Managing Risk

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Physician Choice: Whose Right Is it?

When an employee suffers a work-related injury, workers' compensation law obligates the employer to pay for medical treatment. Who gets to choose the treating physician—and why does it matter?

In some states, the employer gets to choose the physician and all medical providers. This is called a **full control program**. In this type of system, covered employees can seek a second opinion if they are unsatisfied with their care and provide evidence that their care is inadequate, or if the employer fails to notify employees of their rights or neglects to enforce its rights to full control.

In a partial control program, the employer selects and posts a list of medical providers. It has the right to require employees to use one of these approved providers for a period of time specified by workers' compensation laws. Medical providers must have the skills and qualifications to treat workers' injuries or refer them to specialists

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Risk Tip

"Host employer" is responsible for reporting injuries to temporary workers, says OSHA. In an October 2015 interpretation letter, OSHA clarified that the "host employer" must record injuries and illnesses of temporary workers if it supervises them on a day-to-day basis. The letter states: "OSHA's injury and illness recordkeeping regulation at 29 CFR 1904.31(a) requires employers to record the recordable injuries and illnesses of employees they supervise on a day-to-day basis, even if these workers are not carried on the employer's payroll. Section 1904.31(b)(2) further clarifies that the host employer must record the injuries and illnesses of temporary workers it supervises on a day-to-day basis."

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with the employer's approval. After the initial period of employer control, the employee may continue using those employer-selected providers or choose their own. If the employee feels his/her care is inadequate, he or she will have to submit to an independent medical exam, and the employer may suspend workers' compensation payments until the employee complies.

Some states have **medical panels**. In this type of system, the workers' compensation jurisdiction (the state) maintains a list of approved medical providers. The employer and employee work together to select the providers that offer the best possibility of recovery. This model occurs most frequently in monopolistic states, in which the state's workers' compensation organization pays all claims.

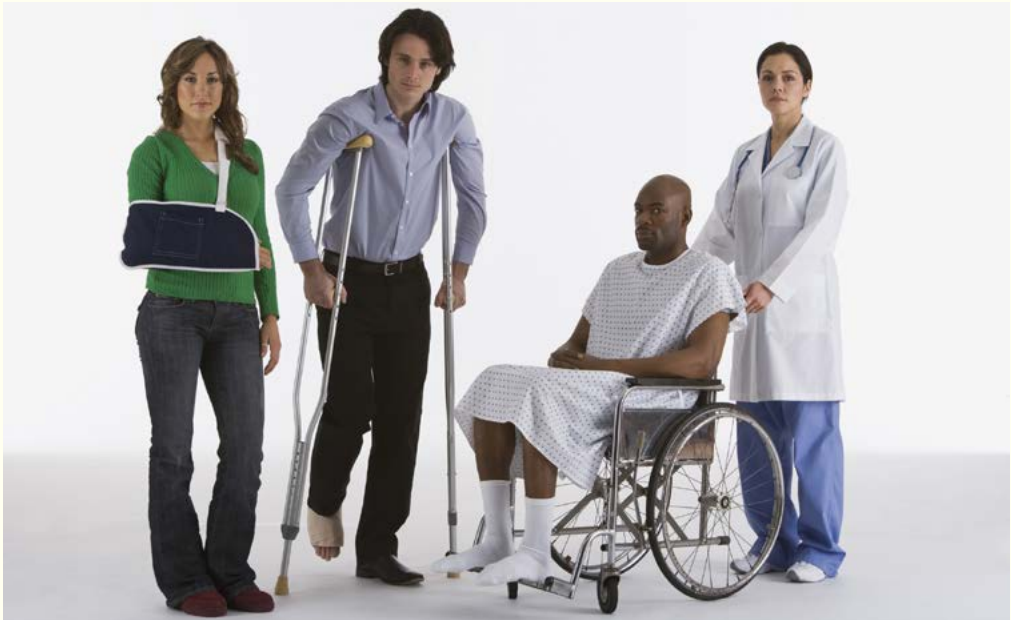
Finally, some states allow **free choice**, where employees can use whatever licensed providers they choose. Some of these states require the employee to designate a "primary treating physician" before they are injured. For example, California requires employees to provide their employer with the name of a licensed medical doctor (M.D.), doctor of osteopathic medicine (D.O.) or a medical group with an M.D. or D.O. as the doctor with overall responsibility for treating their injuries. If employees do not predesignate a doctor, the employee must select a doctor from the employer's medical provider network. If the employer does not have a medical provider network, the employee must go to a doctor selected by the employer during the first 30 days after injury.

Why Does Physician Choice Matter?

While claimants perpetrate some types of workers' compensation fraud, such as passing off non-work injuries as work-related or malingering, physicians can also be guilty of fraud. Dishonest medical clinics, or claims mills, can scam insurers out of millions of dollars by inflating injuries or giving illegal kickbacks to workers. Others might have no licensed doctors and little useful medical equipment. The use of medical provider networks helps employers by ensuring that employees will be treated by pre-screened providers. And it can help injured workers by ensuring that they will be treated by a practitioner qualified and experienced in treating workers' compensation injuries. For more information, please contact us. ■

In this instance, the temporary employment agency handled orientation, training and all personnel matters, including vacation/leave requests, reporting injury/illness, compensation and benefits, corrective action/discipline, and drug screening. It also provided onsite supervision for its employees 24 hours per day, five days per week.

Despite this, the fact that the host employer assigned daily tasks to the temporary workers made it responsible for recording injuries and illnesses. If you are unsure which recordkeeping and reporting responsibilities and other OSHA compliance rules apply to your business, please contact us for assistance.

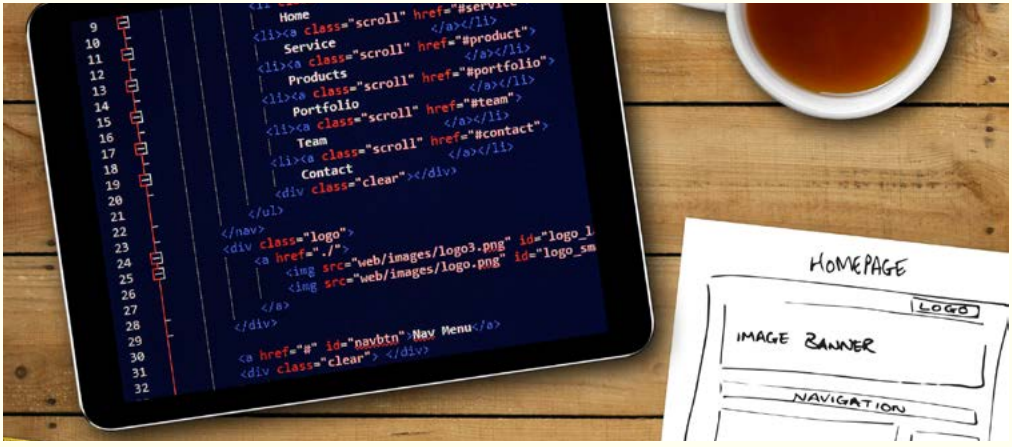


Is Your Website Discriminatory?

Poorly designed websites can create unnecessary barriers for people with disabilities, just as poorly designed buildings prevent some people from entering. And that could constitute discrimination and a violation of the Americans with Disabilities Act (ADA) and its amendments.

Most employers should know Title I of the ADA, which applies to all employers, public and private, that employ 15 or more individuals. Title I prohibits these employers from discriminating against qualified individuals with disabilities in all aspects of employment.

You might be less familiar with Title III. This section prohibits discrimination on the basis of disability in the activities of places of public accommodations, or businesses that are generally open to the public. Some attorneys and advocates for the disabled have argued—successfully—that websites are "public accommodations" that should be made accessible to individuals with disabilities.



Current State of Law

Title III of the ADA falls under the purview of the U.S. Department of Justice, which offers technical assistance on the ADA Standards for Accessible Design and other ADA provisions applying to businesses, non-profit service agencies, and state and local government programs. It also provides information on how to file ADA complaints.

In 2014, Justice announced its intent to revise the regulation implementing Title III. The proposed regulation will "address the obligations of public accommodations to make the websites they use to provide their goods and services to the public accessible to and usable by individuals with disabilities under the legal framework established by the ADA." The Justice department specifically cited these types of organizations:

- Businesses that sell goods online
- Schools at all levels that offer programs, instruction and degree programs online
- Social networks and online meeting places
- Businesses that provide entertainment (games and music) and information (news and videos) online.

Although Justice originally said it would develop its regulations by March of 2015, it has not announced regulations as of the time this newsletter went to press. However, that does not mean you shouldn't pay attention to website accessibility issues.

Penalties

In an early case on website accessibility, in 2010 tax preparer H&R Block agreed to pay $25,000 in civil penalties, plus $5,000 to the complainant. Since then, major organiza-

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tions, including Harvard and MIT, have faced claims for website accessibility.

In 2014, the maximum civil penalty for a first violation under Title III increased from $55,000 to $75,000; for a subsequent violation the new maximum is $150,000. The new maximums apply only to violations occurring on or after April 28, 2014.

Risk Management

When evaluating your organization's websites, look for the following problem areas:

1. **Problem:** Images without text equivalents. Blind people, those with low vision, and people with other disabilities that affect reading abilities often use screen readers and refreshable Braille displays, which cannot interpret images.
   Solution: Add a text equivalent to every image (alt tag).
2. **Problem:** Documents not posted in an accessible format. Some formats, such as PDFs, do not have text equivalents.
   Solution: Post a text equivalent.
3. **Problem:** Specifying colors and font sizes. Web designers often specify certain colors or fonts for aesthetic reasons. However, some people might not be able to see certain colors, and others with low vision might need to change a font to make it more readable.
   Solution: Users need to be able to manipulate color and font settings in their web browsers and operating systems in order to make pages readable. For example, designers can specify font sizes in relative terms (small, medium, large), rather than in point sizes.
4. **Problem:** Websites increasingly make use of video. However, video might not be accessible to those with vision problems or hearing problems.
   Solution: Provide an audio transcript for video for the vision-impaired, and subtitles for hearing-impaired. Or provide a text transcript that's translatable by accessibility programs.

A whole profession of evaluating and designing websites for accessibility has emerged. Take a look at your website. Might it need changes? Run it through an accessibility tester to find out. Find a list of online testers at www.w3.org/WAI/ER/tools. You could also hire an expert to evaluate your website and make the changes to make it more accessible. Or you can do nothing, and wait to be sued. Don't worry, there's an army of lawyers waiting to file Title III accessibility lawsuits against businesses.

For more information on protecting your organization from discrimination claims, please contact us.

Avoiding Winter Storm Damage

As you read this article, you might be enjoying unseasonably warm weather. But winter storms—including hurricanes, windstorms, snow and ice—are coming soon. Is your business prepared?

When it comes to causes of loss, winter storms rank third in terms of the dollar value of damage they cause, second only to hurricanes and tornadoes. According to *Forbes*, a "simple" snowstorm can cost well over a billion dollars. The billion dollar losses come from lost productivity and lost sales.

Are You Prepared?

Snow, ice, sleet: Organizations operating in areas that have freezing temperatures have specific insurance needs. The basic "named perils" property policy covers your buildings and contents from damage or loss caused by specific perils, or causes of loss, named in the policy. These include fire, lightning, explosion, windstorm or hail, smoke, and more. However, these policies do not include coverage for falling objects; weight of snow, ice or sleet; water damage or collapse.

The most common types of property damage that severe winter weather causes are roof damage or collapse due to snow, ice or sleet, and water damage from burst pipes or "ice dams." Ice dams occur when water fails to flow properly through gutters, allowing it to seep into a building, damaging ceilings and walls. The resulting water damage would not be covered by a basic "named

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perils" policy, nor would any of these other types of damage.

To remedy that property insurance gap, businesses can buy one of these types of property policies:

- a broad form property policy, which covers the basic named perils, and adds coverage for falling objects; weight of snow, ice or sleet; water damage (from certain causes) or collapse (from certain causes).
- an "all-risks" policy. This type of policy covers your business from property damage or loss due to all causes, unless specifically excluded by the policy. Typical exclusions include nuclear hazard, war and military action, earth movement, flood, wear and tear, and more.
- a business owner's policy (BOP). The standard BOP offers a package of coverages the typical small to mid-sized business needs. These include property coverage, business income coverage, general liability coverage, and coverage for autos you borrow or rent for business purposes.

High hurricane-risk areas: In certain high-risk coastal areas of Southern states (including Alabama, Florida, Louisiana, Mississippi, North Carolina, South Carolina and Texas), the standard business property policy excludes windstorm coverage. In these areas, business owners might have to obtain their windstorm coverage from a state-sponsored insurance pool, while a private insurer writes the rest of their property coverage. We can help you determine the amount of coverage you need.

Preventive Measures

Although you might have the right coverage for freezes and snow, ice or windstorm damage, that does not eliminate the obligation to maintain your property. Before winter starts, take the opportunity to evaluate your roofs. Large, flat roofs, those with heavy insulation and those in shady areas have highest risk of dangerous snow and ice build-up, as do roofs of varying levels, which can create drifts. Skylights and vents can also cause structural weaknesses and leaks. Poorly insulated areas of roofs can also cause problems by allowing heat to escape, causing snow to melt and refreeze.

Snow causes the most problems when it accumulates over time. The actual weight of the snow doesn't depend on its depth, but rather the amount of water that it contains. Water content varies because of the difference in snow crystal structure. In general, snow that falls at warmer temperatures will be denser; snow also packs down over time and becomes denser. Zurich Re, a reinsurance company, estimated that one foot of dry snow weighs about three pounds per square foot, while wet snow can weigh as much as 21 pounds per square foot. If snow accumulations occur in your area, plan now on how you will safely remove them.

Likewise, in high-wind areas, roofs, windows and doors can allow wind to enter and are your building's most vulnerable areas. Checking structures on a regular basis to ensure they are in proper repair and meet current codes can help you prevent major damage.

You will also want to ensure your business has enough business income coverage to weather a loss in income due to damage from snow, ice, windstorm or other covered cause.

For more information on preparing your business for winter's challenges, please contact us.

Study: Employers Do Not Understand OSHA's Recordkeeping Requirements

A study titled "Exploring the Relationship Between Employer Recordkeeping and Underreporting in the BLS Survey of Occupational Injuries and Illnesses" sought to gauge the accuracy of the Bureau of Labor Statistics' annual Survey of Occupational Injuries and Illnesses.

The study found that employers did indeed underreport injuries, largely because they either did not comply with or did not understand OSHA's recordkeeping requirements.

The study's authors estimated that the BLS survey underestimated injuries by 38 percent due largely to employer error. Specifically:

- 8.4 percent of employers kept no records at all. Of these, half were exempt, but the others should have kept records.
- Most of the employers that maintained OSHA records did not understand what to record. Half included all workers' compensation claims, all workplace injuries and illnesses that resulted in a medical visit, or all reported injuries regardless of severity.

To clarify what employers must report, OSHA states that, as of January 1, 2015, all employers must report:

- All work-related fatalities within 8 hours.
- All work-related inpatient hospitalizations, all amputations and all losses of an eye within 24 hours.

You can report these to OSHA by:

- Calling OSHA's free and confidential number at 1-800-321-OSHA (6742).
- Calling or visiting the nearest OSHA area office during normal business hours.

For more information on your reporting requirements and other OSHA regulations that might apply to your organization, please contact us. ■

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