Managing Risk

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Do Your Safety Incentives Violate OSHA Regulations?

You consider your company's safety incentive program an effective way to promote safe behavior among your employees and reduce injuries. But OSHA could see the very same program as unlawful discrimination and a violation of OSHA recordkeeping regulations and whistleblower protections. Knowing the difference between lawful and unlawful incentives can help you keep an effective prevention tool while avoiding fines and other penalties.

OSHA regards the ability to report injuries or illnesses without fear of retaliation as "crucial to protecting worker safety and health." Without that right, "Employees do not learn of and correct dangerous conditions that have resulted in injuries, and injured employees may not receive the proper medical attention or the workers' compensation benefits."

Earlier this year, OSHA released a memorandum to compliance officers and whistleblower investigative staff.

According to the memo, certain incentive pro-

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Risk Tip

The Americans with Disabilities Act (ADA) does not apply to medical marijuana use, ruled the typically liberal Ninth Circuit Court of Appeals in *James v. City of Costa Mesa.*

The case involved severely disabled medical marijuana users who alleged the cities of Costa Mesa and Lake Forest, Calif. violated Title II of the ADA by taking actions to close marijuana dispensaries within their boundaries. Title II prohibits public entities from denying public services to any "qualified individual with a disability." The district court sympathized, but denied the plaintiffs' application for preliminary injunctive relief.

The court of appeals acknowledged that California law allows medical marijuana use, but said Congress has made clear that the

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grams discourage the reporting of injuries and encourage discrimination against workers who report injuries. These include:

1. Taking disciplinary action against all employees who are injured on the job, regardless of circumstances. Reporting an injury is always a protected activity, and OSHA views discipline against an employee who reports an injury as a direct violation of whistleblower statutes.
2. Taking disciplinary action against an employee who violates an employer rule about the time or manner for reporting injuries and illnesses. OSHA recognizes that employers have a legitimate interest in establishing procedures for receiving and responding to reports of injuries. However, such procedures must be reasonable and may not unduly burden the employee's right and ability to report. For example, the rules cannot penalize workers who do not realize immediately that their injuries are serious enough to report, or even that they are injured at all.
3. Disciplining an injured employee because the injury resulted from his/her violation of a safety rule. OSHA encourages legitimate workplace safety rules to eliminate or reduce workplace hazards and prevent injuries. In some cases, however, an employer may use a work rule as a pretext for discrimination against a worker who reports an injury. OSHA will investigate these situations carefully, looking at whether the employer monitors for compliance with the work rule in the absence of injury and whether it consistently disciplines employees who violate the work rule in the absence of an injury. Enforcing a rule more stringently against injured employees than noninjured employees may suggest that the rule is a pretext for discrimination against an injured employee.
4. Creating a program that unintentionally or intentionally incentivizes employees to not report injuries. For example, an employer might enter all employees who have not been injured in the previous year in a drawing to win a prize, or a team of employees might be awarded a bonus if no one from the team is injured over some period of time. Such programs might be well-intentioned efforts to encourage workers to use safe practices. However, there are better ways to encourage safe work practices.

ADA does not apply to illegal drug use. Federal law still classifies marijuana as an illegal drug.

Generally, employers can prohibit the medical use of marijuana by on-duty employees; refusing to hire or otherwise discriminating against medical marijuana users remains a gray area unless state law specifically prohibits it. Connecticut recently joined Arizona by passing a law protecting medical marijuana users from employment discrimination.

Employment practices liability insurance can protect your organization from costly employment discrimination claims. For assistance in handling a specific situation, please contact an employment attorney.

Acceptable Safety Incentives

A safety incentive program structured to recognize and reward positive behaviors, rather than punishing negative ones, is less likely to draw the wrath of OSHA. Suggestions include:

- providing tee shirts to workers serving on safety and health committees
- offering rewards for suggesting ways to strengthen safety and health
- throwing a recognition party at the successful completion of company-wide safety and health training.

For more suggestions on structuring a safety program and complying with OSHA rules and guidelines, please contact us.

Managing the Contingent Workforce

For most companies, managing human resources will probably require more attention than any other aspect of your risk management plan. Workers' compensation, safety, compliance with wage/hour laws and avoiding discrimination—these responsibilities can keep one or more managers busy full-time. Using contingent workers can relieve your organization of some human resource functions; however, it can create other risk management exposures.

Over the past two decades, contingent work has moved into a wider array of occupations. According to the Bureau of Labor Statistics, by 2008, the types of clerical positions commonly associated with temp work, such as secretary, typist, receptionist, data-entry operator and office clerk, represented less than a quarter of overall temp help services industry employment. Today, you can hire anyone from manufacturing help to a CEO on a contingent basis.

When you hire individuals on an independent contractor basis, they act as their own employer, retaining responsibility for payment of any employment taxes, workers' compensation and insurance, including any professional liability coverage needed. They simply invoice the employer, often on a per-job rather than a per-hour basis.

When you hire temporary or leased employees, the agency acts as the employer. The agency is responsible for screening employees, paying employment taxes, providing workers' compensation and, in some instances, providing employee benefits. The agency pays the employee directly, invoicing your organization (at a marked-up rate) for hours the employee works.

Professional employer organizations, or PEOs, are similar to temporary agencies, except they handle long-term relationships that involve all or most of a company's employees. The National Association of Professional Employer Organizations (NAPEO) estimates between 2 and 3 million people are currently covered by a PEO arrangement.

Under a PEO arrangement, the company and PEO enter a contractual agreement to become co-employers and share or allocate employment responsibilities. The PEO generally handles all human resource and benefit management functions. It hires workers, controls payment of wages, provides unemployment insurance and other benefits, and handles employment taxes. The subscribing company retains some employer responsibilities, including supervision, to ensure the delivery of the company's products or services. Smaller employers in particular find advantages in PEOs and leasing.

Benefits of temporary employment or PEO arrangements include:

- Expert human resource and benefit administration. PEOs and temporary employment agencies can devote full-time, professional staff to these tasks.
- Better benefits. Larger PEOs and agencies manage thousands of employees, giving them more purchasing power than individual small employers have.
- Better safety. A PEO should have on-staff safety professionals, who conduct regular audits that could reduce injuries and costs.

Still, using contingent employees can create risk exposures, including:

1. Workers' compensation coverage gaps. Some states permit PEOs to provide workers' compensation for their clients. If yours does, ask the PEO for a

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certificate of insurance as evidence of coverage. And make sure the PEO's policy includes an "alternate employer endorsement" to cover employees injured while working for you.

Even if your PEO provides coverage, you might want to keep a minimum premium workers' compensation policy in place. A minimum premium policy will provide some protection if your PEO fails to buy coverage or stops making premium payments — just make sure your insurer agrees to cover leased employees as regular employees.

2. Lawsuits from injured workers. Even if your PEO or lease arrangement includes workers' compensation coverage, the worker can sue your company for negligence if unsafe or hazardous conditions led to the injury. Most commercial general liability policies exclude coverage for "special employees," such as leased employees or independent contractors. You can remedy this coverage gap by adding the "coverage for injury to leased workers" endorsement.
3. Gaps in umbrella liability. Some umbrella policies require you to schedule the underlying employers' liability policy, which is part of your workers' compensation policy. If you have no workers' compensation policy in place, your umbrella might not respond to an employer's liability claim. Having a minimum premium workers' compensation policy could help eliminate this coverage gap as well.
4. An organization can still be held responsible for discrimination law violations when using a temporary agency or PEO. To protect your company, consider buying employment practices liability coverage. If you already have a policy, make sure it includes leased and special employees in its definition of covered employees.
5. Employment tax liability. When you contract with a PEO, the IRS considers it the "employer of record" for employment tax purposes. However, if you maintain too much control over the employees, the IRS could consider your firm the employer and liable for withholding and Social Security. State laws on leased employees vary. Some states consider the PEO to be the employer, while others consider the PEO a co-employer.

Before entering into a PEO or leased employee arrangement, check the provider's qualifications and references. The Employer Services Assurance Corporation conducts voluntary accreditation for PEOs. See their listing of accredited PEOs at www.esacorp.org. You can also check whether a PEO's risk management staff has earned professional accreditation at www.certificationinstitute.org.

We can review your insurance program to help you manage any employment-related exposures, no matter what type of employees your organization has. For more information, please call us. ■

Email, Phone and Social Media Monitoring in the Workplace — Know Your Rights as an Employer

Do you know how much privacy your employees are entitled to? For example, if you feel employees are abusing their work privileges, is it legal to intercept emails or phone conversations to find out what they're up to and confirm your suspicions? Can you ask potential job candidates for their Facebook profile log-on information? Here are some general guidelines that can help.

Screening Job Candidates' Social Media Profiles

There has been plenty of coverage in the media recently about companies and public sector organizations asking job candidates for their Facebook passwords as part of the employment screening pro-

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cess. Many of the employers who do this are in law enforcement and are on the lookout for potential illegal activity. But businesses have also been known to use this approach to get a better handle on whom they are about to hire.

Although there is no federal law prohibiting this, the Department of Justice considers it a crime to violate social media terms of service and enter these sites illegally. Asking employees or candidates for their log-on information means you and those individuals are in direct violation of Facebook's terms of service, which state the following: "You will not solicit login information or access an account belonging to someone else" or "You will not share your password... let anyone else access your account, or do anything else that might jeopardize the security of your account." Many states are also now looking to make this practice illegal.

The bottom line: Simply asking for access to personal passwords is a clear privacy violation and is both offensive to the candidate and unethical. Employers and managers should also be careful they're not accessing profile information to determine an employee's religious, sexual or political views. If it's determined that you used this information to discriminate against an employee, you may be found in violation of equal employment opportunity and privacy rules.

Monitoring Employee Social Media Activity in the Workplace

A recent report by Gartner suggests that by 2016, up to 60 percent of employers are expected to watch workers' social media use for security breaches. Currently, no specific laws govern the monitoring of an employee's social media activity on a company's computer (employers are on the lookout for unauthorized posting of company content — videos, documents, photos, etc.). However, the U.S. National Labor Relations Act does address employee rights in regard to the use of social media and acceptable social media policy. There has also been a ruling against employers who fired workers for complaining on social media sites about their workplace conditions.

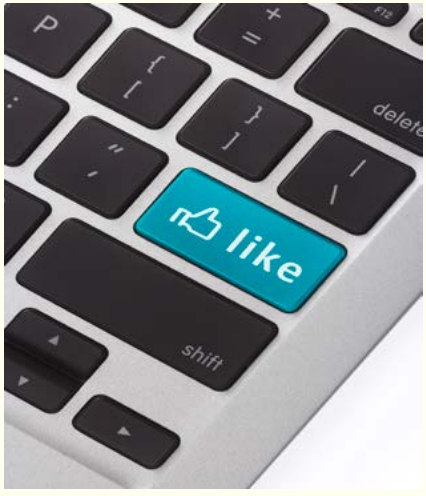
The bottom line: Provide employees with a social media policy and be sure to include information about what you consider confidential and proprietary company information that should not be shared. For more tips on social media monitoring do's and don'ts, check out this article from Small Business CEO: "Considerations for Social Media Use in the Workplace," www.smbceo.com/2012/05/24/social-media-in-the-workplace/

Intercepting Email or Phone Conversations

Increasingly sophisticated ways of storing and accessing email have made it easier than ever for employers to monitor email accounts. But is this an invasion of privacy? The law is fuzzy.

The Electronic Communications Privacy Act (ECPA) of 1986 prohibits the intentional interception of "any wire, oral or electronic communication," but it does include a business use exemption that permits email and phone call monitoring.

This exemption often comes under close scrutiny by courts, and includes several elements. Generally, if an employee is using a company-owned computer or phone system, and an employer can show a valid business reason for monitoring that employee's email or phone conversations, then the employer is well within his or her rights to do so. Likewise, if employees have consented to email or phone monitoring (in their contract of employment, for example), then you may monitor their calls or emails.



But here's the rub: the ECPA draws a line between business and personal email content you can monitor — business

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content is ok, but personal emails are private.

Tip: If in doubt, consult your legal counsel. Develop and share a monitoring policy with employees (for example, in your employee handbook). If possible, get them to agree to it. Courts often look at whether employees were informed that their calls or emails might be monitored in the workplace, whether there was a valid business justification for the monitoring, and whether the employer complied with established policy. *Source: U.S. Small Business Administration*

For more information on protecting your business from liability claims by employees, please contact us. ■

Professional Appraisal Services Can Save Money

Obtaining a professional property valuation can help insureds avoid many common property valuation errors. If your company has significant business personal property, multiple locations, any form of unique construction or sizeable total values, you may wish to consider using a professional appraisal service. When you consider the potential costs of over- or underinsurance, the price of this service could pay for itself in a short time.

A professional appraiser has the advantage of being able to use up-to-date comparative information. Different appraisers have different specialties, so make sure any firm you use has experience evaluating properties like yours.

Appraisers offer a range of services:

- **Developing accurate values by using multiple indexes, modeling approaches and other techniques**
- **Calculating depreciation accurately**
- **Identifying property excluded in the policy to avoid reporting it**
- **Providing documentation that can help prove loss in the event of a claim**
- **Providing expert testimony in case of loss.**

Some appraisers will offer periodic updating of your property valuations at a reduced charge and appraisals for property difficult to value, such as art. For information on obtaining a property valuation, please contact us. ■

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