

Risk Monitor



Avoid Lawsuits When Laying Off Workers

With the U.S. economy in recession, companies are trying to make up for declining sales by reducing expenses. Workforce reductions, though they may improve short-run profits, may also cause long-term problems if the firm does not handle them with care. Angry former employees may look for justification for legal action. The employees who remain will take on extra work with no additional compensation, while they deal emotionally with the loss of colleagues and fear that the job cutting will eventually hit them. Consequently, companies must approach layoffs with caution.

The company must first determine whether a layoff is the best option. While it may quickly reduce costs, it may also cause the company to dismiss valuable workers. This will hurt long-term productivity, lower the morale of the survivors, and wipe out valuable institutional knowledge. There is also a risk that a layoff will unfairly affect older or minority workers, which could lead to discrimination complaints. Therefore, the company should look at alternatives such as hiring and wage freezes, adjustments to employee benefits, not replacing workers who leave or retire, and job sharing.

If the company decides that it must reduce its workforce, several careful steps are required;

- Establish a specific goal for the layoff to achieve, such as a dollar amount of savings or number of positions.
- Identify those job functions and skills that it will need to operate successfully after the layoff.
- Set a timetable so that the reduction has a clear end.
- Comply with federal and state labor laws.
- Determine which jobs are unnecessary and eliminate them.

When determining which employees to dismiss, the company may legally use criteria such as length of service with the

company, the necessity of a certain job classification, employee status (i.e., part-time or temporary), or employees' performance records. Management should review candidates for dismissal to ensure that the cutback does not disproportionately impact classes of employees protected by law. If managers can find no other compelling business reason for terminating those employees, they must seek out alternatives.

Once managers have made selections and the decision to proceed, they must inform the affected workers in a professional manner. They should be able to clearly explain the reasons for the action; workers' entitlement to benefits such as severance, health coverage, and others; and post-employment services available to the workers, such as outplacement. The workers may express emotions ranging from stunned silence to rage; the managers must be prepared to deal with their reactions in a businesslike manner. Remaining employees will have concerns about their own futures and the firm's outlook. Management should, to the extent possible, explain the reasons for the layoff, the likelihood of additional job cuts, and the business goals the firm seeks to achieve through the layoffs.

The company must take particular care when the layoff involves older employees. Severance packages usually require the employee to waive his right to press a claim under federal law. However, regulations impose procedural requirements that an employer must meet before a court will consider the waivers valid. Companies must take special care to meet those requirements.

Shrinking a company is an unpleasant prospect that no manager relishes. Employee lawsuits may well result from a workforce reduction. However, if the firm handles the action with care and sensitivity, it can make such claims less likely and will be in a better position to defend itself against claims that do arise.

Welcome to the Jackson & Jackson Insurance Agents and Brokers Newsletter!

It is with great satisfaction that we bring this newsletter to you. In this issue and in coming months, we will discuss pertinent risk management topics which may affect your organization. We sincerely hope that you will find this newsletter informative and please do not hesitate to contact us should you have any questions or needs.



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Tips on Spotting Workers' Comp Fraud

Spotting the red flags that indicate possible workers' compensation fraud by employees is the best way to prevent fraud from occurring. Knowing how to spot the red flags is a proactive way to nip a potentially costly but false workers' compensation claim before it begins.

Most instances of workers' compensation fraud occur when the claimant:

- Deliberately falsifies information about how an injury occurred, such as claiming the injury was work-related when it was not,
- Deliberately amplifies the seriousness of an injury to falsely prolong the claim, or
- Deliberately continues to collect entitlements while working on the sly for their own purposes or with another employer.

Knowing how to spot the red flags is a proactive way to nip a potentially costly but false workers' compensation claim before it begins.

Common Signs of Workers' Compensation Fraud

- Lack of witnesses – The majority of people claiming false work-related injuries usually do not have witnesses to support their claim. Vigilance is especially necessary when the employee normally works with other co-workers who should have witnessed the injury but did not.
- Contradictory accounts of how the injury occurred – This can be particularly blatant when any of the doctor's, employer's, or witnesses' reports contradict the employee's report of the incident. Another red flag should be raised when the employee is deliberately vague about how the injury occurred.
- Dissatisfied employees – Unhappy employees can be motivated to make a false workers' compensation claim, especially if a recent incident such as a reprimand, changed responsibilities, or a possible demotion has occurred.
- Time occurrence of the injury – Many false workers' compensation claims are submitted before a potential strike, project conclusion, strike, or possible layoff. Many false claims also happen to be submitted on either a Friday or a Monday.

- Inconsistent injury – The nature and extent of the injury is not consistent with their duties or type of job performed.
- Inconsistent reporting procedures – Occurs when there is an inexplicable gap between when the injury occurred and when the employee reported the injury. Be alert if crucial injury data is absent, such as no definite time reported when the injury happened or if other vital dates are absent.
- Lack of contact – The employee cannot be easily contacted by the claims rep or employer. Continuous lack of contact might be indicative the employee is working elsewhere while receiving ongoing entitlements. Another red flag should be raised when the employee immediately moves to another state or foreign destination after going on workers' compensation.
- Lack of cooperation – The employee deliberately delays or avoids medical treatment or medical diagnostics needed to clarify the medical condition of the employee's alleged injury.
- Physical signs – The employee exhibits physical signs of working such as dirt or grease on their hands or fingernails, work clothes that exhibit traces of work, or scrapes or bruises.
- Newer employee – From a statistics vantage, new employees are more likely to commit workers' compensation fraud than senior employees. The most proactive means to counter this is to carefully screen all new employees in the hiring process beforehand.

Although red flags can help minimize potential workers' compensation losses from fraud, your best strategies to counter this problems should include:

1. Implement a Zero Tolerance policy for workers' compensation fraud and be sure your employees know about it.
2. Take a hands on approach with all workers' compensation claims and become especially vigilant when red flags appear.
3. Keep in regular communication with your injured employee.
4. Have a consistent new employee screening process. Offer new employees a thorough orientation and communicate a comprehensive explanation of the workers' compensation process along with the employee's rights and responsibilities.

Fraudulent workers' compensation claims are a severe drag on the costs of any business. By being aware of how to spot potential problems and being proactive at the outset can help you reduce workers' compensation fraud in the workplace.



Is It Legal for You to Obtain Your Employee's MVR?

prevent fraud. Also, an employer may obtain information relating to the holder of a commercial driver's license. Any person may obtain another's MVR if he can show a written consent by the other party for its release.


The federal Fair Credit Reporting Act (FCRA) is more restrictive. This law governs the release of consumer reports, a term that includes driving records, credit reports, credit scores, and others. It provides that a consumer reporting agency (such as Equifax) may not release a consumer record to an employer for employment purposes unless the consumer has given written permission. Therefore, a messenger service that wants to look at prospective employee Bob's driving record before hiring him

must get Bob's written permission first. The consumer reporting agency must give Bob a Summary of Consumer Rights. If the employer takes an adverse action against Bob (doesn't hire him, declines to promote him, etc.) at least in part because of the information in his report, it must give him a Notice of Adverse Action, advising him of the information that affected the decision and the name of the reporting agency.

Some employers ask their insurance agents to obtain employees' driving records. The DPPA permits agents to order these records for insurance purposes and allows a person with a permissible use to share information with another person with a permissible use. The FCRA, however, imposes on the agent the same obligations that a consumer reporting

agency would have. In addition, some vendors forbid agents from sharing the records.

Businesses have a legitimate need for some information about how their employees drive. Employees have an equally legitimate concern about who will see their information and how it will be used. These laws attempt to balance business needs and employee privacy rights. All employers should familiarize themselves with these laws and state laws that may restrict their access to personal information.



Employers frequently require their workers to drive on company business. For some firms, driving may be the major part of employees' jobs. Other companies may need salespeople or inspectors to drive as an incidental but necessary part of their jobs. Even companies that perform most of their work in an office will need employees to drive at least occasionally to projects, conferences, or job sites. Employers who require their employees to do driving at all take the risk that their workers will become involved in automobile accidents. These incidents subject employers to medical bills, the costs of repairing or replacing damaged vehicles and property, and potential lawsuits from third parties.

Employers can get a fair picture of how employees drive by obtaining copies of their employees' motor vehicle records (MVR). Employers who decide to do obtain their employees' MVRs need to be aware of the boundaries set by federal and state laws.

Congress enacted the Driver's Privacy Protection Act (DPPA) of 1994 to restrict access to personal information that may appear on an individual's driving record. Personal information is anything that can identify a person, such as a name, photograph, Social Security number, phone number, address, or similar information. The law allows a motor vehicle bureau to release the record, including personal information, to anyone who has a permissible use. There are 14 permissible uses; three are relevant to employers. A bureau may disclose information for use in the normal course of business to verify the accuracy of personal information a person provided to the business and, if the information is inaccurate, to obtain accurate information to

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continued from page 4...Employer Liability for Employee Cell Phone Use on the Rise

Swedish National Institute for Working Life, examined the cell phone usage of 905 adults who developed malignant brain tumors. They found that people with more than 2,000 hours of total talk time had 3.7 times the risk of developing brain cancer as compared with non-users. The study also found an increase for tumors specifically on the side of the head where the cell phone was used.

While there is no way to alleviate all potential liability arising from cell phones in the workplace, companies can offer employees training on the safety issues and possible health risks associated with using cell phones. Promoting a safe workplace is a simple way to reduce the number of accidents and health risks associated with cell phones.

Employer Liability for Employee Cell Phone Use on the Rise

Employers are facing increasing liability as a direct result from their employees' cell phone use. So why is this the next legal frontier? The number of lawsuits involving employer liability for traffic accidents caused by employee cell phone usage is steadily growing, as well as lawsuits based on health problems associated with cell phone use.

The principal of vicarious liability states that an employer is responsible for the harm caused by its employees if the employees are acting within the scope of their employment at the time an accident happened. In this situation, a company can be held accountable by a third party for auto accidents caused by an employee's cell phone use if the company provided the phone or if the cell phone is an integral part of the employee's job. The company can even be held liable for incidents resulting from personal calls made by employees on company-issued cell phones, or phones inside company cars.

There is also an emerging trend establishing that an employer can be found directly negligent if it allowed employees to use cell phones for business without proper training or in spite of safety issues, and an accident results.

Another exposure resulting from employee cell phone use is the rise in the number of claims brought by employees for

health problems associated with their cell phones. Employees who consistently use cell phones as part of their job are filing workers' compensation claims and lawsuits alleging that radio frequency radiation from cell phones causes brain cancer.

The scientific evidence concerning whether or not cell phone use increases the risk of cancer is inconclusive. There are two studies that are most frequently quoted, and their results are contradictory. A study conducted at the Danish Institute of Cancer Epidemiology, whose results were released in December 2006, followed the health of over 420,000 cell phone users over the course of 21 years to determine if cell phone use causes cancer. The researchers concluded that the radio frequency energy produced by cell phones did not increase the risk of contracting brain cancer. However, a April 2006 study conducted by the



continued on page 3



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