

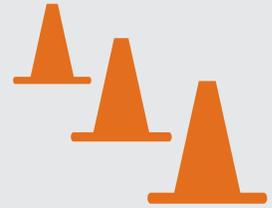
# Workers' Comp & Safety News



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Legal Update

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## This Just In

**The federal stimulus package expanded privacy rights under HIPAA, the Health Insurance Portability and Accountability Act (HIPAA). Will the changes apply to workers' compensation?**

Although HIPAA puts strict controls on disclosure of an individual's private health information (PHI), the law allows disclosures of PHI in these instances:

- "to comply with laws relating to workers' compensation or similar programs...that provide benefits for work-related injuries or illness without regard to fault."
- "if...required by state or other law..."
- "for the purpose of obtaining payment for any health care provided to an injured or ill employee."

**About 6.9 million illegal immigrants work in the United States, the Center for Immigration Studies found in a 2007 study. About 55 percent of these workers have provided their employer a Social Security card, although it may be fraudulent, the report's author told *Business Insurance magazine*. What does illegal immigration mean for your workers' compensation insurance? See the article on Page 1 for more information.**

## Illegal Workers May Have Right to Comp Benefits

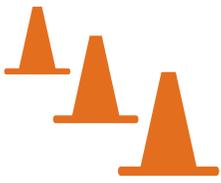
The Center for Immigration Studies estimates about five percent of workers in the U.S. are illegal immigrants. In some industries, such as food service and construction, it's much higher—18 percent for construction. If you either knowingly or inadvertently hire an illegal worker, he or she could be entitled to workers' compensation benefits if injured on the job.

Federal law expressly forbids immigrants from entering or working in the country illegally; it also prohibits employers from hiring illegal immigrants. However, state law, which regulates workers' compensation, usually requires employers to pay for medical treatment and reimburse lost wages after a worker suffers a work-related injury or illness. In most states, workers' compensation statutes make no distinction between employees who work legally and those who

are illegally working in this country.

Sometimes, an employer will discover that an employee was working in the country illegally only after an injury occurs, and discrepancies in his/her documentation come to light. What do you do in those cases?

Although the federal government has jurisdiction over immigration, regulation of workers' compensation falls to the state, so your legal obligations vary



## Medical Marijuana: Out of the Pot and Into the Fire?

As this issue went to press, legislators in Illinois, Minnesota and New Hampshire were considering legalizing the use of marijuana for medical reasons. If the laws pass, these states will join 15 others with laws decriminalizing use of marijuana for medical use. They include Alaska, California, Colorado, Hawaii, Maryland, Maine, Michigan, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont and Washington.

Employers in these states can find themselves between a rock and a legal hard place. What issues do you need to consider?

**Federal drug laws:** Federal law currently bans the use of marijuana under the U.S. Controlled Substance Act. Further, the Drug-Free Workplace Act of 1988 applies to some federal contractors and all federal grantees. If the law applies to your organization, you must agree to provide a drug-free workplace. Failure to comply can result in penalties, including suspension of payments, termination of contracts or grants and being barred from receiving future contracts

or grants from any federal agency for up to five years.

**Court decisions:** *Gonzales v. Raich*, a Supreme Court case decided in 2005, addressed one aspect of state versus federal power to control the use of drugs. California residents Angel Raich and Diana Monson brought suit against the federal Drug Enforcement Agency (DEA), which had broken up some of California's medical marijuana co-ops on the premise they violated the federal Controlled Substances Act (CSA), although the co-ops were legal under the state's Compassionate Use Act of 1996.

Raich and Monson sought an injunction, claiming that local cultivation and use of marijuana under California's Compassionate Use Act was not interstate commerce and therefore did not fall under the authority of the federal CSA. The court disagreed, and in a 6-3 decision, upheld the validity of Controlled Substances Act. As a result of *Gonzales v. Raich*, employers can refuse to accommodate medical marijuana use on the grounds that it is an illegal activity prohibited by federal law.

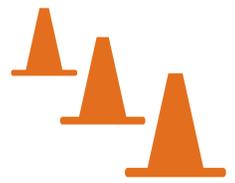
**Federal employment discrimination laws:**

However, in the states that have decriminalized medical marijuana use, you might have to deal with employment discrimination problems.

Although employers have no legal obligation to accommodate workplace use of medical marijuana, you will want to consult an employment attorney before firing or taking disciplinary action against a registered medical marijuana user. The condition for which the user takes marijuana may be a protected disability under the Americans with Disabilities Act; taking employment action could lead to a claim of discrimination under the ADA.

**State laws:** Many states have considered legislation that would clarify an employer's obligations to accommodate medical marijuana use. For example, Oregon voters legalized marijuana use for medical purposes in 1998. In the current session, legislators are considering several bills to clarify the law and help employers navigate the minefields of medical marijuana use. HB 2503 would prohibit medical marijuana use on the employer's property or during employment hours; it also would prohibit employers from discriminating against employees for possession of a medical marijuana registry card or medical use of marijuana outside the hours and premises of employment. HB 2881 would establish procedures for employment-related marijuana testing. HB 3052 would clarify that employers have no obligation to accommodate medical use of marijuana "in any workplace, regardless of where the use occurs."

For more state-specific information on drug use and workers' compensation, please contact us. ■



## Compliance

COMP BENEFITS—continued from Page 1

according to state workers' compensation law.

Here's what each state's workers' compensation law says about coverage for illegal immigrants:

Alabama	Covers "immigrants and minors...legally authorized" to work
Alaska	Law silent
Arizona	Covers "immigrants and minors...legally authorized" to work
Arkansas	Law silent
California	Expressly covers illegal immigrants
Colorado	Covers "immigrants and minors...legally authorized" to work
Connecticut	Law silent
Delaware	Law silent
Florida	Expressly covers illegal immigrants
Georgia	Law silent
Hawaii	Law silent
Idaho	Expressly excludes illegal immigrants
Illinois	Covers immigrants, but with no reference to legal status
Indiana	Law silent
Iowa	Law silent
Kansas	Law silent
Kentucky	Law silent
Louisiana	Law silent
Maine	Law silent
Maryland	Covers <i>minors</i> regardless of immigration status
Massachusetts	Law silent
Michigan	Covers immigrants, but with no reference to legal status
Minnesota	Covers immigrants, but with no reference to legal status
Mississippi	Covers <i>minors</i> regardless of immigration status
Missouri	Covers <i>minors</i> regardless of immigration status

Montana	Covers "immigrants and minors...legally authorized" to work
Nebraska	Law silent
Nevada	Expressly covers illegal immigrants
New Hampshire	Law silent
New Jersey	Law silent
New Mexico	Law silent
New York	Expressly covers illegal immigrants
North Carolina	Covers "immigrants and minors...legally authorized" to work
North Dakota	Covers immigrants, but with no reference to legal status
Ohio	Covers immigrants, but with no reference to legal status
Oklahoma	Law silent
Oregon	Covers <i>minors</i> regardless of immigration status
Pennsylvania	Law silent
Rhode Island	Law silent
South Carolina	Covers "immigrants and minors...legally authorized" to work
South Dakota	Law silent
Tennessee	Covers <i>minors</i> regardless of immigration status
Texas	Expressly covers illegal immigrants
Utah	Expressly covers illegal immigrants
Vermont	Law silent
Virginia	Covers "immigrants and minors...legally authorized" to work
Washington	Law silent
West Virginia	Covers <i>minors</i> regardless of immigration status
Wisconsin	Law silent
Wyoming	Expressly excludes illegal immigrants

(Source: Workers' Compensation and the Undocumented Worker, by Thomas R. Lee and Dennis V. Lloyd, AASCIF News, [www.aascif.org/public/Third\\_Quarter\\_2007/undocumented.htm](http://www.aascif.org/public/Third_Quarter_2007/undocumented.htm))

As a matter of public policy, the law and courts generally rule that injured illegal workers are entitled to medical and indemnity benefits. However, a workers' illegal status can make it impossible to receive other workers' compensation benefits, such as vocational rehabilitation or light-duty work. For example, in a Georgia case, *Martines v. Worley & Sons Construction*, the contractor offered an injured employee a light-duty job as a truck driver; Martines could not accept the job because he did not have a Georgia drivers license. The administrative law judge found the job unsuitable due to Martines' inability to obtain a license. However, when the employer appealed, the appeals court ruled that Martines was not entitled to another light-duty job because his inability to take the job was due to his illegal status, rather than physical condition. (Source: "Illegal Immigrants and the Georgia Workers' Compensation Act: The Employer/Insurer's Perspective," by Bernadett Rosszer, Drew, Eckl & Farnham, State Bar of Georgia Workers' Compensation Section Newsletter, Winter 2007)

Handling claims from illegal immigrants can create other administrative problems. For starters, fraudulent Social Security numbers, incorrect addresses, unwillingness to work with those they perceive as authority figures for fear of being deported and a lack of checking accounts can complicate claim payments.

Delivering appropriate medical care can present problems as well. Language barriers might make providing healthcare difficult, while transportation problems can make it difficult for patients to get to physical therapy or other follow-up appointments. Living situations can also complicate medical care. As Mary Hawkins, a nurse case worker for Intracorp in Atlanta, told *Business Insurance*, "...you can't send someone home with an infection and an open wound..." if they are living in crowded or impoverished circumstances.

Our recommendations? To avoid this situation, always verify a job applicant's documents carefully before hiring. And remember your business could be liable if a contractor or subcontractor is uninsured. Ask any business that provides workers to your worksite to provide documentation of workers' compensation and liability insurance. General contractors should also require any business they subcontract with to name the contractor as an "additional insured" on the subcontractor's workers' compensation and liability insurance policies, and require a stamped certificate of insurance as proof. If someone slips through the cracks and you face a claim from an illegal alien, consult with an experienced workers' compensation attorney. ■



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# Using Your EAP to Reduce Workers' Compensation Costs

Today, nearly two-thirds (65 percent) of employers have an employee assistance program, or EAP. Generally considered part of an employee benefits program, your EAP might also be a hidden resource to help you control workers' compensation costs. Consider the following facts:

- **Workers under stress are more likely to become ill or injured.** Counseling can help employees deal with stress.

- **Drug and alcohol abuse contribute to many work-related accidents.** By providing confidential access to drug and alcohol treatment programs, your EAP makes access to treatment programs easier.

- **An EAP can provide referrals to licensed psychologists or psychiatrists** who can examine workers' comp claimants suspected of fraud or malingering.

- **EAPs can offer behavioral health treatments to those undergoing treatment for workplace illness or injury,** possibly helping speed the return-to-work process by alleviating depression and stress related to the physical condition.

An EAP offers employees confidential short-term counseling with a counselor specially trained to identify the underlying problem. When appropriate, the EAP counselor will make referrals to specialists or other providers. Some EAPs have their own network of

specialists—such as addiction specialists, mental health specialists, family counseling specialists, legal advisors and more. Others work on a referral basis, referring employees to outside providers and programs when necessary. The employee has the responsibility of following through with any referral appointments and making financial arrangements for any services that fall outside the scope of the benefit program.

EAPs can also help employers deal with personnel problems in a sensitive manner, without violating an employee's right to privacy. For example, a supervisor who sees an employee's work suffering due to a personal problem or possible drug or alcohol abuse can refer that employee to the EAP without having to inquire on the nature of the problem.

An EAP can help you get the most out of your benefit plan. A good EAP will promote its services with communications to your employees. When an employee turns to the EAP for assistance, the EAP counselor can help your employee identify resources covered by your

benefit program. For example, an employee facing addiction might be referred to a program covered by your health benefits. An employee with mental health problems might be referred to a provider in your group health insurance plan's network. EAPs may also inform employees of their rights under government-mandated benefit programs, such as workers' compensation, the Family and Medical Leave Act, the Americans with Disabilities Act and federal and state mental health parity mandates.

The Northeast Georgia Employee Assistance Program, an EAP provider, says, "The median annual EAP cost per employee, which varied by region of the country, was \$21.83 for internal programs and \$18.09 for external programs in a select sample study." An EAP may be structured with a flat per-employee fee, or on a pay-as-you-go basis.

As employees in downsized workforces deal with increased workloads and increased demands at home, you may find an EAP is a worthwhile investment. For more information on EAPs, please call us. ■

## The Problem with EAPs

EAPs can help employees deal with a plethora of stresses—from marital crises to eldercare issues and financial problems. Although a recent survey found nearly two-thirds of employers give employees access to an EAP, usage of EAP services remains fairly low—despite the fact that most EAPs provide at least an initial counseling appointment and referrals at no charge.

If you have invested valuable benefits dollars into an EAP, here are some suggestions to help you get your money's worth:

1. Tell employees how to use their EAP. Most programs have a toll-free number employees can call to speak with a counselor who will evaluate their prob-

lem and refer them to the appropriate professional for help.

2. Tell employees that using the EAP is free. Most programs provide referral services and at least the initial counseling appointment at no cost to the employee. If the employee needs additional services, such as additional counseling or addiction treatment, a good EAP will work with the employee to use any benefits available under his/her insurance program.

3. Stress that an EAP is confidential. Studies have found that some employees hesitate to use their employer's EAP for fear that the employer will find out. Employers pay for the EAP on a per-employee basis, not on the number or type of services provided.

For more information on EAPs, please call us. ■