Managing Risk

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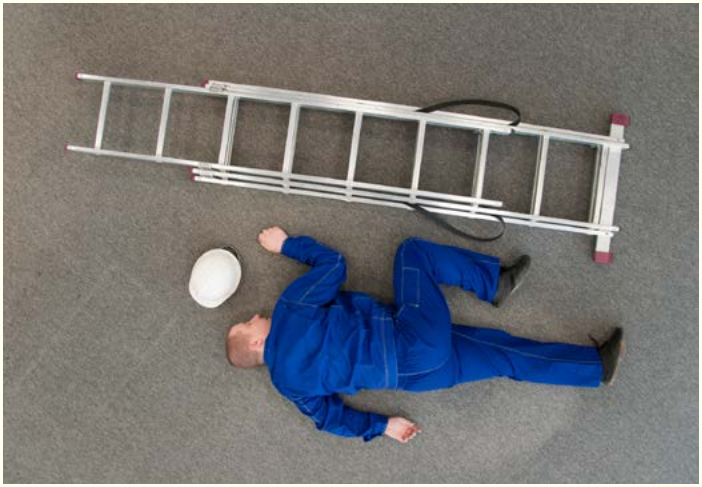
Triage: Improved Response Can Save Costs

When an injury occurs at your worksite, your first responsibility is to ensure your employee receives prompt and proper treatment based on the severity of the injury. Triage systems can help.

In some cases, your injured employee's supervisor or in-house first aider might be unable to accurately assess what level of care an injured or ill employee needs. You wouldn't want someone to think that the injury isn't serious enough to go through an emergency room wait and delay important medical treatment. On the other hand, going to the local emergency room or urgent care facility for minor medical treatment can get expensive. In addition, your employee and accompanying super-



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Risk Tip

As of late last year, fewer than 10 percent of the policies written by the National Flood Insurance Program (NFIP) covered commercial properties. Most owners of commercial properties obtain flood coverage through the private market. However, these policies typically have high deductibles.

The NFIP will cover commercial properties with limits up to $500,000 for buildings and $500,000 for contents. Residential commercial properties may obtain coverage as well, including hotels/motels, apartment buildings and assisted-living facilities.

Owners of buildings covered by an NFIP policy should understand that the NFIP's "substantial damage" rules apply. If the owner wishes to improve or repair an existing building, it must be brought

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visor can experience an incredibly long wait while other, more seriously injured or ill patients are taken first. So what other options do employers have?

Triage systems use specially trained nurses who can provide immediate assessments and treatment options, no matter what time of day or night. They can help employers obtain the appropriate level of care for injured employees and reduce costs for that care. With telephone or online triage, when an injury occurs, the patient, first responder or the patient's supervisor places a phone call that accesses a 24/7 network of triage nurses. The nurses are trained in clinical algorithms designed by physicians and nurses experienced in occupational health and emergency medicine.

The on-duty nurse gathers information related to the injury. Some systems offer translation services, if needed. Through the use of the software and professional judgment, the nurse can recommend first-line treatment for the patient and set up referrals, as needed. Some systems now use web cameras as well, so the nurse or medical provider can see the patient and provide an even more accurate diagnosis and treatment plan.

In addition to ensuring proper treatment, triage systems can help employers with their injury reporting and documentation tasks. Using information from the injured employee or supervisor, the on-call nurse can complete required forms. The system can generate an online report sent directly to the employer's safety, human resource or risk management person for workers' compensation and OSHA 300 log filing. Everyone who needs to know of the injury is in the communication loop almost immediately.

One study has shown that employers utilizing this type of triage system have reduced workers' compensation claim costs by 30 percent by reducing unnecessary trips to the emergency room and time away from work. Using this system has also reduced unnecessary and unsubstantiated claims.

Triage systems can also assist in the return-to-work process, by recommending light-duty or modified tasks appropriate for the worker's condition. And employers don't have to change insurance carriers or third-party administrators to utilize this service and technology.

Is telephone triage right for you? Only you can judge that. But as technology continues to develop, the opportunities will only increase for ensuring employees get prompt medical care coupled with a balanced cost-saving program. For more information on this and other cost-control strategies, please call us. ■

up to current floodplain management standards if the cost of improvements or repairs exceeds 50 percent of the building's market value (not including land value). For a building located in a floodplain, standards could require raising or even relocating the building.

Over the past five years (2006-2010), the average commercial flood claim has amounted to just over $85,000. Typically, there's a 30-day waiting period from date of purchase before your policy goes into effect. To ensure you have coverage in place before the spring flooding season, please contact us today.

Does Your Social Media Policy Pass the Test?

Where do employers' social media policies and procedures violate employee rights under the National Labor Relations Act (NLRA)? Test your knowledge by seeing how you'd handle these actual cases brought before the National Labor Relations Board (NLRB).

The National Labor Relations Act (NLRA) protects the rights of most private-sector employees to join together, with or without a union, in "concerted activity" to improve their wages and working conditions. Yet employers have rights to protect the reputation of their organization, protect trade secrets and protect staff members from harassment. Do these employers' social media policies violate employee rights under the NLRA?

1 An employee of a nonprofit was preparing for a meeting with the executive director regarding a co-worker's complaint that the employee in question and her co-workers didn't help the employer's clients enough. The employee asked fellow workers for their opinions on Facebook. The employer fired this employee and four co-workers who responded. The employer had reason, since the discussions had occurred in a "public" forum: true or false?

False. The NLRA protects employees engaged in "protected concerted activity" when they discuss terms and conditions of employment with fellow employees, even if that discussion takes place on a public forum such as Facebook. In this instance, the employee was asking fellow employees for their input—which the NLRB interpreted as "concerted activity."

2 An employee under investigation for a customer complaint posted negative remarks about her supervisor, including calling her a "scumbag" on her personal Facebook page. The employer terminated the employee because the Facebook postings violated its policy prohibiting employees from making disparaging remarks on the Internet and social media. The employer had the right to fire this employee: true or false?

False. The NLRB states, "It is well established that the protest of supervisory actions is protected conduct under Section 7." Regarding the name-calling, the NLRB states, "…the name-calling was not accompanied by verbal or physical threats, and the Board has found more egregious name-calling protected."

3 An employer, a nonprofit facility for homeless people, discharged an employee for inappropriate Facebook

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posts to friends that referred to the employer's mentally disabled clients. The firing was a violation of the employee's rights under the NLRA: true or false?

False. The employee's remarks were not directed at fellow employees, and they were not related to the conditions of employment but simply comments on what was happening during her shift. Therefore, the NLRB concluded that the employee was not engaged in protected concerted activity.

4 A company includes an interviews policy in its employee handbook, which states that the public affairs office is responsible for all official external communications. The policy also states employees must maintain confidentiality about sensitive information and directs employees to respond to all media questions by referring them to the public affairs office. The employer has the right to control communications in this way: true or false?

True. An employer has a legitimate business interest in limiting who can make official statements for the company. Its rules cannot be so broadly worded that employees would reasonably think that they were prohibited from exercising their right under the NLRA's Section 7 to speak with reporters about working conditions. However, a media policy that simply seeks to ensure a consistent, controlled company message cannot be reasonably interpreted to restrict Section 7 communications.

5 A retail store operator took disciplinary action against a customer service employee who called his assistant manager an insulting name on Facebook and complained about being chewed out for mispriced or misplaced merchandise. The employer's actions in this case were allowed by the NLRB: true or false?

True. Although co-workers made "hang in there" type remarks to the Facebook posting, the NLRB found insufficient evidence that the employee engaged in concerted activity. When an employee engages in "individual gripes" against the employer, that speech is not "concerted activity" and not protected by the NLRA.

6 A hospital issued a rule prohibiting employees from social media use that may violate, compromise or disregard the rights and reasonable expectations of privacy or confidentiality of any person or entity. Another rule prohibited communications or posts that constitute embarrassment, harassment or defamation of the hospital or of any employee, officer, board member, representative or staff member. An employee complained about a colleague's pattern of calling in sick or absent on her own Facebook page, and asked anyone with other details to contact her. The hospital was justified in terminating her, since she violated the hospital's policy against damaging the reputation of another staff member: true or false?

False. The NLRB determined the employer's social media policies were overly broad. The rules provided no definition or guidance as to what the employer considered private or confidential, yet the employer relied on it in terminating the employee. Employees could reasonably construe the rules to prohibit protected conduct, as information on salary and working conditions could be considered protected information.

These cases underscore two main points regarding the NLRB and social media:

- Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees.
- An employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees.

For assistance in drafting a social media policy, please consult an employment attorney. We can ensure your firm has the coverage to protect itself from social media and employment liability claims—please contact us for more information.

When Rights and Safety Collide

Most employers strive to accommodate employees with disabilities. However, when safety becomes an issue, employers can be confused about which regulations apply and what actions to take.

Applicable Laws

The Americans with Disabilities Act (ADA) of 1970 and the ADA Amendments Act of 2008 prohibit discrimination against qualified people with disabilities in businesses with 15 or more people. The ADA defines a disabled person as one who has a physical or mental impairment that substantially limits one or more major life activities. The ADA also covers people who have the appearance of being impaired.

The U.S. Equal Employment Opportunity Commission, which enforces the ADA, defines a qualified person as someone who can perform the essential functions of a given job — with or without accommodation.

"Reasonable accommodation" can include:

- ✔ Making existing facilities readily accessible and usable for the disabled person
- ✔ Restructuring the job, modifying the work schedule or assigning to another job
- ✔ Buying or modifying equipment
- ✔ Adjusting exams or training materials
- ✔ Providing qualified readers or interpreters.

However, the federal Occupational Safety and Health (OSH) Act obligates the employer to provide a safe workplace by furnishing "…each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." If an employee's disability could cause harm to himself or another in the workplace, employers need to assess whether he or she can safely perform a job with reasonable accommodation.

Some specific situations employers could encounter include:

Chronic Conditions: The ADA protects people with chronic physical conditions that limit their life activities. For example, Steve drives a delivery truck. When his supervisor sees him sleeping between deliveries, Steve discloses that he has sleep apnea, an ADA-protected impairment that causes people to fall asleep without warning. His employer becomes concerned that Steve poses a safety threat because he may fall asleep at the wheel. The company requests medical tests. If tests reveal Steve's condition could threaten safety, the company needs to explore whether it can reasonably accommodate Steve's needs while maintaining safety standards. Perhaps Steve can be reassigned to a desk job.

Communicable Diseases: The ADA defines AIDS and HIV infection as disabilities, and employees with those conditions require accommodation. People who are perceived to have AIDS or HIV are also protected. When Mary, suffering liver damage from hepatitis A, applies for work at a computer company, she is not required to disclose her disability. However, if she wants reasonable accommodation in her work schedule in order to get treatment, she will need to disclose her condition so her employer can

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accommodate her.

If Mary were to apply for a job at a restaurant, her disability would disqualify her, based on Food & Drug Administration regulations regarding communicable diseases. It is unlikely that the restaurant could offer reasonable accommodation.

Mental Disorders: Mental disorders can also be protected disabilities. Employers need to recognize that many mental illnesses do not cause safety issues.

If an employee seems to be acting unsafely, your first step is to define the essential job functions so you can evaluate the employee's actions within that context. If the employee cannot perform these functions safely, the employer will need to talk to the worker in a legally compliant manner to evaluate whether the employee suffers from a disability covered by the ADA. If he/she does, the employer will need to determine whether it can provide "reasonable" accommodations.

If an employee with a mental illness is angry or aggressive, you may need to turn to a psychologist who specializes in assessing employees for safety risks. The ADA provides protection to employees with mental disorders, but does not require a business to retain an employee who demonstrates a credible threat of violence. In that situation, it would be prudent to also consult with an employment law attorney before terminating someone who has a known mental disability and demonstrates disruptive behavior. For more information on accommodating disabled employees, please contact us.

Workers' Compensation and Immigration

The U.S. Office of Immigration Statistics estimated the "unauthorized population" at 10.8 million in 2010. Many of these immigrants are working in high-risk occupations—are they entitled to workers' compensation if injured on the job?

Although federal law, the Immigration Reform and Control Act of 1986, controls immigrants' right to enter and work in the country, laws of the state of employment, which govern workers' compensation, determine whether they can receive benefits for work-related illness or injury.

According to the Nolo Legal Encyclopedia (www.nolo.com), "Some states — including Arizona, California, Florida, Montana, Nevada, New York, Texas, and Utah — expressly cover undocumented workers in their workers' compensation statutes." These states protect undocumented workers for reasons both humanitarian and practical.

Excluding undocumented workers from workers' compensation and other employment laws could encourage employers to hire illegal workers to reduce employment costs. For example, the California Department of Industrial Relations, which enforces workplace health and safety laws, specifically mentions illegal workers. "All California workers — whether or not they are legally authorized to work in the United States — are protected by state laws regulating wages and working conditions." Other states, such as Idaho and Wyoming, expressly exclude illegal workers from workers' compensation benefits. Idaho's statute reads, "Benefits shall not be payable on the basis of services performed by an alien unless the alien was lawfully admitted for permanent residence at the time such services were performed…"

In states where the law does not mention an employee's immigration status, some courts have decided in favor of awarding benefits. In Pennsylvania, the Commonwealth Court ruled in *Reinforced Earth Co. v. WCAB* that immigration status did not preclude a worker from receiving benefits.

Undocumented workers can create claims-handling challenges. Lack of a valid Social Security number, lack of a checking account and fear of dealing with authority figures can complicate claims payments.

A worker's legal status can also make it impossible to receive other workers' compensation benefits, such as vocational rehabilitation or light-duty work. To avoid this situation, always verify an 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.

For more information please contact us.