 34:15-7 clarifying 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*.[6]

Relevant Statute

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 . . . 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.[7]

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.[8] Prior to the availability of workers' compensation, most claims were defeated

[1] N.J. STAT. ANN. § 34:15-7 (West 2022).
[2] *Id*.
[3] 245 N.J. 157 (2021).
[4] *Id*. at 161.
[5] *Id*. at 161-162.
[6] 178 N.J. 513 (2004).
[7] N.J. STAT. ANN. § 34:15-7 (emphasis added).
[8] 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).

in the courts by the exercise of the common law principles of "assumed risk," "fellow servant negligence," and "contributory negligence."[9] Conversely, the "small percentage of injured workers who succeeded in winning court awards often would receive very large amounts of compensation."[10]

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."[11] The original statute set forth only two defenses: "when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury."[12] As a result, it was left to the courts for many years to "determine whether accidents arose 'out of and in the course of employment' and were thus compensable."[13]

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."[14] This reasoning reflected 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."[15] 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."[16]

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.[17]

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[9] *Id.* at 13.
[10] *Id.* at 14.
[11] L. 1911, c. 95, § 7, p. 136 ("Compensation under agreement").
[12] L. 1911, c. 95, § 7, p. 136 ("Exceptions").
[13] *Goulding*, 245 N.J. at 168.
[14] *Id.*, quoting *Lozano v. Frank DeLuca Const.*, 178 N.J. 513 (2004).
[15] *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).
[16] *Id.* 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 he had] hired . . . so that he and his wife could attend an event sponsored by an organization that his employer 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.").
[17] *Goulding*, 245 N.J. at 168, quoting *Harrison*, 26 N.J. Super. at 199.

In *Tocci v. Tessler & Weiss, Inc.*,[18] and in *Complitano v. Steel & Alloy Tank Co.*,[19] the New Jersey Supreme Court "departed from [the five factor test] and expanded the scope of coverage for voluntary recreational and social activities."[20] 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.[21]

In 1979, the WCA was amended by the Legislature to codify the recreational or social activities defense, as well as other defenses to compensation; these amendments included the addition of N.J.S. 34:15-7 to the WCA.[22] The Joint Statement that accompanied 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.'"[23] The "carve-outs from coverage…[that N.J.S. 34:15-7]…contains -- including the carve-out for injuries sustained in the course of recreational and social activities at the center of this appeal -- have been interpreted as a legislative attempt to reverse the judicial trend toward expansive interpretation that began in *Tocci* and *Complitano*. *See Lozano*, 178 N.J. at 529-30. . . ."[24]

Background

In *Goulding v. N.J. Friendship House, Inc.*, Plaintiff was a cook at Friendship House, a non-profit entity providing services to individuals with developmental disabilities.[25] She volunteered to work as a cook during the organization's first annual "Family Fun Day," and filed a compensation claim for injuries arising from a fall at the event.[26] 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."[27] Although Friendship House asked its employees to volunteer to work at the event, there were no consequences for those who did not volunteer.[28]

Friendship House opposed the compensation claim, asserting the recreational or social activities defense in N.J.S. 34:15-7.[29] 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

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[18] 28 N.J. 582, 587 (1959) (finding the injury compensable after reviewing the caselaw, the Court explained "[t]he continued sweeping generality of the statutory language and its judicial definition suggest the conscientious endeavor to maintain a liberally just line between those accidental injuries which may be said to have had some work connection and those which may be said to have been unrelated to the employment.").
[19] 34 N.J. 300 (1961).
[20] *Lozano*, 178 N.J. at 525.
[21] *Goulding*, 245 N.J. at 169-170.
[22] *Goulding*, 245 N.J. at 168.
[23] *Lozano*, 178 N.J. at 529.
[24] *Goulding*, 245 N.J. at 170. *See also Cotton v. Worthington Corp.*, 192 N.J. Super. 467, 471 (App. Div. 1984) ("It 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).
[25] *Goulding*, 245 N.J. at 161.
[26] *Id.*
[27] *Id.* at 163.
[28] *Id.*
[29] *Id.* at 164.

of employment"[30] and did not produce a benefit to Friendship House "beyond an improvement to employee health and morale."[31]

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."[32] The New Jersey Supreme Court granted certification.[33]

Analysis

The Supreme Court, in *Goulding* considered the legislative history of the recreational or social activities defense in N.J.S. 34:15-7,[34] the plain language of the statute, and the common law interpretation of its scope. The Court emphasized that it has "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."[35]

To determine whether the Plaintiff's injury was compensable under N.J.S. 34:15-7, the Court considered first "whether the activity was, in fact, 'recreational or social' within the meaning of the statute."[36] If so, the Court explained that the injury was still compensable if the recreational or social activity was "(1) . . . a 'regular incident of employment,' and (2) . . . 'produce[d] a benefit to the employer beyond improvement in employee health and morale."[37]

- *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."[38] As a result, the Court's inquiry into the meaning of the term "extend[ed] beyond the plain language" of the statute.[39]

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[30] *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").

[31] *Id*. (explaining "there was no fundraising or marketing associated with the event").

[32] *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.

[33] 241 N.J. 66 (2020).

[34] *See supra* at pp. 2-4.

[35] *Goulding*, 245 N.J. at 167.

[36] *Id*. at 171.

[37] *Id.*

[38] *Goulding*, 245 N.J. 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.").

[39] *Id*. (quoting *Lozano,* 178 N.J. at 522).

- *Lozano v. Frank DeLuca Constr.*[40]

The Supreme Court referred to its decision in *Lozano*, which concerned an employee injured while driving a go-cart.[41] 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.[42] Although 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.'"[43]

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."[44] 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."[45] In light of Lozano's assertions that he felt compelled by his employer to drive the go-cart, the Court remanded for further proceedings to develop the record on the issue of compulsion.[46]

The *Lozano* Court also developed "the standard that courts should apply when assessing an employee's allegation of compulsion."[47] Recognizing that compulsion can be "indirect or implicit" as a result of 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."[48]

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."[49] The *Goulding* Court explained that an event 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, Plaintiff "did not participate . . . in a social or recreational role."[50]

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[40] 178 N.J. 513 (2004).
[41] *Id*. at 517.
[42] *Id*. at 518-519.
[43] *Id.* at 519.
[44] *Id.* at 531.
[45] *Id*. at 518.
[46] *Id.*
[47] *Id.* at 534.
[48] 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.
[49] *Goulding*, 245 N.J. at 174.
[50] *Id*.

The *Goulding* Court found that the Legislature "could have," but did not, limit compensation "based on the broad category of event involved."[51] The Court noted that doing so would "impl[y] that whenever an employee volunteers at an employer-sponsored event, she cannot be compensated if injured simply because the event has a social or recreational purpose."[52] Consequently, it is the "nature of [the employee's] activities at the event that determine compensability. . . not the character of the event."[53]

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,"[54] and the injury she sustained during the event was compensable.[55]

- *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."[56]

Family Fun Day was a "regular incident of employment" based on the event's relationship to the Appellant's employment at Friendship House.[57] Friendship House was actively involved in, and 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.[58] The Court also noted that Plaintiff "volunteered to cook at the event in keeping with her regular employment position."[59]

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 community."[60] It also received "a separate benefit in and of itself" arising from the "experience enjoyed . . . by clients [of Friendship House] and their families."[61]

Finding that "[b]oth prongs" of the exception were met, the *Goulding* Court concluded that "even if her volunteering for Family Fun Day were social or recreational" pursuant to N.J.S 34:15-7, Plaintiff would still be entitled to compensation for her injury.[62]

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[51] *Id*.
[52] *Id*. at 173.
[53] *Id*. at 174.
[54] *Id*.
[55] *Id*. at 174-175.
[56] *Id*. at 175.
[57] *Id*. at 175-176.
[58] *Id*. (providing "a lunch, coffee, or cigarette break" and "a daily softball game" as examples of "customary" activities).
[59] *Id*.
[60] *Id*.
[61] *Id*. at 168.
[62] *Id*.

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

Since *Goulding*,[63] 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).[64] Petitioner began working extra shifts during the school's A.M. Care Program, which involved supervising students in various locations before school.[65] 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.[66]

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.'"[67] 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.[68]

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."[69] As a result, the court found "that the recreational and social activity exception is not applicable."[70]

Citing to *Goulding*, the *Ryan-Wirth* Court then observed that "[t]he nature of [P]etitioner's activities at Cardio Club determines compensability."[71] 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.[72] Therefore, the Court concluded that "Petitioner's voluntary participation in the Cardio Club was not a 'regular incident of employment' as a school nurse."[73] 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]."[74]

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

[63] The Appellate Division also addressed the recreational and social activities defense in *Regalado v. F&B Garage Door*, which involved injuries sustained in a car accident after a company holiday party. 2021 WL 2325311 (N.J. Super. Ct. App. Div. June 8, 2021), *cert. denied*, 249 N.J. 81 (2021). 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.
[64] 2021 WL 5816722, at *1 (N.J. Super. Ct. App. Div. Dec. 8, 2021), *cert. denied*, 250 N.J. 510 (2022).
[65] *Id*. at *1.
[66] *Id.*
[67] *Id*. at *4.
[68] *Id*. at *6.
[69] *Id*. at *5.
[70] *Id*. at *4.
[71] *Id*. at *5.
[72] *Id.*
[73] *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").
[74] *Id*. at *4.

requisite work connection' are adequately supported by credible evidence in the record and consonant with the [WCA]."[75]

The *Ryan-Wirth* decision is consistent with *Goulding* in that the recreational or social activities defense in N.J.S. 34:15-7 was held inapplicable because Petitioner's participation in Cardio Club failed the two-prong exception.[76] 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."[77] It is notable that, in 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."[78]

- *Other State Statutes*

Twenty-five states have codified a recreational or social activities defense to workers compensation coverage.[79] Most of these statutes are structured in a manner similar 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 "employment,"[80] or "injury,"[81] while in others, the defense appears in the section articulating the scope of insurance carrier liability.[82]

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. In some states, the defense applies only to those activities that occur when an employee is "off-duty,"[83] or are unrelated to

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[75] *Id*. at *7.
[76] *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.").
[77] *Ryan-Wirth*, 2021 WL 5816722, at *4-5.
[78] *Id*. at *5.
[79] 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).
[80] 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).
[81] 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).
[82] VT. STAT. ANN. TIT. 21, § 618(a)(2); TEX. LABOR CODE ANN. § 406.032(1)(D).
[83] CAL. LAB. CODE § 3600(a)(9); TEX. LABOR CODE ANN. § 406.032(1)(D); VA. CODE ANN. § 65.2-101(1).

employment[84] or unpaid.[85] Alaska limits its defense to "recreational league activities,"[86] and in Vermont, only recreational activities "available . . . as part of the employee's compensation package or as an inducement to attract employees" fall outside coverage.[87] Ohio is the only state that requires coverage unless "the employee signs a waiver of the . . . right to compensation or benefits . . . prior to engaging in the . . . activity."[88]-

- *Voluntariness of Activity*

However, 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. Other than New Jersey, only four other state statutes do not explicitly require that an employee's participation is voluntary. The statutes in Arkansas, Oklahoma, and Oregon employ nearly identical language excluding "any recreational or social activities for the employee's personal pleasure."[89] Michigan's statute simply declines to provide coverage for injuries sustained "in the pursuit of an activity the major purpose of which is social or recreational."[90]

Most common among the remaining statutes is the use of the word "voluntary" to describe either the activity,[91] or the employee's participation in the activity.[92] The Kansas and Wyoming statutes apply the defense when an employee is "under no duty to attend."[93] Some states permit the defense to be asserted *unless* participation was "required,"[94] "ordered,"[95] "directed,"[96] or

[84] 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").

[85] 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").

[86] ALASKA STAT. ANN. § 23.30.395(2).

[87] VT. STAT. ANN. TIT. 21, § 618(a)(2).

[88] OHIO REV. CODE ANN. § 4123.01(C)(3).

[89] 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).

[90] MICH. COMP. LAWS ANN. § 418.301(3).

[91] 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).

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

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

[94] 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).

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

[96] WASH. REV. CODE ANN. § 51.08.013(2)(b).

"assigned"[97] by an employer or as a condition[98] or "incident"[99] of employment. Finally, six states permit coverage if an employer "request[ed]" employee participation[100] or the mandatory nature of the activity was implied[101] or a "reasonable expectancy" of employment.[102]

Given 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,"[103] the proposed modifications add language to N.J.S. 34:15-7 requiring that an employee's participation in a recreational or social activity is voluntary.

- *Facilitation of Activity*

Montana and Nevada provide that the recreational or social activities defense does not apply when an employee "assume[s] duties for the activity" or "enable[s]" a recreational or social activity.[104] In Montana, employees whose "presence at the activity [was] requested by the employer" are not barred from receiving workers compensation on the basis of the recreational or social activities defense.[105] The statute defines the term "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."[106]

In Nevada, there is an exception to the social and recreational activities defense for school district employees[107] who are injured "while engaging in [certain school-related] athletic or social event[s]."[108] In addition to requiring that a school district employee's participation was either "at the request of or with the concurrence of supervisory personnel,"[109] the exception allows for recovery if "[t]he employee participated . . . to enable the event to take place or to ensure the safety and well-being of . . . students."[110] In the Nevada Assembly Committee minutes related to the amendment adding this language to the statute, the sponsoring Assemblyman notes that the amendment extends coverage to employees "exercising the duty of [their] office."[111]

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[97] 820 ILL. COMP. STAT. ANN. 305/11.
[98] 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).
[99] FLA. STAT. ANN. § 440.092(1).
[100] MONT. CODE ANN. § 39-71-407(2)(b); NEV. REV. STAT. ANN. § 616A.265(3); VT. STAT. ANN. TIT. 21, § 618(a)(2).
[101] 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").
[102] CAL. LAB. CODE § 3600(a)(9); TEX. LABOR CODE ANN. § 406.032(1)(D).
[103] *Lozano*, 178 N.J. at 531.
[104] MONT. CODE ANN. § 39-71-407(2)(b).
[105] *Id.*
[106] *Id.*
[107] 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 renumeration for participation").
[108] NEV. REV. STAT. ANN. § 616A.265(3)(a).
[109] NEV. REV. STAT. ANN. § 616A.265(3)(b).
[110] NEV. REV. STAT. ANN. § 616A.265(3)(c).
[111] Nevada Assembly Committee Minutes, 5/12/2003.

The Montana statutory language excluding participation that "is not completely voluntary and optional,"[112] 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."[113] Similarly, the language in the Nevada statute allowing coverage when an employee's participation "enable[s] the event to take place,"[114] aligns with the *Goulding* Court's conclusion that an employee who "volunteers to help facilitate" an event or activity is entitled to workers' compensation.[115]

Pending Bills

There are no bills currently pending that involve the recreational or social activities defense, or the exception to it, in N.J.S. 34:15-7.[116]

Conclusion

The proposed modifications to N.J.S. 34:15-7 set forth in the Appendix add language clarifying the scope of the "recreational or social activities" defense, pursuant to the New Jersey Supreme Court decisions in *Goulding v. N.J. Friendship House, Inc.*, 245 N.J. 157 (2021) and *Lozano v. Frank DeLuca Construction*, 178 N.J. 513 (2004).

[112] MONT. CODE ANN. § 39-71-407(2)(b).
[113] *Goulding*, 245 N.J. at 174.
[114] NEV. REV. STAT. ANN. § 616A.265(3)(c).
[115] *Goulding*, 245 N.J. at 174.
[116] Assembly Bill No. 712 (identical to Senate Bill No. 1693), 220th Legislature, 1st Sess. (Jan. 11, 2022) ("[p]revents intoxicated employees from receiving workers' compensation").

Appendix

The proposed modifications to **N.J.S. 34:15-7** (shown with ~~strikethrough~~, 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

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

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

COMMENT

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 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,"[117] and the subsection is subdivided again to address the four defenses that involve employee conduct that is "the natural and proximate cause"[118] of the employee's injury or death.

Subsection (b)(1)-(3)

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."[119] 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."[120] 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.[121] In addition, the proposed language indicates that the phrase "recreational or social activities" excludes certain activities that might otherwise fall into those categories.[122]

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*[123] and *Goulding*.[124] Subsection (b)(4)(A) excludes activities in which an employee is compelled by the employer to participate,

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[117] N.J. STAT. ANN. § 34:15-7.
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] 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).
[123] *Lozano v. Frank DeLuca Constr.*, 178 N.J. 513 (2004).
[124] *Goulding v. N.J. Friendship House, Inc.*, 245 N.J. 157 (2021).

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."[125] Subsection (b)(4)(B) excludes activities in which an employee's role is to facilitate the event. The proposed language 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."[126]

Subsection (c)

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.[127]

[125] *Lozano*, 178 N.J. at 534.
[126] *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.
[127] *See* L.1911, c. 95, §7, p.136.