

Employee Benefits & Workers' Comp News



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MOC Insurance Services
Maroevich, O'Shea & Coghlan Insurance

Divisions of MOC Insurance Services
Farallon Associates Insurance Brokers
San Francisco Insurance Center

44 Montgomery Street, 17th Floor, San Francisco, CA 94104
Toll Free (800) 951-0600 | Main (415) 957-0600 | License # 0589960



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The Affordable Care Act and Workers' Comp

In a recent scholarly article, David A. North outlines how the Affordable Care Act has changed workers' compensation, and what we might expect in the future.



Pros:

- ✦ The Affordable Care Act (ACA) requires employers to "pay or play," by providing health-care coverage for employees who work 30 or more hours a week.
- ✦ It encourages wider adoption of accountable

care organizations (ACOs), which promote wiser use of medical care dollars. ACOs reward providers for keeping patients healthy, rather than for delivering more (often unnecessary) services.

- ✦ It eliminates pre-existing medical condition exclusions, expanding coverage for those already insured and allowing many previously uncovered Americans to obtain health insurance.

All these initiatives will reduce cost-shifting, or the temptation of workers to claim workers' compensation benefits for uncovered non-work injuries or illnesses.

- ✦ In Massachusetts, which enacted healthcare reform in 2006, the number of uninsured people accessing emergency rooms dropped 40 percent. Workers' compensation emergen-

This Just In

Can you walk and talk at the same time? Apparently many people can't, as "distracted walking" injuries are becoming more common.

The National Safety Council (NSC) calls distracted walking injuries involving cell phones a "significant safety threat." NSC President and CEO Deborah A.P. Hersman reminded employers that slips, trips and falls are among the most reported workplace injuries. This makes distracted walking "a recipe for disaster," she said. Although 52 percent of distracted walking injuries occur at home, employers should take steps to reduce the risk of distracted walking.

The NSC reported that women are most likely to be injured by walking while distracted (68 per-

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cy room bill volume also dropped seven percent. The author suggests that Massachusetts' healthcare reform may reduce workers' compensation "billing volume and costs." However, findings in Massachusetts might not apply nationwide.

- ✱ It promotes expansion of wellness programs. Wellness and safety programs can positively affect workers' compensation costs.
- ✱ It encourages people to enter the healthcare field by funding grants and scholarships for primary healthcare physicians, nurses, dentists and mental and behavioral health professionals.
- ✱ It encourages healthcare technology advancements. The ACA itself, and projected provider shortages, are encouraging technologies that save physicians time. Examples include electronic medical records, telehealth, robotic devices, Internet-connected sensors. 3-D printing and more.
- ✱ It encourages the use of paraprofessionals, such as nurse practitioners and physician's assistants. Using lower-cost providers for routine care can free physicians' time and help control medical costs.

Cons:

- ✱ Medical provider shortages could affect the timeliness of treatment of workers' compensation injuries. Employers have an incentive to get injured workers back to productive work as soon as possible, to reduce lost time costs. The Congressional Budget Office estimates the ACA will give 26 million newly insured individuals

greater access to the healthcare system by 2017. That could create provider shortages, increasing waiting times as much as 50 percent and increasing times between medical appointments. This could increase the length of disabilities.

The author recommends that employers begin forging relationships with healthcare facilities and providers near their locations and develop agreements to provide quality care.

- ✱ Medical providers often charge more for treating a workers' compensation case than they would for a similar non-occupational case—often 40 percent more for common outpatient surgeries. They attribute that to a "hassle-factor" for the additional paperwork or payment delays involved. Naturally, the discrepancy was greatest in states that either had no fee schedule for workers' compensation treatments, or that paid on a percentage of fees basis. This difference in fees could give providers incentive to treat non-occupational cases as occupational cases and increase employers' costs.

What Employers Can Do

The full effects of the Affordable Care Act and growing technology will take years to play out. To determine how the ACA affects your workers' compensation claims, the author suggests the following action steps:

- ✱ Monitor claims duration. How long are claims staying open versus historical levels?

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cent). **Fifty-four percent of those injured are age 40 or younger.**

Back in 2012, a survey by the Pew Research Center found that 23 percent of cell phone owners have bumped into another person or object while using their phone, up from 17 percent in May 2010. Between May 2011 and October 2014, the percentage of American adults who own a smartphone has nearly doubled, from 35 percent to 64 percent. As smartphone use continues to increase, look for distracted walking accidents to increase as well. For suggestions on improving safety, please contact us.

- ✱ Monitor medical costs. Do electronic medical records and advanced technologies affect costs for the better or worse?
- ✱ Monitor lost time claims/lost time days. Are indemnity payments increasing because employees are off work longer due to reduced access to care?
- ✱ Monitor reopened claims. Are fewer claims reopened due to effectiveness of care?
- ✱ Monitor litigation rates. Are litigation rates increasing or decreasing? Improved communication and quality of care can reduce rates.
- ✱ Survey claimants and your medical providers. Their experiences can tell you what is working and what is not.

For more information on controlling the medical component of your workers' compensation, please contact us. ■

Employee or Independent Contractor... and Why You Need to Know

Earlier this year, a court ruled that Federal Express drivers should have been classified as employees, when the company had classified them as independent contractors. And the U.S. Department of Labor announced that a five-year investigation in Utah and Arizona yielded \$700,000 in back wages, damages, penalties and other guarantees for more than 1,000 construction industry workers.

In the case of the Southwestern construction workers, the employers required the workers to become “member/owners” of limited liability companies, stripping them of federal and state protections that come with employee status. These construction workers were building houses in Utah and Arizona as employees one day and then the next day were performing the same work on the same job sites for the same companies but without the protection of federal and state wage and safety laws. The companies, in turn, avoided paying hundreds of thousands of dollars in payroll taxes and other benefits.

In recent years, employers have increasingly contracted out or otherwise shed activities to be performed by other entities through, for example, the use of subcontractors, temporary agencies, labor brokers, franchising, licensing and third-party management. The Labor Department supports the use of legitimate independent contractors—who play an important role in our economy—but when

employers deliberately misclassify employees in an attempt to cut costs, everyone loses.

Employers often misclassify workers to reduce labor costs and avoid employment taxes. A misclassified employee—with independent contractor or other non-employee status—lacks minimum wage, overtime,

workers compensation, unemployment insurance, and other workplace protections.

By not complying with the law, these employers have an unfair advantage over competitors who pay fair wages, taxes due, and ensure wage and other protections for their employees.



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Whether a worker is an employee under the Fair Labor Standards Act is a legal question determined by the economic realities of the working relationship between the employer and the worker, not by job title or any agreement that the parties may make. To guide employers, the U.S. Department of Labor issued Administrator's Interpretation No. 2015-1 in July. You can find the entire document at dol.gov/whd/workers/Misclassification/AI-2015_1.pdf. In summary, the interpretation uses an "economic realities" test to determine whether the worker is economically dependent on the employer or in business for him or herself.

Factors to consider include:

- A)** the extent to which the work performed is an integral part of the employer's business;
- B)** the worker's opportunity for profit or loss depending on his or her managerial skill;
- C)** the investments made by the employer and the worker, including materials and equipment, training, advertising, etc.;
- D)** whether the work performed requires special skills and initiative;
- E)** the permanency of the relationship; and
- F)** the degree of control exercised or retained by the employer.

The Department of Labor says "...most workers are employees under the FLSA's broad definitions. The very broad definition of employment under the FLSA as 'to suffer or permit to work' and the Act's intended expansive coverage for workers must be considered when applying the economic realities factors to determine whether a worker is an employee or an independent contractor."

The Consequences of Misclassification

Employers caught misclassifying employees—whether deliberately or not—can be required to pay fines, penalties, and back taxes. If you have questions on classifying your employees, please call us. ■

Coming to a City Near You: Mandated Sick Leave Benefits

More employers provide paid vacation time than paid sick leave time: 58 percent versus 52 percent, found a survey by the Society for Human Resource Management. Forty-one percent provided paid time off (a combination of vacation time, paid sick leave and general paid time off).

California became the first state to require employers to provide paid sick leave. Beginning in July 2015, employees who work at least 30 days per year must have access to a minimum of three paid sick days per year. Tacoma, Washington passed a law requiring employers to provide paid sick leave, making it the 16th city to do so.

Mandatory paid leave could become even more widespread. According to a recent AP report, President Barack Obama is considering signing an executive order that would require all federal contractors to offer paid sick leave to their employees. According to sources, the executive order would require companies doing business with the federal government to allow workers to earn at least seven days of paid leave per year to care for themselves or a family member.

Why should an employer consider offering paid sick leave benefits? Sick or medically impaired employees are less productive than healthy ones. If suffering a contagious disease, they can spread it to others. An employee who is sick or in pain is also less alert, which could lead to mistakes, errors of judgments or lack of coordination that could cause an injury or other safety problem.

Proponents say paid sick leave prevents "presenteeism," which a *Harvard Business Review* study defined as "the problem of workers' being on the job but, because of illness or other medical conditions, not fully functioning." A study in the *Journal of Occupational and Environmental Medicine* estimated that employees with chronic, contagious or other illnesses who show up and perform poorly account for two-thirds of health-related productivity

losses, versus one-third for sick employees who miss work. The *Harvard Business Review* estimated that presenteeism "...costs U.S. companies over 150 billion dollars a year—much more than absenteeism does."

Economic conditions have made the presenteeism problem worse, as employees hesitate to take time off for fear of losing their job. In fact, in a survey by EAP provider ComPsych Corp., 22 percent of employees see "being present" as their top priority at work, versus accomplishing their basic responsibilities or improving their performance.

Despite employer fears to the contrary, most employees will not abuse sick leave benefits. A study by the Institute for Women's Policy Research found that the typical worker with access to sick leave benefits under San Francisco's law used only three paid sick days during



the previous year, while one-quarter of employees used none. This occurred despite the fact that San Francisco's leave law provides up to either five or nine sick days per year, depending on hours worked.

Sick leave benefits provide all or part of an employee's earnings if the employee is unable to work because of a non-work-related illness or injury. Sick leave typically is provided on a per-year basis, usually expressed in days, and is never insured. However, employers can buy short-term disability

coverage. This type of insurance will replace a specified portion of an employee's salary if he/she still cannot work due to a non-occupational illness after sick leave benefits run out. If you don't currently offer sick leave and short-term disability benefits, please contact us for more information. ■

Out-of-Pocket Spending Rule Will Make Health Plans More Expensive

Guidance on out-of-pocket spending issued by the Departments of Labor, Health and Human Services, and the Treasury will make health plans more expensive for employers.

The Affordable Care Act places annual limits on employees' out-of-pocket expenses for certain "essential health benefits." For plan years beginning in 2016, limits equal \$6,850 for self-only coverage and \$13,700 for other than self-only coverage. Out-of-pocket expenses include deductibles, co-payments and other expenses plan members must pay themselves before the plan will pay benefits. Limits apply to all non-grandfathered group health plans, including self-insured plans.

Earlier this year, HHS clarified that self-only out-of-pocket limits apply to each individual, regardless of whether he or she is enrolled in self-only coverage or in self-plus-spouse

or family coverage. Under this rule, after a family member's costs for essential health benefits exceeds the out-of-pocket limit for self-only coverage, the plan must pay all covered expenses for that individual for the rest of the policy year. This applies even if total costs for all family members have not reached the family coverage out-of-pocket limit. This will likely increase employers' coverage costs.

Three Congressional representatives—Reps. Paul Ryan, R-Wis., John Kline, R-Minn., and Fred Upton, R-Mich., are challenging the HHS on this clarification. "[T]he relevant statute is clear — these are two distinct and separate limits," they said in a letter to U.S. Health and Human Services Secretary Sylvia Burwell.

For more information on how the Affordable Care Act affects your healthcare costs—and what you can do to control them—please contact us. ■

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