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Workers' Comp 101

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Second Injury Funds

More than half of all injured workers have a pre-existing condition, according to one expert. When you have an employee with a permanent impairment who suffers a second injury, you are responsible for compensating only the most recent injury. Many employers fail to realize this, leaving thousands of dollars on the table.

Most states have “second injury funds” that pay benefits to workers when an injury aggravates a pre-existing permanent health condition. According to *Rupp's Insurance and Risk Management Glossary, Second Edition*, second injury funds have the goals of fairly apportioning “liability for compensation benefits and to overcome reluctance to hire handicapped or disabled workers.” Insurance carriers and self-insured employers fund second injury funds by paying an assessment, which is usually a percentage of workers' compensation premium

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This Just In

Workers' compensation medical costs accounted for more than half of all comp costs for the first time in 2008, according to a study by the National Academy of Social Insurance (NASI).

“The growth in medical spending may reflect both higher prices for medical care and greater use of services,” said John F. Burton, Jr., chair of the panel that supervised the report, entitled “Workers Compensation: Benefits, Coverage, and Costs, 2008.” “The increase is the continuation of a long-term trend since 1980, but this is the first year that payments for medical care were more than half of all workers' compensation benefits.”

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written in the state (for insurance carriers) or total benefits paid.

Second injury funds will reimburse an employer or insurer when a worker with a pre-existing condition suffers a second injury that aggravates the pre-existing one. However, reimbursement is not automatic—an insurer or self-insured employer must apply for it.

Generally, if you have a fully insured plan, your insurer will take responsibility for applying to the second injury fund for any eligible claims. The fund will either reimburse the carrier or self-insured employer for lost-time and medical benefits paid to a claimant, or take over payments to the claimant once he or she is deemed eligible for second-injury fund payments. The state laws governing the fund will determine which method the second injury fund uses.

To be eligible for reimbursement by a second injury fund, the second injury must be more severe than it would have been if the individual did not have a pre-existing condition. And claims must meet a threshold, such as 104 weeks of indemnity payments, before the fund applies.

Second injury funds may cover claims where the pre-existing disability was not work-related. In other words, if you have an employee with a permanent partial disability, such as hearing loss, that was congenital rather than work-related, and a second injury worsened that condition, the second injury fund might cover the second injury.

What do second injury funds mean for employers?

Most second injury funds require an employer to certify it knew that the employee had a pre-existing injury at time of hire, or before the second injury occurred. Although employers might fear asking employees about pre-existing conditions due to concerns of violating the Americans with Disabilities Act (ADA), the ADA does not prohibit employers from obtaining information about a pre-existing injury, as long as the employer requires a medical examination or makes medical inquiries only after making a conditional offer of employment. The ADA also does not bar employers from sharing information on an employee's pre-existing condition with a second injury fund or state workers' compensation authorities.

Employers paid a total of \$78.9 billion nationwide for workers' compensation in 2008, a decrease of 6.7 percent from the previous year. However, medical spending went up 8.8 percent to \$29.1 billion. Cash benefits totaled \$28.6 billion, up only 0.3 percent.



On a financial level, submitting a claim to a second injury fund can help employers with experience-rated workers' compensation policies avoid a big premium increase. They can also make it more appealing to hire former military service persons, many of whom have service-related disabilities.

For more information on second injury funds, or more information on handling permanent partial disabilities in the workplace, please contact us. ■

Don't Let the Bedbug (Claim) Bite!

"Bedbugs are back in a very big way," says the National Pest Management Association (NPMA). Members' calls for bedbug infestations increased 57 percent between 2000 and 2010. You might think of bedbugs as a problem for hotels or big-city apartment dwellers. But they are infesting workplaces as well, with implications for your workers' compensation and risk management programs.

A 2010 survey by the NPMA and the University of Kentucky found that nearly one in five U.S. extermination firms reported finding a bedbug infestation in an office building—up from fewer than 1 percent in 2007.

From a compliance standpoint, bedbugs give employers little cause to worry. To date, no OSHA regulations specifically mention bedbug bites or infestations. And in most cases, bedbug bites will not create an OSHA "recordable injury," since most insect bites do not cause lost work time and do not require treatment beyond simple first aid.

OSHA does require employers to provide employees with a safe and hazard-free workplace. Although bedbug bites will not cause

medical problems for most people, some individuals can experience reactions. These include swelling, severe itching, hives and other allergic reactions. Some individuals have also claimed to suffer asthma attacks due to bedbug bites. If one of your workers needs to seek medical treatment due to bedbug bites that occurred at work, he or she could have a workers' compensation claim.

Bedbug infestations can also cause strife among employees. Mark Sheperdigian, vice president of technical services at Troy, Mich.-based Rose Pest Solutions, told *USA Today* in August 2010, "Bedbug lawsuits are starting to grow like crazy...[once an infestation spreads], you have other employees saying, 'I got bedbugs because you had them in the office, and I took them home.'"

Local health and building codes require landlords and tenants to protect their premises from pests. If your work premises have a bedbug infestation—or if you have reason to suspect one—common sense and good risk management practices suggest that you hire a licensed pest control specialist as soon as possible. Although most bedbug-related liability lawsuits to date have involved landlords or hotels, one employer, Fox News, was successfully sued by an employee after the company failed to remediate the problem, despite repeated reassurances that it had.

With the increase in prevalence and attention from media and attorneys, bedbugs could present a growing problem for employers. Wise employers—particularly those in crowded urban areas—will need to be on the lookout for symptoms of bedbug infestation and take immediate steps to eradicate them.

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Dealing with a Bedbug Infestation

Adult bedbugs are ¼ to ⅜ inch (4-5mm) long, brown in color, with a flat, oval-shaped body; while young bedbugs (called nymphs) are smaller and lighter in color. They feed on human blood. Although they are not known to transmit disease, their bites can be painful, itchy and cause embarrassment.

When not feeding, bedbugs hide in a variety of places. Although they got their name from their habit of hiding in and around beds, they also hide in other places, such as in the seams of chairs and couches, between cushions, and in the folds of curtains.

Bedbugs are very successful hitchhikers, moving from an infested site to furniture, bedding, baggage, boxes and clothing. Although they typically feed on blood every five to ten days, bed bugs can be quite resilient; they are capable of surviving over a year without feeding.

To prevent infestations, remind your employees who travel for business or pleasure to take the following precautions:

- ✦ In hotel rooms, use luggage racks to hold luggage when packing or unpacking, rather than setting it on the bed or floor.
- ✦ Check the mattress and headboard before sleeping.
- ✦ Upon returning home, unpack directly into a washing machine and inspect luggage carefully.

Eliminating clutter and covering mattresses and upholstered furniture with protective coverings can reduce the number of places for bedbugs to hide.

Finally, if you see bedbugs or bedbug bites, hire a pest management professional. Many pest control chemicals can be hazardous if used improperly, particularly in an enclosed space. ■

Independent Contractor or Not, and Why It Matters



Hiring a worker as an independent contractor has many advantages for employers—these workers are responsible for their own workers' compensation, benefits and withholding. But misclassifying regular employees as independent contractors can lead to costly fines and penalties.

As the economy slowly rebounds, employers who have laid off workers may be reluctant to staff up again. Hiring someone on an independent contractor basis has many advantages for these employers. They can hire independent contractors on a per-project basis and let them go when the project is completed.

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They can often hire experienced workers who want to maintain a degree of independence. And they don't have to pay benefits or workers' compensation.

Or do they? In the late 1980s and early 1990s, many companies faced steep fines for failing to provide workers' compensation to workers who were misclassified as independent contractors, particularly in the garment and manufacturing industries. Although today most companies are more aware of the problems of misclassifying workers, problems do still arise. Misclassifying someone as an independent contractor when they really should be classified as an employee can lead to back taxes, penalties and fines, so it pays to know the difference.

Generally, the degree of control you exercise over the worker determines whether he or she is an employee or independent contractor. For example, an employer usually provides a worker's materials; an independent contractor often provides his/her own. An employer sets an employee's work hours; an independent contractor usually has the right to set his/her own schedule.

The following criteria can help you determine whether a worker is an employee or an independent contractor.

Employee

- Must obey instructions concerning when or how to perform the job.
- Company provides training.
- The job is "integrated," or central to the company's operations—the more integrated, the more likely the worker will be considered an employee.
- Services must be performed by a particular person.
- Has an ongoing relationship with the company.
- Company sets the work hours.
- Company requires full-time work at its business.
- Company controls where the work is performed.

- Company determines the order in which tasks are to be done.
- Company requires oral or written reports.
- Receives payment by hour, week or month.
- Company provides tools and materials.
- Company pays travel/business expenses.
- Company can discharge a worker for reasons other than not meeting a contract's terms.
- Can usually quit without liability for failure to complete a job.

Independent Contractor

- Responsible for the outcome of the job and can determine how it is to be done.
- May be licensed by a state board; may have invested considerable sums in training.
- Can hire assistants and is responsible for their pay.
- Advertises or otherwise makes his/her services available to the general public.
- Can set his/her own work hours.
- Can work for more than one company at the same time.
- Usually paid on a per-job or commission basis.
- May have made significant investment in tools.
- Can realize a profit or loss from a job.
- Liable for completing a job according to contract.

If you're still unsure whether a worker qualifies as an independent contractor, you can request a ruling from the state department of labor or employment. For information on classifying employees for workers' compensation purposes, please contact us. ■

Happy 100th Birthday, Workers' Compensation!

Our state-based workers' compensation system turns 100 this year. Although a federal workers' compensation law passed in 1908, the first state workers' compensation law covering private employers that survived legal challenges passed in Wisconsin in 1911. Today, every state has workers' compensation laws that guarantee medical payments to workers injured, sickened or killed on the job and replace a portion of their lost wages.

As a state-based system, no national standards exist for workers' compensation. Most states require employers to buy insurance or to self-insure; a few, such as Texas, make insurance coverage optional. In practice, however, most employers insure their workers' compensation exposures because it protects them from liability and the cost and damaging effects of lawsuits. With this no-fault system, employers can expect more predictable costs than under the law of negligence, while employees are spared lengthy and uncertain litigation.

Before the passage of workers' compensation laws, compensation for work-related injury or death was the exception rather than the rule, as employees had to sue their employers for negligence, and this could be difficult to prove. The goal of workers' compensa-

tion programs is to provide prompt, adequate benefits to injured workers while at the same time limiting employers' liabilities.

Although far from a perfect system, workers' compensation provides workers an essential safety net and plays an important role in any organization's risk management program. For help in navigating this complex system, or for a review of your company's workers' compensation claims, please contact us. ■

Financial Dimensions of Workers' Compensation

	1990	1995	2000	2005
Cash benefits paid (in billions of dollars)	21.7	25.7	25.0	29.1
Medical benefits paid (in billions of dollars)	15.1	16.6	19.9	26.2
Employer cost per \$100 in covered wages (in dollars)	2.18	1.82	1.34	1.70

Source: Sengupta et al. (2005)

Workers' Comp & Safety News



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