



BRADY, CONNOLLY & MASUDA, P.C.
ATTORNEYS AT LAW CHICAGO • BLOOMINGTON/NORMAL

Defending Work Injuries . . . Before They Happen!

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Workers' Compensation: A No-Fault Liability System

- Per OSHA, each year:
 - 4500 work-related deaths
 - 4.1 million work-related injuries
 - \$58 billion paid in WC benefits
 - \$74 billion total cost to employers



Workers' Compensation: A No-Fault Liability System

- Q: What can we do to decrease the chance of exposure?
- A: Prevention and mitigation



Preparing before the Injury

- Adopting Pre-employment Screening Policies
- Promoting Employee Safety & Wellness Programs
- Planning an Internal Documentation System



After the Injury

- Aggressive post-accident investigation
- Picking an Effective Accident Defense Team
- Preventing recurrence through remedial responsiveness



Pre-employment Screening Policies:

ADA Considerations

Pre-offer inquiries

- Employer may not inquire about any disability or the nature or severity of any disability
- Test for illegal use of drugs are not medical exams subject to ADA restrictions
- Physical fitness testing is permissible

Post-offer inquiries

- Employer may condition job offer on satisfactory result of post-offer medical exam or inquiry
- Exam or inquiry must be equally administered to all employees in same job category
- All medical information must be kept confidential and separate from the personnel file of the employee



Pre-employment Screening Policies:

ADA Considerations

Acceptable Pre-offer inquiry examples:

- Can you perform this job?
- Can you demonstrate how you would perform this job?
- Do you need reasonable accommodation for hiring process?
- Can you meet our attendance policy?
- Do you currently use illegal drugs?

Unacceptable Pre-offer inquiry examples:

- Do you need reasonable accommodation to perform the job?
- Do you have any prior WC claims?
- Inquiries through third parties: prior WC claims search



Pre-employment screening

- Employers must also consider state law requirements:
- Illinois Human Rights Act:
 - Before a job offer is made, an employer may ask if an applicant has any physical or mental impairments which would affect the applicant's ability to perform the essential job functions. An employer may ask this type of question only if all job applicants are questioned in the same manner.
 - This is a narrow rule and must be carefully used, if at all.



Pre-employment screening

Medical Exam vs. Agility Test?

- WHO released evidence-based study in 2009*:
- Goal of pre-employment medical exam: to ensure prospective employees can perform their jobs safely without placing co-workers at risk.
- Contrary data:
 - Exams often exceed scope of employment duties
 - Only 1.7% of exams resulted in “significant” diagnoses
 - Insufficient evidence that drug screening results are predictive of work performance
- Consensus: Focused fitness testing is more suitable to determine if work can be done safely.
- * Bulletin of the World Health Organization 2009;87:529-534.



Pre-employment screening

- Physical agility testing is not “medical” and can be done in the pre-offer stage
- If used as a basis for the hiring decision, the agility testing must relate directly to the job duties involved in the position
- No disability inquiry can be made during agility testing



Post-offer screening:

Medical Examination or Questionnaire

- Can ask about prior injuries, including WC
- Can require examination of unrelated conditions
- Can ask if reasonable accommodation is needed, and require medical information to support accommodation request



Screening:

- Whether pre-offer or post-offer screening is used, the best practices for handling results are:
- Advise the prospective employee that the screening was failed
- The employer does not have to disclose the specific reason for not hiring/rescinding the offer
- However, if the employee was screened out because of a disability, the employer must show the exclusionary criterion is: job-related **and** consistent with business necessity.



Employee Wellness & Safety Programs

- Wellness=Healthy employees
- Safety Culture: planning and carrying out work in the safest possible way
- Results:
- Incur lower healthcare costs
- Sustain fewer workplace injuries
- A win/win for employers!



Wellness Programs

- Loeppke, et al. (2009) studied 50,000 workers:
 - Loss of productivity costs 6.1 times more than medical and pharmacy costs combined
- Dow Chemical study (2002) calculated the average annual costs to employer per employee due to:
 - Absenteeism due to illness: \$661
 - Direct health care: \$2278
 - “Presenteeism” (loss of productivity due to working while ill or under stress): **\$6,721**



Wellness Programs

- Per the Harvard Business Review (2010), the efficacy of a wellness program depends on six pillars:
 - Multi-level leadership
 - Alignment with company's identity and aspirations
 - Scope, relevance, and quality
 - Accessibility
 - Partnerships
 - Communication
- Kaiser Family Foundation survey (2014) showed 55% of wellness programs are provided by group health plans



Wellness Programs: Legal issues

- **ERISA:**
 - Prohibits discrimination by group health plans based on health status
 - Exceptions for wellness programs to offer discounts based health status
- **ADA:** prohibits employment discrimination based on disability (allows "reasonably designed program")
- **GINA** (Genetic Information Nondiscrimination Act): prohibits employment discrimination based on genetic information, including family members' health status or family history (e.g., spouse participation)



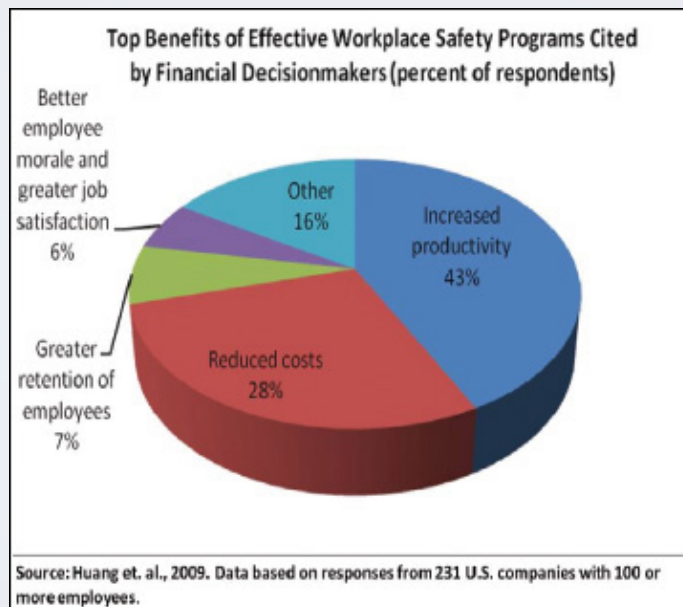
Wellness Programs

Various studies show positive impact of wellness programs in several ways:

- Reduced healthcare costs for the employer
- Reduced absenteeism and presenteeism
- Reduced number of injuries
- Reduced duration of disability and severity of injuries
- Increased trust between employees and the employer
- Increased employee pride and commitment



Wellness Programs



Safety Programs: Injury and Illness Prevention

- Finding hazards and fixing them before injuries occur
- Basic common elements of successful plans (OSHA White Paper, 2012):
 - Management leadership
 - Worker participation
 - Hazard identification and assessment
 - Hazard prevention and control
 - Education and training
 - Program evaluation and improvement



Safety Programs: Injury and Illness Prevention

- Effective for small employers, as well
- Mandatory in 15 states
- Voluntary standards published by ANSI/AIHA and OHSAS



Planning an Internal Documentation System



Planning an Internal Documentation System

After an employee is hired

- Photo/Address of the employee
- Background Checks
- Post-Hire Drug Screening
- Post-Hire Physical Examination
- Concurrent Employment?
- Communicate the Company Accident Reporting Policy
- Hold Safety Meetings
 - Signature or Fill-in Sheets for attendance
- Job Description/Video



Planning an Internal Documentation System

During the course of the employment

- Earnings/payroll records
 - 52 weeks with last pay period prior to accident date
 - Itemize any overtime hours and rates, bonuses
 - Specify whether overtime was mandatory or voluntary
- Union Contract



Planning an Internal Documentation System

During the course of the employment

- Attendance Records
 - Prior and Post accident records
 - Include reasons for missed days
- Time Cards, Daily Job Logs



Planning an Internal Documentation System

During the course of the employment

- Personnel/Employment Records
- Disciplinary Records
- Termination/Resignation Documentation
- FMLA Documentation
- STD/LTD Documentation



Designing Aggressive Post-Incident Investigations



amazon

The Amazon logo consists of the word "amazon" in a dark blue, lowercase, sans-serif font. Below the text is a curved orange arrow that starts under the 'a' and points towards the 'n'.

BCM

FedEx®

The FedEx logo features the word "FedEx" in a bold, sans-serif font. The "Fed" is purple and the "Ex" is orange. A registered trademark symbol (®) is located to the right of the "x".

BCM



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FACEBOOK'S LOGO MAKES SO MUCH
SENSE NOW



wittyfeed

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Investigate the Facts

- Written Statement of Injured Worker
 - Get specific – time, place, mechanism, witnesses, body part involved
- Witness Statements
 - Identify any direct supervisors or co-workers
- Internal Accident Report
 - Who was given notice/when? Witnesses? Text/Email?
- Accurate Documentation of Third Party Involvement
 - Police reports (auto, assault, etc.)
 - Manufacturer information (product liability)
 - Property owner/maintainer (premises liability)
- Investigation of Scene (take pictures, measurements)
- Job Description/Video (repetitive trauma)
- Time Cards/Job Logs
- Hobbies/Interests of the Injured Worker



Investigate Ability to Work

- Does the injured worker have activity limitations?
- Does the employer provide light duty work?
- Does petitioner regularly engage in any personal activity that would violate the work restrictions?
- Is transitional work an option?



Investigate Alternate Methods of Payment

- Medicare/Medicaid
- Group Health Benefits
- Social Security Disability Benefits
- Short Term and Long Term Disability Benefits
- Earnings/payroll records and attendance records



Beware of Spoliation

- Preserve evidence: Any tools, machines, vehicles or objects involved in an accident
- Document the chain of custody



Remedial Responsiveness

- Learn from experience
- Adapt hiring process—fitness standards
- Invest in education—update safe practices
- Provide adequate resources
- Regularly inspect and monitor



Remedial Responsiveness

- Studies show that property damage and downtime resulting from accidents cost companies five to 50 times more than the workers' compensation cost.
- All accidents, including minor property damage incidents and near misses, should be investigated
- Focus on the root cause
- Develop a plan to address recurrence
 - Education
 - Equipment/facility maintenance
 - Revision of processes



Picking Effective Accident Defense Team Members



Create the Dream Team

- Claim Representative
- Occupational Health Clinic
- Nurse Case Manager
- Independent Medical Examiner
- Vocational Rehabilitation Counselor
- Medicare - CMS Vendor/Annuity Specialist
- Defense Attorney



Create the Dream Team

Identify the Responsibilities of Each Team Member

- Claim Management
- Medical Treatment
- Vocational Rehabilitation
- Litigation Management



Prepare the Defense Strategy



Are your Goals SMART?



Prepare the Defense Strategy

- Is immediate file closure possible? If not, why not?
- Is the injured worker interested in settlement?
- Is injured worker close to MMI or still treating?
- Is an IME, addendum or supplement required?
- Is injured worker working?
- Does employer offer light duty?
- Does injured worker have access to group insurance, pension, SSD or Medicaid?



Your defense counsel should provide:

- Timely communications
- Assessment of the Persons involved in the litigation
 - Arbitrator
 - Doctors
 - Petitioner
 - Petitioner's attorney
- Assessment of the Issues involved in litigation
 - Trial Exposure
 - Changes of prevailing on disputed issues
 - Cost of defense
 - Length of defense
 - Settlement vs. Trial





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