Workers' Comp & Safety News

PETRA
RISK SOLUTIONS
The Art of Hospitality

Hospitality Insurance Specialist:

• Custom Tailored Insurance Programs
• Loss Control and Risk Management
• Safety Compliance and Training

13950 Cerritos Corporate Drive, Suite A • Cerritos, CA 90703
800-466-8951 • 800-494-6829 fax
www.petrarisksolutions.com • Lic# 0817715

Safety | August/September 2015 | Volume 13 • Number 4

Horseplay: Who Pays When Someone Gets Hurt?

When horseplay occurs in a work environment, does workers' compensation apply?

Generally, an injury must 1) occur in the course of employment and 2) arise out of the worker's employment to be compensable. Merriam-Webster defines horseplay as "rough or loud play: energetic and noisy playful activity."' Most job descriptions don't include play...so should employees receive workers' compensation for injuries occurring due to recreational activities or horseplay?

In the past, courts usually ruled against compensation, because horseplay and other non-work activities don't arise out of the course of em-

continued on next page

Risk Note

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

continued on next page

ployment. Even non-participating employees were denied compensation for injuries caused by another employee's horseplay.

Today, courts tend to be more liberal in awarding benefits, particularly when situations fall into a gray area. According to OSHA, an injury is presumed to be work-related if it results from an event occurring in the work environment. The work environment includes any location where one or more employees are working or are present as a condition of their employment. For example, what about injuries that occur at work-related recreational events, such as a company picnic or softball game? If the employer expects or encourages attendance or participation, the injury could be compensable.

Whether a court decides that these types of injuries occur in the course of employment could hinge upon four factors:

1. Where the injury occurred. If it occurred on the employer's premises, it's not always compensable, but more likely to be.
2. Employer expectations. Did the injury occur at an employer-sponsored or employer-organized event? Courts are more likely to find injuries compensable when they occur at an event where employees are expected or encouraged to attend.
3. The employer's financial role. If the employer sponsored or financially supported the activity where the injury occurred, compensation becomes more likely.
4. Whether the activity benefited the employer. One could argue that a sports team that wears shirts with company logos advertises the company, or that company outings boost employee morale and team spirit.

When it comes to horseplay claims, some courts apply "Larson's Rule." Named after *Larson's Workers' Compensation*, a 17-volume manual covering workers' compensation law, relevant court cases and analysis, Larson's Rule on horseplay considers several factors:

1. Did the activity leading to injury deviate substantially from normal activities? In some cases, horseplay can become rough or cruel enough to be considered bullying or workplace violence.
2. How long did it last? Did the horseplay occur during ordinary duties, or did all regular work stop?
3. Does horseplay occur routinely? If it does and the employer does nothing to stop it, then horseplay could be considered a normal part of employment at that workplace.
4. What are industry norms? In some industries, horseplay occurs more regularly than in others.

To prevent horseplay-related injuries, employers should take the following action steps:

1. Define job duties specifically.
2. Include a prohibition of horseplay in work areas in your employee handbook. Define work areas specifically.

women are most likely to be injured by walking while distracted (68 percent). 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.

3. Where appropriate, post signs.
4. Enforce your policies with disciplinary action, if necessary.

For more information on preventing horseplay or improving workplace safety, please contact us.

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 healthcare 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) medical 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 should help 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 emergency 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 physi-

continued on next page

cian'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 charging 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 better understand the effects of the ACA on your workers' compensation claims, the author suggests the following action steps:

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

continued on next page

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 the use of subcontractors, temporary agencies, labor brokers, franchising, licensing and third-party management. Legitimate independent contractors 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.

The Fair Labor Standards Act governs federal wage/hour standards and provides a minimal level of protection for employees. (States may enact stricter employee protection laws.) Whether a worker meets the Fair Labor Standards Act's definition of employee depends on the working relationship between the employer and the worker, not 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 [allow] 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.

Hot Weather Alert

Employers are responsible for providing workplaces that are safe from excessive heat. Yet every year, thousands of workers become sick from exposure to heat, and some even die. Heat illnesses and deaths are preventable.

How can heat illness be prevented?

Employers should establish a complete heat illness prevention program to prevent heat illness. This includes: provide workers with water, rest and shade; gradually increase workloads and allow more frequent breaks for new workers or workers who have been away for a week or more to build a tolerance for working in the heat (acclimatization); modify work schedules as necessary; plan for emergencies and train workers about the symptoms of heat-related illnesses and their prevention; and monitor workers for signs of illness. Workers new to the heat or those who have been away from work and are returning can be most vulnerable to heat stress and they must be acclimatized (see box on P2).

To prevent heat-related illness and fatalities:

- Drink water every 15 minutes, even if you are not thirsty.
- Rest in the shade to cool down.
- Wear a hat and light-colored clothing.
- Learn the signs of heat illness and what to do in an emergency.
- Keep an eye on fellow workers.
- "Easy does it" on your first days of work in the heat. You need to get used to it.

If workers are new to working in the heat or returning from more than a week off, and for all workers on the first day of a sudden heat wave, implement a work schedule to allow them to get used to the heat gradually. Working in full sunlight can increase heat index values by 15 degrees Fahrenheit. Keep this in mind and plan additional precautions for working in these conditions.

Remember these three simple words: Water, Rest, Shade. Taking these precautions can mean the difference between life and death. For more information, please see the "Safety Tip" in this issue, or call us. ■

Workers' Comp & Safety News