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News You Can Use

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WORKERS' COMP

How to Deal with the 'Monday Morning Surprise'

THE "MONDAY morning surprise" – the term for when an employee approaches you on the first morning of the working week to report an injury sustained at work on Friday – can be a dreaded situation for any employer.

Nearly all organizations face this at some point and the initial injury report is likely to trigger an agonizing chain of events the employer will have to deal with, according to a report by the Society of Human Resource Management.

The Monday morning surprise comes with several questions:

- Is the injury truly work-related?
- Could it be a case of cumulative effects?
- Was this an injury sustained over the weekend, on the employee's personal time?
- Do you have evidence to prove it?

The injury could be legitimate (especially if it involves the musculoskeletal system) or due to cumulative exposure, but employers should be wary of instances where an employee clocks out of a shift on Friday with no reported injury and returns on Monday with an injury.

That's a red flag for workers' comp fraud.

What Not to Do

Workers' comp fraud experts recommend that you DO NOT:

- **Spy on employees** – If the employer plays investigator and creates a Big Brother atmosphere of spying on workers, especially when they're injured, a huge divide in trust is created between employees and managers. When a supervisor functions as a spy, employees are quick to notice and feel devalued.
- **Have employees sign a no-injury pledge** – While the intent may be positive, to eliminate work-related injuries and illnesses, such an agreement discourages early reporting and could deter a worker from reporting an actual injury that gets worse over time.
- **Restrict employees' personal activities** – The range of activities outside of work that could be deemed too risky for employees is impossible to define, and is not legally defensible. An employer who tries to dictate employees' personal lives will end up with disgruntled workers.

What You Can Do

Organizations that act only when a problem occurs typically are the ones with the most fraudulent claims, because there aren't any barriers set up to prevent fraud.

Nearly all reasoning in such cases circles back to the employee and studiously avoids references to anything the organization may have done to contribute to the situation, starting with the hiring process.

See 'Claims' on page 2

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WORKPLACE ALERT

New FMLA Poster Must Be on Display Now

EMPLOYERS WITH 50 or more employees have been required to display an updated federal family leave poster from March 8.

The final rule outlining the requirement was issued by the U.S. Department of Labor (DOL) to implement federal laws expanding Family and Medical Leave Act (FMLA) protections.

Family leave notice change

The final regulation requires a change to the federal FMLA notice/poster entitled "Employee Rights and Responsibilities under the Family and Medical Leave Act," prepared by the DOL.

This is "Notice C" on most California employment notices posters and the Federal Employment Notices Poster.

All covered employers must display the poster summarizing the major provisions of the FMLA and telling employees how to file a complaint.

The poster must be displayed in a conspicuous place where employees and applicants for employment can see it. It must be displayed at all locations, even if there are no eligible employees at a particular location.

Definition clarified

The FMLA includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered service member during a single 12-month period.

The revised federal FMLA poster clarifies that in addition to those currently serving, a "covered service member" also includes veterans discharged in the last five years.

Among the mandatory revisions on the federal poster is a note that the FMLA definitions of "serious injury or illness" for current service members and veterans are distinct from the FMLA definition of "serious health condition."

A second mandatory note states that special hours of service eligibility requirements apply to airline flight crew employees.

Changed requirements that took effect on March 8 include "military caregiver leave for a veteran, qualifying exigency leave for parental care, and the special leave calculation method for flight crew employees."

The mandatory changes to the FMLA affect:

- Private-sector employers with 50 or more employees in 20 or more work weeks in the current or preceding calendar year, including a joint employer or successor in interest to a covered employer;
- Public agencies, including a local, state or federal government agency, regardless of the number of employees; and
- Public or private elementary or secondary schools, regardless of the number of employees.

You can download the *new poster here*.❖

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Avoiding Bogus Claims Starts with the Hiring Process

In other words, managers need to know their employees.

One way to address the Monday morning surprise is to develop an "End-of Week Employee Injury Statement."

Your accounting department can attach something like the following statement to each employee's paycheck:

I have not received or witnessed any injury during the course of this week's work with [Employer Name Here.]

Employees would be required to complete the form, sign it and return it to their supervisor. The benefits that a reporting program could yield include:

- Employees reporting workplace injuries in a timely manner.
- Improved communication between management and labor.
- Better accident prevention and employee safety.
- The ability to reconcile injuries and to alert supervisors and management of hazardous conditions and unreported injuries.
- The identification of witnesses who should be interviewed during accident investigations.

It should be noted, however, the use of an end-of-week statement would not be defensible against a claim for benefits at the Workers' Compensation Appeals Board, but it could be used to establish the condition of the employee leading up to the at-work injury. ❖

RISK MANAGEMENT

Reducing the Damage from Employee Lawsuits

IN OUR last issue we covered tips for avoiding lawsuits initiated by your employees, but sometimes, no matter what you do, you'll get hit with one anyway

Such litigation is rampant and spans a number of areas such as discrimination, harassment, breach of contract and wrongful termination, to name a few. Avoiding employee lawsuits is not 100% guaranteed, but there are a number of tactics employers can utilize to reduce the fallout, and the cost to you should you be sued.

In his blog, Michael W. Hawkins, a partner in the East Coast law firm of Dinsmore & Shohl, recommends the following for his firm's clients:

1. "At-will" needs to be spelled out. Most employers think that if they are an "at-will" employer, it gives them the right to fire someone on the spot for no particular reason. If your company bills itself as such, you need to make sure that you include this disclaimer in all of your employee-related paperwork, including the initial employment application, the employee handbook, in your workplace rules and any other related policies you have in place.

Also, even if you are an at-will employer, your state and federal discrimination laws still apply. And if you fire someone and refuse to give a reason, they can secure the services of a lawyer to compel you to give them one.

2. Identify the rule or policy violation that led to termination. This comes down to basic documentation of prior violations of rules or policies, as well as the final violation that led to the termination. If the violation is a severe one, such as theft, then one infraction may justify termination. But make sure you document the violation thoroughly.

3. Keep quiet. If you are planning to terminate someone, or already have, the best policy is to stay mum about it to other employees. If you make comments about a termination or disciplinary action to others, it could lead to a lawsuit and spell ruin for your defense in the matter.

4. Keep your facts straight. Make sure emotion does not cloud your judgment in the termination or disciplinary action. Ask yourself if you can articulate the reasons for your actions clearly and cogently. Writes Hawkins: "If it doesn't make sense to your lawyer, it's not likely to make sense to a judge or jury."

5. Admit your mistakes. Sometimes you make mistakes and, even without malice, you may violate state or federal wage and hour laws, Employee Retirement Income Security Act requirements, discrimination laws or even affirmative action requirements. Maybe you fired someone for something others have done in the past without similar consequences.

If you discover you've made a mistake, then own up to it. Don't try to mount a defense for a clear violation. If you are honest, you can settle before things get really ugly.

6. Listen to your lawyer. This is an important lesson in the detriments of too much pride. The further away you are from trial, the less expensive settling will be, especially if the employee has a strong case and/or yours may be lacking. Not only does the settlement figure increase as time goes by, but a judgment in the case usually significantly increases the tab. Then you're also faced with your own attorney fees on top of it.

7. Don't be too detailed in your documentation. Sticking to the point and minimum verbosity is the rule. Don't include opinions, such as "This is the worst case of harassment I have seen." Also don't note disagreements among management concerning a person's performance. Stick to what's in the actual performance evaluation.

This means not only in the documentation that goes into an employee's file, but also e-mails that refer to the employee. Just think how damaging such musings can be in a courtroom as they are read to a jury by the opposing counsel.

8. Avoid the appearance of retaliation. If a worker complains to you or other management about discrimination or files a charge with a government labor agency, don't look for other reasons to fire them later, after the fact. It does not matter if you let them go days, weeks or months after the complaint – if you fire them after they've made a complaint, you could be in hot water.

9. Know your definitions. For example, you may fire someone for insubordination for what they said but, even if the employee speaks bluntly or is even surly, in the eyes of the law that's not insubordination. Neither is poor performance or not following policies. Insubordination means "refusing to follow a direct order or refusing to submit to the authority of a supervisor."

10. Thoroughly vet the person before you hire them. Did you conduct a background check or drug test? Did they fill out an application? Where did they qualify and did you evaluate their skills? If you do all this before you hire someone, you are less likely to be sued in the future. ❖

HEALTH CARE EXCHANGES

Health Application Form a Whopping 21 Pages

IN MARCH the Obama Administration released its draft form for applying for benefits under the Patient Protection and Affordable Care Act (PPACA) – and in short, it's massive.

For a three-person family, the draft application form is 21 pages long and even the online version has 21 steps, including some sections with additional questions.

Health pundits have pointed out that the complexity of the process could thwart one of the main intentions of the law – providing health insurance to the masses – by chasing away the people it was meant to serve.

The government estimates the paper application form should take 45 minutes to complete, but health care professionals are questioning that estimate.

In the preamble to the draft form, it states that applicants will need the following:

- Social Security numbers (or document numbers for any legal immigrants who need insurance)
- Birth dates
- Employer and income information for everyone in the applicant's family (for example, from pay stubs or Forms W-2, Wage and Tax Statements)
- Policy numbers for any current health insurance, and
- Information about any job-related health insurance available to your family

But the application form contains other questions to determine eligibility for government subsidized health coverage. It asks:

- If the applicant wants help paying for medical bills from the last three months
- If the applicant was ever in foster care
- If the applicant has a parent living outside the home
- If the applicant lost employer-supported health benefits in the last three months
- If the applicant is a U.S. citizen, and
- Income amount

Checking identity, income and citizenship is supposed to happen in real time, for those applying online.

All of those questions are part of the first step, which is designed to assess if the applicant qualifies for financial assistance. The PPACA is means-tested, with lower-income people getting the most generous help to pay premiums.

Once an applicant has finished the section assessing eligibility for assistance, they must move to the next part of choosing a health plan, which will require additional steps, plus a basic understanding of insurance jargon.

The application is a crucial part of the health care reform as the law requires virtually all Americans to carry health insurance starting in 2014, although most will just keep the coverage they now have through their jobs, Medicare or Medicaid.

Drafts of the paper application form and a 60-page description of the online version were quietly posted online by the Health and Human Services Department, seeking feedback from industry and consumer groups. Those materials, along with a recent HHS presentation to insurers, run counter to the vision of simplicity promoted by administration officials.

The HHS estimates that it will take 30 minutes to complete the online application, on average. If you need a break, or have to gather supporting documents, you can save your work and come back later.

The application is designed to vet the middle-class individuals who are eligible for tax credits to help pay for private insurance plans, while low-income individuals will be steered to safety-net programs like Medicaid.

The HHS estimates it will receive more than 4.3 million applications for financial assistance in 2014, with online applications accounting for about 80% of them. Because families can apply together, the government estimates 16 million people will be served.

Near-instantaneous online verification?

One positive about the new application system is that those who apply online are supposed to be able to get near-instantaneous verification of their identity, income, and citizenship or immigration status. An online government clearinghouse called the Data Services Hub will access Social Security Administration records for birth information, the IRS for income data and Homeland Security for immigration status.

Also, despite the complexity, the new system could still end up being simpler than the current process many individuals go through to secure coverage.

For example, applicants won't have to fill out a medical questionnaire, although they do have to answer whether they have a disability. Under the law, even if they are disabled, they can still get coverage for the same premium a healthy person of their same age would pay.

On the other hand, if an applicant's household income has changed in the past year and they want help paying their premiums, they will have extra work to contend with.

They will be applying for assistance in part based on their expected income in 2014, but the latest tax return the IRS will have on file will be for 2012. So, if that person has secured a better-paying job, lost their job or their spouse got a job or was laid off, more information will be required.

And if anyone in the applicant's household is offered health insurance on the job but does not take it, they should be prepared for more questions, such as "What's the name of the lowest cost self-only health plan the employee listed above could enroll in at this job?"

HHS spokeswoman Erin Shields Britt said in a statement the application is a work in progress, "being refined thanks to public input."

A copy of the draft application can be found *here*. ❖