

Minimizing Workers' Comp Risk for Your Business

By Philip Unwin
Goldberg Segalla



The Workers' Compensation Law was enacted in 1914, and was designed to be a compromise between employers and employees: employees would give up the right to sue their employer in exchange for a speedier, less formalized process; damages would be significantly less than what they might be in a personal injury lawsuit, but recovery would be easier.

However, recent changes in the law have dramatically increased exposure for employers. For instance, since 2007, the maximum weekly compensation rate has increased from \$400 to \$803.21. To put this in perspective, a shoulder injury that resulted in a range of motion of 90 degrees would, absent other conditions, result in a 40% schedule loss of use, or 124.8 weeks of benefits. In 2007, that schedule loss of use would yield a maximum payment of \$49,920. Now, that same injury would yield a maximum payment of \$100,240.61. When you include lifetime medical coverage, with the spiraling cost of prescription medication, the exposure on most Workers' Compensation claims far exceeds whatever the claimant would receive in a hypothetical lawsuit.

It is all but impossible to imagine the state legislature and the governor coming to the rescue; the changes from the 2007 Workers' Compensation Reform Act have not resulted in significant cost savings to employers, yet the cases are significantly more complex than they were pre-2007. To that end, the only way to reduce exposure from workers' compensation claims is by working with carrier and counsel from the start.

The best time to defeat a claim is at its inception, so a thorough investigation of a new claim is essential. These are the questions that the employer needs to ask:

- Was it reported timely? According to WCL section 18, a claimant has 30 days to report a claim. It should be noted that although many employers have a 24-hour notice policy for workplace accidents, this does not trump the statute. Still, a claim

reported abnormally late may be cause for concern, and may give rise to doubts about its legitimacy.

- Is there reason to doubt that it happened as claimed? Witnesses should be interviewed as soon as possible, with written statements taken. Photographs of the site may be helpful, as might a walkthrough.
- Does the claimant have any pre-existing injuries? When a claimant files a workers' compensation claim, they need to provide the carrier and employer a medical release. Prior medical records need to be requested right away; once a claim is indexed by the Workers' Compensation Board, it will move rapidly. The old practice was to get a medical release at the first hearing, and investigate medicals at that time, but this is no longer sufficient. Any relevant medical records should be in the hands of the carrier and counsel at the time the claim is controverted.
- Is there some other issue that might render this claim non-compensable? For instance, was the claimant not an employee, or were they injured while off the premises on a lunch break?

Having counsel involved from the start of a case is advisable; the sooner your attorneys are involved, the better they will know the case and be prepared for trial.

The further a workers' compensation claim goes along, the more the exposure is

increased. Medical costs pile up, and every day a claimant stays out makes it more unlikely that they will ever return. A light duty program is an excellent way to keep the claimant at work; repeated studies have shown that employers who are able to offer light duty assignments get better outcomes from their claims. If a claimant cannot, or will not, return to work, pursuing the defense of attachment to the labor market can be very helpful in pushing the claim to a favorable outcome. A claimant has an obligation to look for work within his or her restrictions, and if the employer cannot accommodate their restrictions, they have an obligation to look for work elsewhere. By aggressively pursuing this defense, ongoing indemnity benefits may be suspended, giving the employer and carrier leverage for a potential settlement.

Speaking of which, settlement should be pursued at every opportunity. It is never too soon to settle a case; cases settled while the claim is still controverted will settle for a fraction of the value of a case that has been established with long-term awards. And while it may be tempting to avoid formalities, a workers' compensation claim can only be resolved by WCL section 32; a side agreement with the claimant will not be recognized by the Workers' Compensation Board.

In workers' compensation, it often seems like the deck is stacked against the employer, and while that may be true, there are still plenty of ways to mitigate your exposure; it just requires effort and taking advantage of the defenses available to you to do so. ✦

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