

WORKERS' COMP

How to Avoid Inheriting an Old Injury Claim

ONE OF an employer's biggest shocks is to find out that a workplace incident aggravated a pre-existing injury that was sustained at the worker's prior job.

Fortunately, there are steps you can take if you don't want to inherit a claim that someone incurred at another job, or an injury that they may risk aggravating while working for you.

Here are five ways to reduce the chances of incurring such claims to begin with:

Pre-work screenings

Pre-work screenings can weed out applicants who physically cannot perform a job. You can subject them to a test to gauge their ability to perform specific physical demands of the job for which they are applying.

Screenings should especially be used for high-risk jobs, those which cost your business the most in workers' comp costs. There are two types of pre-employment screenings:

- **Pre-offer.** This screening identifies applicants who are physically able to safely complete the essential job functions of the position for which they are applying.
- **Post-offer.** This screen measures the same functions, but you can also require a medical exam. This can help you identify any disability, including if they are under doctor's orders to limit certain types of physical activity.

Drug tests/background checks

Drug tests can determine if there is a history of drug use, and, if so, indicate the types of drugs in the system.

Background checks probe the criminal and financial records of an applicant.

If an applicant shows negative incidents on a drug or background check, he or she could be a candidate for future fraudulent activity.

On-site ergonomic solutions

Utilize physical therapists or ergonomists before injuries occur to work with employees, supervisors and management to understand workflow and all job task requirements.

Those specialists can recommend optimum positions, ergonomic strategies and proper physical movements required at workstations to reduce the chances of employees sustaining musculoskeletal injuries.

Employee education

Educate employees on how to use workers' comp legitimately and how it can be used illegitimately.

Explain the damage to the employer from malingering and fraud by illustrating how claims affect the premium employers pay.

Information also should be shared about penalties and fines that could be incurred with fraudulent claims.

Educating employees regularly can reduce the chances of fraud.

Prompt injury reporting

Train employees to report any health concerns as soon as they notice any discomfort.

Injuries can develop over time in many jobs when they are executed using improper or ergonomically incorrect motions.

If an employee raises concerns about discomfort to a supervisor, it should be given serious attention.

That way the supervisor, the worker and inside or outside specialists can address the issue.

This can be done through observations and evaluations of the work pattern of the worker, and in comparison to those of others in the department.

The worker should also be sent for medical diagnosis or medical care to treat the discomfort before it becomes a bigger problem. ✓



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CONSTRUCTION RISKS

Keeping Workers Safe around Heavy Equipment

THE SAFE use of heavy equipment is critical when machinery such as bulldozers, graders or ground-moving equipment is used in the construction of new homes, bridges, shopping malls or other commercial buildings.

The size and weight of these heavy machines make them extremely hazardous, and proper operation is required to avoid serious injury or death. Heavy-equipment injuries are a frequent occurrence during the construction of roads or commercial properties in particular, due to the amount of activity taking place.

Even the most experienced of operators may find operating heavy equipment a challenge at times.

Prior to the start of a project, inspect all heavy machinery. Heavy-equipment inspection is crucial in ensuring that everything is in working condition and ready for safe operation.

But remember: a visual inspection is not enough. Physically check the equipment for issues such as torn belts, worn brakes and hoses, and leaking hydraulics. That means feeling and manipulating the various parts.

When storing machinery, ensure that the component parts are properly secured or disabled.

Also, just because equipment is in the “off” position does not necessarily mean it is safe.

Moving parts such as blades and saws have the potential to cause injury and, when storing away mobile equipment, make sure that brakes are in the locked position.

The owner’s manuals for equipment should include detailed information on how to properly secure equipment when not in use.

Construction vehicles – Weather conditions such as rain could cause a shift in the ground under a backhoe, while a strong breeze could affect the balance of a crane.

In addition, operators should never work while impaired or under the effects of medication – and worksites should be constantly monitored for unsafe operating conditions.

Safety requirements vary depending upon the type of heavy machinery. For example, regulations for operating a bulldozer will differ vastly from those for a forklift or a loader.

Some machinery also may require the use of a commercial driver’s license and an approved training course. Employees must be properly

trained on each piece of equipment that they operate.

Cal/OSHA regulations are in place to ensure safe operation. The types of requirements depend on the type of construction activities performed. For additional information, including requirements, refer to Cal/OSHA Title 8 regulations.

As the employer, you have a responsibility for the health and well-being of your employees. Ensuring that you and your employees become familiar with safe work practices with heavy equipment will keep jobsites free of injury.

Here are a few common safety rules for operators and ground-based workers to consider:

Good communication is essential – Standardized hand signals should be used by the operator and signal person. Operators should always know where all ground-based workers are located, and the wearing of high-visibility vests will help the operator to locate them.

The equipment should have a back-up warning alarm that can be heard by all nearby workers. Two-way radios are also valuable communication tools.

Rollover protective structures (ROPS) – Heavy equipment must have a ROPS that meets Cal/OSHA requirements. The ROPS is designed to protect the operator if the machine tips over. A seat belt must be worn so that the operator will not be thrown out of the seat during a rollover or upset situation.

If working on slopes, try to avoid moving across the face of the slope. Try to operate up and down the slope face if possible. Use extreme caution when operating near open excavations.

Wear hearing protection when required – If it has been determined that noise levels around the equipment could potentially cause hearing loss, always use protective plugs or muffs when working on or around the equipment.

Never jump onto or off the equipment – Operators should always use the three-point contact rule when climbing onto or off heavy equipment. The rule means having both feet and one hand, or one foot and both hands, in contact with the ladder access at all times.

Inspect and service equipment regularly – Complete equipment service in accordance with the manufacturer’s recommendations. Periodic safety inspections on all components of the equipment should be done regularly by qualified personnel. Inspect the steering system and brake systems carefully. A pre-shift walk-around inspection by the operator is highly recommended.

Injuries from contacts with heavy equipment have a higher probability of resulting in a fatality than many other types of accidents. It is critical that your workers follow all of your company’s safety rules and procedures when operating or working around heavy equipment. ✓

RISK MANAGEMENT

Compliance Can Avert ADA Lawsuits by Employees

DURING THE last eight years since the Americans with Disabilities Act Amendments Act (ADAAA) was enacted, the landscape for employers has changed dramatically.

The odds of being sued have increased significantly and the onus is now on employers to engage in an interactive process with an employee who claims to be disabled or one that you, as an employer, consider to be disabled.

The original Americans with Disabilities Act has been in effect for 25 years, but the ADAAA shifted the emphasis from whether an employee has a qualifying disability to the interactive process and the efforts employers take to explore reasonable accommodation with employees. That is where the focus remains today.

The employment law firm of Foley and Lardner LLP, in a recent blog post, recommends the following whenever an employee mentions a potential disability or the circumstances suggest a potential need for accommodation:

1. Majority of people have a 'disability'



The law firm recommends working from the position that if an employee begins talking about a mental health or physical condition affecting their ability to work, you should consider approaching the issue from the perspective that they potentially have a disability.

Better than to ignore what you're hearing.

Many recent precedent-setting lawsuits have hinged on employers starting the interactive process too late or ignoring employees' requests for accommodation.

And some courts have ruled that even if the employer "perceives" that the employee is disabled, they may have an obligation to consider accommodation.

In other words, it's better to start interacting with the employee than shutting down the process before it has a chance to start.

2. Process matters as much as the result

Under the ADAAA, the focus is on the interactive process with the end goal of identifying how the employer can reasonably accommodate the employee or job applicant so that they can do their job.

The process must be conducted in good faith and thoroughly with the legitimate goal of identifying a reasonable accommodation. Courts have increasingly viewed this process as crucial, and almost as important as the end goal.

3. Truly engage in the process

You'll need to back up your interactive process with proof that you were engaged in it.

Even when it may be clear to you that you won't be able to accommodate someone, you should still show that you tried to find a solution that would work.

Foley and Lardner recommend that you at least:

- Communicate with the employee and show that you either

reached agreement on the restrictions or obtained supporting medical documentation.

- Show that you explored with the employee and their supervisor the possible reassignment of non-essential tasks.

- Show you assessed the employee's qualifications and looked at every open job for which they qualified to assess a potential transfer.

- Show you had a final conference with the employee before concluding reasonable accommodation was not possible.

Make sure that you have a clear record of the interactive process. The more you can back up your efforts of trying to identify a reasonable accommodation, the more likely it will be that a court would view your efforts favorably and that you made good-faith steps in arriving at your conclusion.

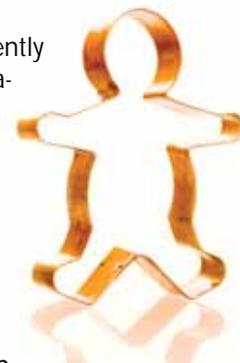
"As we counselors love to say – document everything, including the thought process leading up to all conclusions reached, and the fact that you did not reach the final conclusion until after completing all steps in the process," the law firm wrote in its blog.

4. No cookie-cutter approach

While many employers want to consistently perform the same kinds of steps from situation to situation, it is equally important to take each accommodation inquiry and each employee's unique circumstances on their own merits.

It's unlikely that multiple employees will have the same limitations and medical diagnoses, restrictions and prognoses regarding the various essential functions of the job.

Because of this, there is no single approach to accommodation, and your approach to the interactive process should allow for flexibility.



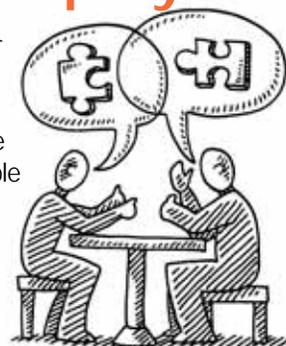
5. Don't forget the FMLA and workers' comp

Often there is some overlap between the ADA and other legal frameworks like the Family Medical Leave Act and workers' compensation insurance.

For example, if an employee cannot return at the expiration of FMLA leave for his or her own serious health condition, the employer runs a serious risk of terminating the employee without first conducting an independent ADA analysis and assessing whether additional leave or moving them into a different position conforming with their restrictions is a reasonable accommodation.

The same applies after an employee receives a permanent and stationary workers' compensation diagnosis with restrictions that preclude maintaining him or her in the same position.

State workers' compensation requirements may not require an employer to take further steps in such a circumstance, but the ADA does. ✓



WORKPLACE INJURIES

Early Reporting Can Cut Claims, Premium Costs

HOW LONG you wait to notify your workers' compensation insurer of a workplace injury can make a significant difference in the cost of that claim.

When your premium is calculated, one of the key elements that we take into account is the cost and frequency of prior claims during the past few years.

In short, by improving your organization's injury notification times, you can also positively affect the cost of the claim, which in turn can help reduce your overall workers' comp premiums going forward.

Can early reporting really affect the cost of a claim?

The graph to the right shows results from a National Council on Compensation Insurance study looking at the cost of a claim based on the delay between incidence and notification. Note that even as little as 2-3 weeks can begin to increase the cost of the claim by over 10%.

Why does early reporting work?

The sooner medical treatment begins, the better the outcome.

For a workers' comp claim, the sooner your insurer knows about an injury to one of your workers, the sooner we can start collecting information and plan for appropriate treatment options.

If medical treatment is delayed, the likelier it is that costs will mushroom both in terms of medical costs and lost time from work, which needs to be compensated.

If you notify your insurer when an injury occurs and they can arrange for the worker to begin the medical treatment, it is likely that the length or severity of their treatment program will be less.

For the injured worker, this means a shorter recovery time, better prognosis for general health and return to work outcomes, and probably a more positive attitude toward their injury and the workplace.

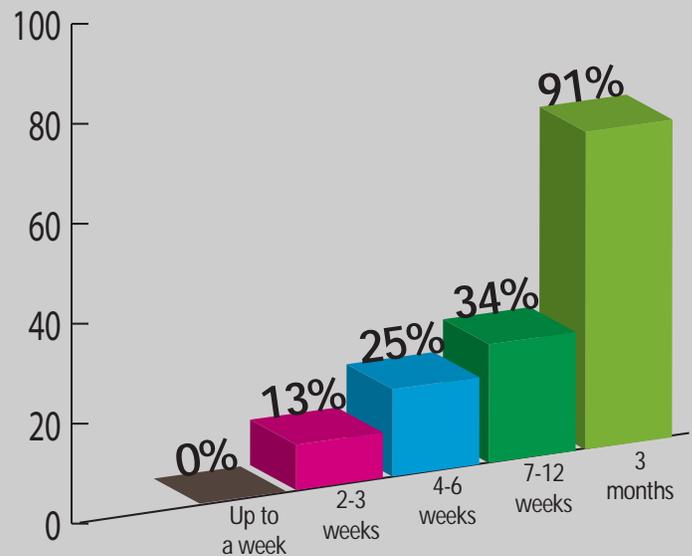
For you as the employer, this translates to less money allocated to covering wages and treatment for the injured worker, and less disruption to your workplace to cover the injured worker's duties. ✓

Claims Reporting Tips

- Develop internal procedures for reporting injuries. Ensure that your staff know the importance of reporting injuries immediately and that they are aware of your reporting procedures.
- Don't question employees' integrity when they report an injury.
- Familiarize yourself with the regulatory and legal requirements in relation to reporting workplace injuries.
- Report a claim immediately after learning about it.
- Encourage safe work practices and ensure that employees are aware of and practice proper safety techniques.
- If an injured worker still has partial capacity for work, you should try to provide interim alternate duties while they heal up. This can have a positive impact on potential disability levels, and on the premium impact of lost time.

Delayed Reporting is Expensive

Average increase in claims costs



Check Subcontractors' Insurance Policies

DID YOU know you can be held liable under your own workers' comp policy should an employee of a subcontractors be injured? Courts have on numerous occasions said you are.

Many times an injured worker may even be a third of fourth level contractor, but if none of your subcontractors are carrying workers' comp, you may see the claim hit your own policy.

This scenario is even more likely if the main contractor has substantial control over the sub's employees. courts have ruled.

Courts generally start with the sub whose employee was injured and move up the chain until they find a valid workers' comp policy.

Protect yourself by requiring your subcontractors to have a certificate of insurance. But don't stop there; you should call the insurance carrier to see if the certificate is valid.

You can check also with the State Contractors Licensing Board to see if your subcontractor has workers' comp coverage. ✓



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