

# Workers' Comp & Safety News

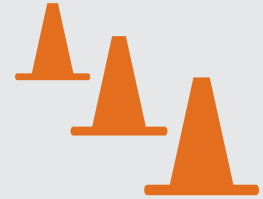


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Prevention

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## How to Keep Your Workplace Drug-Free...without Lawsuits

"My workplace doesn't have a drug problem," you might think. But among adults aged 18 or older, 8.4 percent of those employed full-time currently use illicit drugs, while 11.2 percent of those employed part-time do so. Legal drugs also have the potential for misuse: The National Institute on Drug Abuse estimates that about 7 million people currently use prescription and over-the-counter drugs "taken nonmedically," or in a way other than as prescribed, without a prescription, or for the experience or feeling it causes.



**T**he federal government does not require most private companies or individuals to have drug-free workplace policies. The exceptions: federal contractors, which must comply with the Drug-Free Workplace Act of 1988 and/or the U.S. Department of Defense's Rules and Regulations for Defense Contractors, and employers in "safety-sensitive industries," specified under

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## This Just In

Implementation of injury and illness prevention programs could reduce injuries by 15 percent to 35 percent for employers who do not now have safety and health programs, says OSHA. At the 15 percent program effectiveness level, this will save \$9 billion per year in workers' compensation costs; at the 35 percent effectiveness level, savings could total \$23 billion per year.

Although most states do not require employers to have illness and injury prevention programs,\* the federal OSHA and many states encourage employers to create voluntary programs. An injury and illness prevention program is a proactive process to help employers find and fix workplace hazards before workers are hurt. In addition to reducing workplace injuries, these programs

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the Omnibus Transportation Employee Testing Act of 1991.

However, drug-free workplace programs can protect employers from the negative effects of substance abuse. Studies show that when compared with non-abusers, substance-abusing employees are more likely to:

- ✱ change jobs frequently
- ✱ be late to or absent from work
- ✱ be less productive than other employees
- ✱ be involved in a workplace accident
- ✱ file a workers' compensation claim.

Research also indicates that between 10 and 20 percent of the nation's workers who die on the job test positive for alcohol or other drugs.

Some states offer employers with drug-free workplace programs a discount on workers' compensation premiums. And many states deny workers' compensation benefits to workers whose injuries are determined to be the result of substance abuse. Finally, almost 30 states have laws and rules that limit or deny unemployment benefits to individuals fired because of a positive drug test.

### Should Your Program Include Drug Testing?

Employers can test for drugs at different points in the employment process — during the application process, during employment at random or regular intervals, or after an accident. It can be done for some or all workers — for example, for safety-sensitive positions only, or for all workers. Because drug testing costs money, you may choose not to use this method for as-

essment. However, many workers' compensation experts recommend testing all employees after an accident or near-miss to rule out the use of drugs.

If you decide to implement a drug-testing program, remember that laws designed to protect workers' civil rights could affect your workplace drug policies. These laws include the Civil Rights Act of 1964 and the Americans with Disabilities Act (ADA) of 1990. These statutes limit how far an employer can go in investigating and disciplining employee drug use. Under the ADA, for example, employers cannot fire a drug addict who is already seeking treatment for his/her condition.

Many states and U.S. territories have their own laws and regulations dictating when and how workplace drug testing should be carried out. Some also require state and local contractors to develop drug-free workplace policies similar to those under the federal Drug-Free Workplace Act. No one set of rules and regulations applies throughout the country. Some states, such as Louisiana, allow drug testing in virtually every type of business and in both the public and private sectors. Others, such as Maine, restrict who can be tested, how they can be tested, and what kinds of rehabilitation and disciplinary options can result from a positive test.

Employers can take several simple steps to avoid legal problems with their drug-free workplace policy:

- ✓ Consult an employment lawyer whenever you introduce a new drug-free workplace policy or change an existing policy.
- ✓ Make sure your drug-free workplace policy

**can help improve employee productivity and morale and reduce employer costs. Despite these benefits, many employers in the U.S. have been slow to adopt a workplace "safety culture" that emphasizes planning and carrying out work in the safest way possible.**

**For more information on injury and illness prevention programs, please see the white paper recently released by OSHA at [www.osha.gov/dsg/InjuryIllnessPreventionProgramsWhitePaper.html#footnotea](http://www.osha.gov/dsg/InjuryIllnessPreventionProgramsWhitePaper.html#footnotea).**

*\*States that require injury and illness prevention programs include California, Hawaii, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New York, North Carolina, Oregon, Utah and Washington.*

clearly stipulates penalties for violations. If your policy includes drug testing, spell out exactly who will be tested, when they will be tested, and what will happen to employees who test positive.

- ✓ Make sure every employee receives and signs a written copy of your drug-free workplace policy. Verbal agreements and unsigned agreements have little legal standing.
- ✓ Make sure that you, and all your supervisors, receive proper training in how to detect and respond to workplace drug and alcohol abuse.
- ✓ Maintain detailed and objective records documenting the performance problems of all your employees. Such records often provide a basis for referring workers to employee assistance programs.
- ✓ Never take disciplinary action against a worker or accuse a worker of a policy violation simply because that employee is acting impaired. Instead, try to clarify the reasons for the employee's impairment. If drug test-

ing is a part of your workplace policy, obtain a positive test result before taking any action.

- ✓ Never accuse or confront an employee in front of coworkers. Instead, try to stage all discussions someplace private, with another manager present to serve as a witness.
- ✓ Never single out an individual employee or particular group of employees for special treatment — whether it is rehabilitation or punishment. Inconsistencies in policy enforcement may lead to discrimination charges.
- ✓ Try to get to know your employees as much as possible. This may help you more quickly identify workers who are in trouble or developing substance abuse problems.
- ✓ Most important, try to involve workers at all levels of your organization in developing and implementing your drug-free workplace policy. This will reduce misunderstandings about the reasons for a drug-free workplace program and help ensure that policies and procedures are fair to everyone.

The U.S. Department of Labor's (DOL) Working Partners for an Alcohol- and Drug-Free Workplace Web site provides employers with free resources and tools to help establish and maintain drug-free workplace policies. And we recommend having a local employment attorney review your policy before implementation. ■

## How Claims Adjusters Can Help You Save Money

Workers' compensation adjusters play a pivotal role in the claims management process. What are the skills of a top-notch adjuster, and how can you recognize a good one?



**W**orkers' comp claims are getting more complicated. Workplace fatalities are becoming rarer each year, but cumulative injuries or repeated injuries are becoming more common, particularly with the growing popularity of return-to-work problems.

As an example, consider a 55-year-old auto mechanic who has had problems with his knees for 20 years. He's had several surgeries on his right knee, but none of them cured his problem. Over the years, he over-compensated for his bad knee, causing more recent injury to his good knee. The mechanic may need more surgery, or he may need a disability settlement, in-

cluding an open medical treatment plan. Those factors alone require the skills of an experienced claims adjuster.

Now, consider that the man has worked for several different employers over the last 20 years. Each shop had a different workers' comp carrier. The current adjuster needs to work back through the files to identify each carrier and then begin an involved process that leads to apportionment of the claim, however it is settled.

For the auto mechanic, one of the key factors in his claim is his age. Older employees are excellent workers and are less likely to be injured. In fact, according to the Bureau of Labor Statistics, employees over 55 years old are sig-

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nificantly less likely to be injured than employees 20 to 24 years old. However, once injured, older workers are more likely to have poor surgical outcomes and they need significantly more time to recover. A good claims adjuster recognizes the complications surrounding age and factors them into the overall plan.

### Adjuster Skills

A complex claim like the mechanic's needs a top-notch adjuster with a broad set of skills:

- ✱ **PLANNING:** The adjuster needs to develop a plan of action that includes investigation and research, return-to-work options, monitoring of medical and pharmacy utilization and settlement options. The investigation should include exploring the possibility of pre-existing conditions and making sure the injury occurred in the workplace.
- ✱ **UTILIZATION:** With medical costs skyrocketing, it is crucial for the adjuster to be part of the team that analyzes utilization of medical treatments and drugs. The adjuster needs to understand the interlocking relationship among treatments, drugs and early-return-to-work in order to find the best balance of effectiveness and cost, while addressing the employee's desire to get well.
- ✱ **APPORTIONMENT:** A good adjuster recognizes the opportunities for recovery of claims paid and for apportionment of current claims filed with other workers' comp carriers.
- ✱ **COMMUNICATIONS:** The adjuster needs to maintain excellent communications among the injured worker, the employer

and the treating physician. The adjuster should have only a reasonable number of files to handle so that he or she is able to return phone calls and emails promptly and encourage everyone to work proactively on the treatment plan.

- ✱ **LOSS CONTROL:** A skilled adjuster can help employers recognize trends in their claims and recommend loss control measures that will help prevent other injuries.

### What Employers Need to Ask

To make sure that an insurance company's or a third-party administrator's (TPA) adjusters will deliver the optimal resolution, you need the services of an adjuster who has the time, resources and the management support to do optimal work. Continuity is extremely important. When an adjuster moves to another company or assignment mid-claim, your claim file could fall through the cracks, resulting in delayed treatment, a disgruntled employee and increased costs to the employer. When an adjuster is assigned to one of your cases, it is appropriate to ask about the adjuster's:

- ✱ Length of time with the company
- ✱ Number of years as a workers' comp adjuster
- ✱ Number of new claims assigned to him/her each month
- ✱ Number of open claims files
- ✱ Types of claims
- ✱ Use of electronic versus paper files.

If you have concerns about a specific workers' compensation claim, please give us a call.

## Preventing Workplace Violence

Workplace violence is a major concern for employers and employees nationwide. According to the Bureau of Labor Statistics Census of Fatal Occupational Injuries, workplace homicides accounted for 506 (11 percent) of the 4,547 fatal workplace injuries in the United States in 2010. Homicide is the leading cause of death for women in the workplace. And nearly 2 million American workers report having been victims of workplace violence each year. Unfortunately, many more cases go unreported.

### Who is at risk of workplace violence?

The truth is, workplace violence can strike anywhere, anytime, and no one is immune. However, research has identified factors that may increase the risk of violence for some workers. These include:



- ✱ Exchanging money with the public
- ✱ Working with volatile, unstable people
- ✱ Working alone or in isolated areas
- ✱ Providing services and care
- ✱ Working where alcohol is served
- ✱ Working late at night or in areas with high crime rates.

Workers at higher risk include delivery drivers, healthcare professionals, public service workers, customer service agents, law enforcement personnel, and those who work alone or in small groups.

### Preventing Violence

OSHA recommends a “zero-tolerance policy towards workplace violence,” while the FBI says “employers should adopt clear no-threats and no-violence policies and prevention plans.” An employer should prevent the root causes of workplace violence by “creating an atmosphere of fairness, trust and cooperation between employees and management,” says the FBI’s National Center for the Analysis of Violent Crime.

Other recommendations include:

- ✱ Communicate anti-violence policies for employees
- ✱ Survey employees to get their ideas about the risk of violence and preventive measures
- ✱ Train employees to recognize the warning signs of violence
- ✱ Provide violence prevention training for managers, especially regarding downsizing and termination procedures
- ✱ Provide physically secure workplaces

- ✱ Adopt staffing policies that keep staff safe on the job
- ✱ Cooperate with unions and other local businesses on employee safety
- ✱ Formulate action plans so managers and supervisors know what to do when violence occurs.

“There is not one absolute factor that predisposes an individual to workplace violence,” says Eugene A. Rugala, supervisory special agent for the FBI’s National Center for the Analysis of Violent Crime. “Managers and employees should be familiar with each potential warning sign, but look at a totality of factors including the work environment, the employee’s home life and his or her behavior as a whole.”

Managers and employers should also beware of focusing too much on dysfunctional and violence-prone individuals, while not paying enough attention to the dysfunctional workplace, say Richard V. Denenberg and Mark

Braverman, the authors of a book called *The Violence-Prone Workplace: A New Approach to Dealing with Hostile, Threatening, and Uncivil Behavior*. They identify failure to recognize and defuse conflicts as the primary causes of workplace violence.

“It is not enough to have an anti-violence policy on the wall and an employee manual on the shelf that purports to address the problem,” adds Larry Chavez, an expert on workplace violence and crisis communications. He recommends providing formal instruction for managers to recognize and eliminate organizational risk factors that have led to violence in other organizations. “They must also be instructed in defusing hostile employees so as to prevent an angry outburst from escalating into violence.”

For more information on preventing workplace violence, see OSHA’s Web site at [www.osha.gov/SLTC/workplaceviolence/index.html](http://www.osha.gov/SLTC/workplaceviolence/index.html) or contact us for assistance. ■



## DOL Looking for Misclassified Employees

The U.S. Department of Labor is stepping up its efforts to identify and correct employee misclassification. According to the Department, "The misclassification of employees as something other than employees, such as independent contractors, presents a serious problem for affected employees, employers, and to the entire economy." In 2010, the Wage and Hour Division collected nearly \$4 million in back wages for employees misclassified as independent contractors or otherwise not treated as employees. In addition, workers' compensation insurers can collect back premiums for employees incorrectly classified as independent contractors.

According to the Department, "Busi-

ness models that attempt to change, obscure or eliminate the employment relationship are not inherently illegal, unless they are used to evade compliance with federal labor law."

Are your independent contractors classified correctly? In determining whether the person providing service is an employee or an independent contractor, you must consider the degree of control you exercise over that worker, and his/her independence.

Does the company control or have the right to control what the worker does and how he/she does the job? Does the payer control business aspects of the job? These include how the worker is paid, whether expenses are reimbursed, who provides tools/supplies,

etc. Are there written contracts or employee-type benefits (i.e. pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

Businesses must look at the entire relationship, consider the degree or extent of the right to direct and control, and finally, document each of the factors used in coming up with the determination. If it is still unclear whether a worker is an employee or an independent contractor, either the business or the worker can file Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding with the IRS. The IRS will review the facts and officially determine the worker's status. ■

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