# Workers' Comp & Safety News

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# Feds and States Clamping Down on Misclassified Independent Contractors

**The California Labor Commissioner recently ruled that drivers for Pacific 9 Transportation were misclassified as independent contractors and ordered the company to pay $6.9 million in back wages.**

Also in California, the 9th Circuit Federal Court in 2015 approved a $228 million settlement against FedEx for misclassifying more than 2,000 California Fedex Ground drivers. The state of Wisconsin just announced that it found 8,613 misclassified workers at Wisconsin companies in 2016.

In a case involving construction workers, 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 construc-

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## This Just In

**A report by The Texas Public Policy Foundation, a research and advocacy group, says that based on its analysis, more states should try to emulate the opt-out model of workers' comp available in Texas.**

**Many Texas employers who opt out of the state's regulated workers comp system, or "nonsubscribe," set up alternative injury benefit arrangements funded by their group health plans. This kind of arrangement creates more opportunity for cost containment, according to the report. In many states with mandatory workers' comp laws, employers and insurers have no input in deciding the choice of doctors. "The Texas Public Policy Foundation asserts that this has led to corruption, kickbacks and an increasing problem with over-prescription of painkillers," according to a story published in *Business Insurance*.**

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tion 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 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. The U.S. Department of Labor has issued Administrator's Interpretation No. 2015-1 to guide employers on FLSA standards for identifying "employees who are misclassified as independent contractors." You can find the entire document and additional related resources at dol.gov/whd/workers/Misclassification/. 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."

**Other states, most recently Oklahoma, have attempted to introduce the opt-out model, but Texas is the only state that currently allows it. Oklahoma attempted to implement an opt-out model but in September 2016 its state Supreme Court struck down the change in workers comp law passed by its legislature in 2013, saying the law denied equal protection to injured workers and denied injured workers "the constitutionally protected right of access to courts."**

**Unlike the Oklahoma law, injured workers in Texas are allowed to bring lawsuits against companies that nonsubscribe to the state's regulated comp system.**


## 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.

# How Does Marijuana Legalization Impact Your Drug-Free Work Environment?

**Marijuana is now legal in some form in 28 states and the District of Columbia. What does this mean for your workers' compensation safety program?**

As of January 2017, recreational marijuana use is legal to some extent in eight states: Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, Washington and the District of Columbia — and more states are expected to follow. Will this send employers' zero-tolerance policies up in smoke? Jeff Burgess, Program Coordinator, Technical Assistance for Employers in Oregon's Bureau of Labor and Industries, says in a recent report, "The answer is no." State laws "generally provide immunity from state and local criminal prosecution under certain circumstances. They do not provide employment protection, however."

Generally, employers can prohibit on-duty employees from using marijuana medicinally. Refusing to hire or otherwise discriminating against those who use medical marijuana on their own time remains a gray area in most states. However, Connecticut and Arizona have passed laws specifically protecting medical marijuana users from employment discrimination.

## Should Your Safety Program Include Drug Testing?

In some states, workers' compensation insurers will discount an employer's premiums if it institutes a drug-free workplace policy and program. There's good reason for that. 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.

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 assessment. 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.

Federal law still classifies marijuana as a Schedule I illegal drug. In an informal opinion, the Equal Employment Opportunity Commission said "…the ADA does not protect individuals who are currently engaging in the illegal use of drugs…" However, the EEOC considers past drug addiction a protected disability, so employers should avoid questions about past addiction to illegal drugs or participation in a rehabilitation program.

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 con-

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tractors 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.

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. For more suggestions on improving workplace safety, please contact us.

## How to Avoid Legal Problems with Drug Testing Policy

**Employers can take several simple steps to avoid legal problems with their drug testing 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 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 testing 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.

# How to Calculate Comp Rates

**Although workers' compensation may seem complicated, only two factors affect your workers' compensation costs: your employees' job classifications and your experience modification factor.**

Rating bureaus publish rates for hundreds of different job classifications, shown as rate per $100 of payroll. These rates are based on the relative hazards of each occupation. For example, it costs more per $100 of payroll to insure roofers than computer programmers, since roofers are more likely to experience severe on-the-job injuries. To avoid overpaying, you will want to review your company's occupational categories to make sure your employees haven't been misclassified.

You can't change your employees' job classifications: if an employee performs the duties of a roofer, then your insurer will classify him/her as a roofer. But you do have control over the other variable that affects your workers' compensation costs: your experience modification factor, often referred to as an ex-mod.

Stated simply, an ex-mod is a multiplier that relates to your claims experience. By multiplying the base rate for the applicable occupational class times your ex-mod, an

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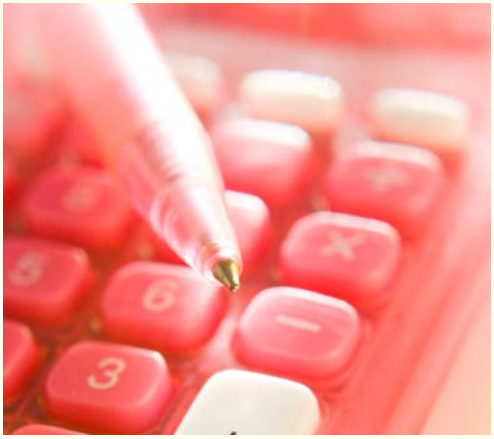

insurer can reward or penalize you for your claims experience.

In most states, your premiums must exceed a certain minimum amount for the ex-mod to apply. If you do not pay enough in premiums, your organization will have a "minimum premium policy," in which ex-mods do not apply.

Insurance companies send information on employers' premiums and losses to the state's rating bureau. The rating bureau then calculates ex-mods based on the employer's paid claims and incurred losses for the "experience period," generally the three years prior to the last policy renewal date.

To calculate your ex-mod, expressed as a percentage, take your total actual losses for this period and divide by the total expected losses, or average losses by $100 of payroll per job classification. An employer with actual losses of $253,563 and expected losses of $352,051 would calculate the experience modification as follows:

$$\frac{253,563}{352,051} = 72\%$$

However, it's not as simple as all that. Not all losses are weighted equally. And rating bureaus use "weighting values" and "ballast values" to arrive at ex-mods that more accurately predict your company's losses.

Following is the actual formula for calculating an experience modification factor:

| | | | |
|---|---|---|---|
| Actual Primary Losses | + Ballast Value | + Weighting Value X Actual Excess Losses | + (1-Weighting Value) X Expected Excess Losses |
| Expected Primary Losses | + Ballast Value | + Weighting Value X Expected Excess Losses | + (1-Weighting Value) X Expected Excess Losses |

## What do these terms mean?

- "Primary losses" are the first $5,000 of any loss; "excess losses" are all loss amounts over $5,000. Losses up to $5,000 are included in full. Losses in excess of $5,000 are included on a discounted basis. In practical terms, this means that smaller losses have a bigger relative impact on your ex-mod than larger ones do.
- The "ballast value" and "weighting value" attempt to correct for the size of the risk. In statistics, the larger the pool sampled, the more accurate the sample is. Calculating ex-mods works in the same way — the larger the payroll base, the more accurately you will be able to predict your losses.

The resulting experience modification factor is expressed in a number that generally ranges from .75 to 1.75. An experience modification of 1.00 indicates your losses reached the expected dollar amount. A number higher than 1.00 indicates that your risk of loss is greater than average, while an ex-mod of less than 1.00 indicates your risk is better than average. If you meet the minimum premium levels, you can control your workers' compensation costs by keeping your ex-mod low.

## Keeping Ex-Mods Low

Keeping ex-mods low requires controlling workers' compensation claims. Focus on controlling the smaller, more frequent losses — they will impact your ex-mods more than less frequent, larger losses.

Next, you'll want to periodically review your payroll and claims information for accuracy. Make sure your payroll data is accurate and your ex-mod calculations include data from the proper years. And keep tabs on loss reserves — unused loss reserves affect your experience modification.

We can help you understand your experience modification factor and help you develop loss reduction strategies to lower your ex-mod, which will control your workers' compensation costs. For more information, please call our office.

# Safety Quiz for Office Workers

**Although office workers face few life-threatening injuries, they can suffer from work-related repetitive strain disorders and other ergonomic injuries. The following quiz can help you spot ergonomic problems before they lead to injury.**

1. I have to look up to see my computer screen when seated.
2. I can read text on my screen without leaning my head, neck or trunk backward or forward.
3. I see glare on my computer screen.
4. My mouse or trackball fits my hand well and is easy to operate.
5. I need to stretch my arms to reach my keyboard and/or input device (mouse or trackball).
6. My elbows are bent, forearms parallel to the floor, when I type or use the mouse.
7. My wrists rest on a rounded, padded wrist rest OR I can type comfortably, keeping my wrists straight, without a wrist rest.
8. Any documents I need to look at while typing are resting flat on my desk.
9. I use a headset when I need to use the telephone and computer at the same time.
10. I can sit close to the keyboard, with feet flat on the floor, while working at my computer.

If your employees answered "yes" or "not applicable" to Questions 2, 4, 6, 7, 9 and 10, and "no or "not applicable" to Questions 1, 3, 5 and 8, congratulations! You have a very ergonomics-friendly workplace and your office workers will likely experience few problems with work-related musculoskeletal disorders or eyestrain. Any "no" answers on Questions 2, 4, 6, 7, 9 or 10 indicate problems. Most can be corrected easily—please contact us for more information.

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