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BOLDS RISK & INSURANCE SERVICES

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WORKPLACE SAFETY

Preventing Heat Illness as Temperatures Soar

WITH SUMMER here, employers with outdoor workers need to take steps to protect them from heat illness.

Cal/OSHA has workplace safety regulations governing the prevention of heat illness. Progression to serious illness can be rapid. If left untreated, very high body temperatures might damage the brain and other vital organs – and ultimately cause a person's death.

Workers with existing health problems or medical conditions – such as diabetes – that reduce tolerance to heat, need to be extra vigilant. Some high blood pressure and anti-inflammatory medications can also increase a person's risk for heat illness.

To ensure you are in compliance with California workplace safety regulations, you need to ensure the following:

Access to water

Staying hydrated is probably the single-most important step in heat-illness prevention. Water must be "fresh, pure, suitably cool" and located as close as practicable to where employees are working (and enough to provide at least one quart per employee per hour for the entire shift).

Employers should encourage workers to stay hydrated and drink water.

Access to shade

When temperatures reach 80 degrees, you must have and maintain one or more areas of shade at all times, when employees are present. Locate the shade as close as practical to the area where employees are working and provide enough to accommodate the number of employees on meal, recovery or rest periods.

Even if temperatures are less than 80 degrees, you must permit access to shade for workers to rest.

Preventative cool-downs

If an employee starts feeling unwell, they must be allowed to take a "preventative cool-down rest," during which they must be monitored for symptoms of heat illness.

They should be encouraged to remain in the shade and not ordered back to work until symptoms are gone. Employees with heat illness symptoms must be provided appropriate first aid or emergency response.

High-heat procedures

High-heat procedures (which are triggered at 95 degrees) must include:

1. "Effective" observation and monitoring of employees, including a mandatory buddy system.
2. Regular communication with employees working by themselves.
3. Designating one or more employees to call for emergency services, if needed.
4. Giving more frequent reminders to drink plenty of water.
5. Holding pre-shift meetings on prevention.
6. During high heat, agricultural employees must be provided with a minimum 10-minute cool-down period every two hours.

See 'Supervisors' on page 2

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WORKERS' COMP

Commissioner Approves 10.3% Benchmark Rate Cut

THANKS TO the reforms enacted in 2014, California Insurance Commissioner Dave Jones has ordered a 10.3% average mid-year decrease to the state's benchmark workers' comp rates.

The new benchmark rate, which insurers use as a guidepost to price their policies, will take effect on July 1.

The benchmark is essentially the base rates that cover expected costs of claims and claims-adjusting expenses across all worker class codes.

Insurers can price their policies as they wish, so there is no guarantee that any particular employers will see rate cuts. When pricing your policy, your insurer will take into account your claims history, your industry and your geographic location, among other factors.

Why are rates falling?

The benchmark rate is falling due to the effects of SB 863, which took effect in 2014. The Workers' Compensation Insurance Rating Bureau said in its rate filing that besides increasing permanent and temporary disability payments to injured workers, the law has reduced claims costs by:

- Significantly reducing the number of spinal surgeries.
- Reducing bureaucratic tie-ups, leading to increases in claim settlement rates. At the 48-month mark, 77.1% of claims had been settled in 2017, up from 71.1% in 2011. The Rating Bureau says the law has accelerated the rate in which claims have settled as a result of quicker medical-treatment resolution through the use of independent medical review, reduction in the volume of liens and the drop in spinal surgeries. The higher claims settlement rates have also decreased the cost of adjusting claims.
- Setting requirements for lien filings and simplifying the lien system. Before new rules on liens took effect, in 2016 the Workers' Compensation Appeals Board was receiving 25,500 liens a month. After the rules took effect, lien filings had fallen 40% to a monthly average of 15,500 as of March 2017.

Also, a new Medical Treatment Utilization Schedule drug formulary, which took effect Jan. 1, 2018, is expected to reduce costs as well.

The black marks

The one area of concern is cumulative injury claims, which continue to grow in numbers mostly in the Los Angeles area and San Diego. The ratio of cumulative injury claims in the LA area had grown to 15.5 claims per 100 indemnity claims in 2016, up from 8.7 in 2011.

In San Diego, they accounted for 11.2 claims per 100 indemnity claims in 2016, up from 6.6 claims in 2011.

In addition, the average cost of medical treatment is also on the way up, but at a relatively low rate of 3% a year. ❖

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Both Employees and Supervisors Must Be Trained

Employee and supervisory training

Employees should be trained in the following:

- The company's heat illness prevention procedures.
- Their rights to take regular water and rest breaks.
- Importance of frequent consumption of small quantities of water.
- Signs and symptoms.
- Appropriate first aid or emergency response.
- Importance and methods of acclimatization.
- Reporting signs or symptoms of heat illness to a supervisor.
- Procedures for responding to possible heat illness.
- Emergency services contact procedures and first aid.

Supervisors must be trained on the following:

- The heat standard requirements.
- The procedures they must follow to implement the requirements.
- Procedures to follow when a worker exhibits or reports symptoms consistent with possible heat illness, including emergency response procedures and first aid.
- How to monitor weather reports and how to respond to hot-weather advisories.

HUMAN RESOURCES

Court Creates New Independent Contractor Test

THE CALIFORNIA Supreme Court has handed down a decision that rewrites the state's independent contractor law by adopting a more stringent test for determining whether or not someone is an employee for wage order cases.

The new law will affect any California business that uses independent contractors and it makes it more difficult to classify someone as an independent contractor.

In its decision in *Dynamex Operations West, Inc. vs. Superior Court*, the court rejected a test that's been used for more than a decade in favor of a more rigid three-factor approach, often called the "ABC" test.

The big change

The prong that changes the most is the B prong under the ruling (see box on right). Prior to this decision, a hiring entity could show that a worker is an independent contractor by either demonstrating that they work outside the course of the company's usual business or outside all of the places of business of the hiring company.

The decision essentially deletes the second clause about outside all of the places of business of the hiring company.

In other words, the only way to be an independent contractor is if the work falls outside the scope of the usual course of business of the hiring entity. So, if you have employees doing the same work as an independent contractor, there could be a problem.

While this shouldn't interfere with your business if you hire a contractor to come in and work on building repairs, companies that have been using the independent contractor model to conduct their business may run into problems.

It should be noted that this case only concerns wage orders issued by the Industrial Welfare Commission, and does not apply to other wage and hour laws.

That means for other cases not concerning wage orders, an earlier decision known as the "Borello" decision still stands in terms of the independent contractor test.

In Borello, the Supreme Court held that the "right to control" the means and manner in which work is performed is the most key factor when evaluating a classification analysis. Other factors include:

- Ownership of equipment
- Opportunity for profit and loss, and
- The belief of the parties.

This test is more flexible because it balances the different factors to arrive at a classification based on individual circumstances of each case.

Prior to Dynamex, many referred to the multi-factor Borello test as the traditional "common law" classification analysis.

The takeaway

The court has abandoned the existing test for deciding a worker's employee status, which included factors like whether a person could be fired without cause and amount of supervision.

Now, workers are considered employees if their job is considered to be the "usual course" of the business operations. ❖

THE NEW 'ABC' TEST

Under this new test, a person would be considered an independent contractor only if the hiring entity can prove:

A. That the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

B. That the worker performs work that is outside the usual course of the hiring entity's business; AND

C. That the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed (in other words, that the worker is in business for themselves).

LIABILITY ISSUES

When a Customer Harasses One of Your Employees

SOCIETY HAS become increasingly aware of the problem of sexual harassment in the workplace. Several high-profile offenders have seen their careers harmed or ended.

Employers are beginning to realize the harm this behavior among employees can cause. However, the problem might not be the business's workers; in many cases, it is the customers.

Harassment by customers may occur in any business, but it is especially prevalent in the hospitality sector. That's especially true if customers have been drinking and behave inappropriately toward waitresses, bartenders, casino dealers or housekeeping staff.

Sales representatives may be subjected to unwanted attention and language, particularly during client dinners where most of the diners are men. And nurses are regularly subjected to patients exposing themselves or touching them improperly.

Employers who do learn of these problems have at least a legal responsibility to address them.

Some employers, such as restaurants, have a no-questions-asked procedure whereby a server can report to a supervisor that a customer is making them feel uncomfortable and the supervisor will immediately assign someone else to that table. This policy tells employees their complaints will be taken seriously.

If an employee complains...

- Listen to them and take them seriously.
- Thank them for coming forward.
- Let them know that the issue will be addressed with the customer.
- Ask them to report any further incidents that may occur.
- Do nothing to imply that they will be retaliated against.

What to do next

- Investigate the incident, including discussions with any witnesses.
- If the customer is from another business, refer the matter to an appropriate person at that company. This should be someone with the authority to take any necessary action.
- If the customer is an individual, separate the employee and the customer.
- If the customer persists, issue a warning.
- As a last resort, ask the customer to leave the premises.

The legal implications

Employers cannot afford to ignore these problems. Equal Employment Opportunity Commission regulations hold an employer liable for harassment by non-employees over whom it has control, such as customers on the premises, if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action.

The EEOC levies penalties of up to six figures for sexual harassment.

In addition, victimized employees may sue their employers for tolerating hostile work environments. Settling these lawsuits can be costly.

If the employers do not carry employment practices liability insurance, settlement costs and attorney and court fees will be paid for out of pocket.

Lastly, the failure to protect employees from harassment can lower workplace morale. This will inevitably lead to increased staff turnover. The employer will lose valuable employees and be faced with the cost of hiring replacements.

Federal law gives employees the right to feel safe at work, free from mistreatment by co-workers, supervisors and non-employees. It is also good business practice to provide a place where people want to work.

Employers must be vigilant about possible mistreatment of staff by customers and vendors. Tolerating this behavior may save a customer in the short run, but it will cost the business dearly in the longer term.

A final thought: Sexual harassment is not the sole preserve of men harassing women. It is also an issue of women harassing men, men harassing men, or one female harassing another. ❖