Managing Risk

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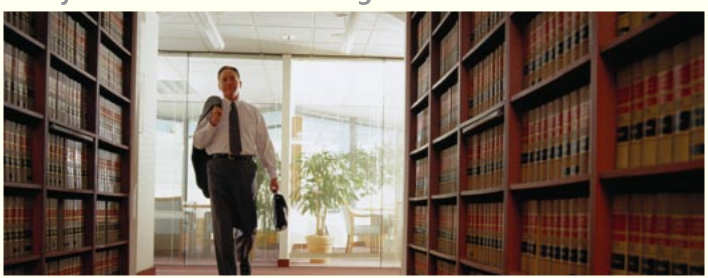
How to Keep Attorneys Out of Your Workers' Comp Claims

The Yellow Pages for New York City lists 45 law firms in its section on workers' compensation attorneys. Even tiny Alturas, California (population 2,827) has listings for six workers' compensation law firms. Someone is keeping all those firms busy—here's how to ensure that your business isn't among them.



The Workers Compensation Research Institute (WCRI) recently released a study on attorney involvement in comp claims. It found employees are more likely to hire an attorney to represent them in a workers' compensation case in these circumstances:

1. The employee feels threatened.
2. The employee fears being fired.
3. The employee's supervisor doesn't believe the claim is valid.
4. The employee fears his/her claim will be denied. Reasons for this include receipt of a denial notice, a delay in payments or communications with the claims manager.
5. The employee has a serious (permanently disabling) injury.

Employers and claims managers can take steps to mitigate the first four situations. However, the

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Risk Tip

Two recent studies, by pharmacy benefit managers Express Scripts, Inc. and Progressive Medical, took a closer look at prescription drug use in workers' compensation and found:

- **Prescription drug costs rose 5.8 percent in 2011.**
- **Employers could save more than $2.1 billion in workers' compensation costs if doctors prescribed lower-cost generics instead of brand-name drugs.**
- **The use of compounded medications has increased since 2008.**
- **Narcotic painkillers (such as OxyContin and oxycodone) might be overprescribed. They accounted for 35-40 percent of workers' comp drug spending among Progressive Medical's clients. That company helped its clients reduce spending on narcotics by 3.9 percent in 2011, while Express Scripts clients reduced utilization of narcotics by 4.2 percent in 2011.**

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WCRI study found that serious injuries had a "high correlation" with attorney involvement. Bogdan Savych, an analyst at WCRI, said actions by employers or claims staff would likely have little effect on reducing attorney involvement in these cases.

The WCRI study found other factors also increased the likelihood of attorney involvement in workers' compensation claims. These include:

- Education level. People with a high school-only education versus college graduates.
- Language. Workers who chose to be interviewed in Spanish.
- Tenure. Workers who'd been on the job a year or less.
- Injury type. Individuals with conditions of the lower back.
- Age. Older workers versus younger ones.

Why Try to Minimize Attorney Involvement?

Attorney involvement in a workers' compensation claim decreases your chances of early return to work, since an attorney has no interest in getting your employee back on the job. Attorney involvement will almost always increase the time it takes to settle a claim and may increase your costs, since you will need your own representation.

Employees don't always win when hiring an attorney, either. Most workers' compensation attorneys work on a contingency basis, taking a percentage of any payments or settlement your employee receives.

The following steps can help you reduce the likelihood of workers' compensation claims disputes:

1. Educate your employees about workers' compensation. Knowing how the system works can often allay the fears that lead employees to consult attorneys.
2. Communicate frequently with any employees who are out of work due to work-related injury. Staying involved, rather than turning the claim completely over to your insurer or administrator, can keep the worker connected to the workplace and lessen his/her fears of being lost in a bureaucracy.

(Source: *Business Insurance*, April 22, 2012)

Prescription drug costs represent nearly one-fifth of all workers' compensation medical expenses, according to the NCCI. In the Consumer Price Index, prescription drug prices increased 4.1 percent between December 2010 and December 2011. Workers' compensation drug cost inflation might be higher than CPI figures due to different drugs being prescribed, less use of generics and fewer cost controls in the workers' comp system, such as managed care plans, that are found in employer-based and other medical systems.

3. Promote your organization's early return-to-work philosophy. Assuring your employees that they will be returned to work as quickly as possible could lessen their fear that they will lose their job due to injury.
4. Train supervisors on the proper handling of a work injury.
5. Make sure employees know that workers' compensation claims affect the company's bottom line. As a component of total compensation costs, excessive comp claims could affect the amount the company can spend on other employee benefits.
6. Consider providing short-term disability benefits. This can provide a source of income to disabled employees whose claims might be in dispute. If the claim is found to be work-related, the workers' compensation insurer will reimburse the disability insurer. (Six jurisdictions require employers to provide employees with benefits for short-term disabilities not related to work: California, Hawaii, New Jersey, New York, Rhode Island and Puerto Rico.)

If, despite these steps, your employee lawyers up, you will want to hire a workers' compensation defense attorney as soon as possible. Keep in mind that your insurer might sometimes want to settle a claim when it might not be in the best interest of your organization and its experience rating. We can help guide you through the claims process—for more information, please contact us.

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Insuring Employees Who Drive Their Own Cars

Just because an employee uses a personal auto does not relieve the employer of liability if he or she injures someone while on the job.

In many companies, employees who drive during the course of their jobs—whether for deliveries, calling on clients or picking up supplies—use their personal car. This has several advantages for the employer—it does not have to maintain a fleet, it does not have to worry about non-employees driving the car, and the employee's personal auto liability policy provides the first layer of coverage. Accounting is also simpler—the employer does not have to account for an employee's personal vs. business use of the car—all the employer has to do is reimburse employees for their mileage. The IRS standard rates provide a good guideline; see www.irs.gov for information.

However, just because an employee uses a personal auto does not relieve the employer of liability if he or she injures someone while on the job. An employer would become "vicariously liable" for any injuries an employee caused to a third party during the course of work. (Time spent commuting to and from work is NOT considered work time; therefore, an employer has no liability for an accident that occurs during an employee's commute.)

An employer can do a couple of things to protect itself from liability when employees drive their own vehicles for work:

A For all positions that require driving, check applicants' motor vehicle records (MVR) before making a final job offer. This will show any tickets they've received or accidents they have been involved in. Avoid hiring someone with multiple moving violations, especially for speeding or failing to obey signals. Studies have shown that these habitually careless drivers are more likely to become involved in accidents.

B Require employees who drive for work to carry a personal auto policy with at least $500,000 in liability coverage. This will serve as your first layer of liability coverage, so be sure to notify employees that if they're involved in a work-related accident, their policy will respond first. Require these employees to submit proof of coverage as a condition of the job.

C Consider buying a business auto policy to cover auto-related liability exposures. The BAP can be written to cover any of an insured's auto-related liability exposures, indicated by "symbols" on the policy's schedule of coverages. To see

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whether your policy covers employee-owned vehicles, check for either Symbol 1 (which covers "any auto") or Symbol 9 (non-owned autos only) in the schedule of coverages.

The BAP covers only the liability of the named insured—that is, the employer. The business auto policy (and your other liability policies) will not cover the employee's own liability.

The BAP and other commercial liability policies also will not cover any injuries an employee causes to a fellow employee. Workers' compensation protects the employer from this type of claim.

In some states, employees can sue their co-workers for work-related injuries under certain circumstances. The employer's workers' compensation insurance will not provide coverage for this kind of claim, making the employee personally liable. If you want to provide employees with liability protection for this and other situations, you can buy this additional coverage in an employees as insureds endorsement. The endorsement will provide employees with coverage under your BAP, secondary to the employee's personal auto policy. Please note that if you have Symbol 9 coverage only (non-owned autos only), the BAP provides liability coverage only; it will not cover property damage to the employee's car.

For more information on managing your firm's auto-related risk exposures, please call us. ■

Getting Back to Business After a Disaster

Disaster can strike any business, at any time. How well would your business recuperate?According to a Dun & Bradstreet study, 43 percent of companies hit by fire never reopened for business, while only 26 percent could continue as before.

If a disaster struck your company, which category would you fall into? A business continuation plan will help your business recover as quickly as possible and minimize any long-term effects. Still, only half of small to medium-sized businesses (1-1,000 employees) had a disaster preparedness plan in place, according to a 2011 survey by Symantec. Fourteen percent did not have a plan, nor did they plan to create one.

If not knowing where to start is preventing your firm from starting a preparedness plan, the following pointers might help.

1. Form a committee and appoint a coordinator. Ideally, your committee should include senior management, such as the chief financial officer, the heads of human resources and operations or manufacturing, and your chief technical officer.
2. Set a timetable for implementing your plan.
3. Gather information. This includes:
   - The maximum allowable downtime for all vital company functions. Analyze each function in terms of its impact on customer service, reputation, revenue, market share and compliance with applicable contracts or laws.
   - The resources (personnel, equipment and funds) you need to perform each vital function. If you can't perform a vital function at your facility, determine how you can move it to another location or outsource it.
   - A list of key customers on whom your company will focus its after-disaster efforts.

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4. Assign post-disaster responsibilities, such as ensuring facility safety, employee communications, media relations, restoring information systems, etc.
5. Determine which employees must be onsite. Until your facilities are operational, other employees may telecommute from home or report to other locations. The company may also arrange to rent temporary space.
6. Take measures to help employees. After a large-scale disaster, employees are likely to be dealing with personal crises in addition to the stress of longer work hours. Determine who will be responsible for identifying excessively stressed employees and what type of assistance the company will provide. If you don't already have an employee assistance plan (EAP), consider offering one. EAPs can help employees cope with "everyday" problems, such as alcohol abuse and family problems, along with counseling and help after a disaster.
7. Implement a system to track and submit extra expenses needed to return to full operations to your insurer for reimbursement under your business income policy.
8. Check your business property policies for so-called "time element" coverages, which cover a loss of earnings or increased expenses resulting from a covered property loss. These include **business income (BI) coverage, extra expense coverage** and **contingent business interruption coverage.** Business property packages sometimes provide these coverages, which are also available on a standalone basis.

Business income insurance will reimburse lost profits and continuing operating expenses when a covered property loss causes a shutdown or slowdown. Receiving a near-normal income after a disaster can help you retain staff and maintain financial stability during rebuilding.

Business income coverage continues to pay for up to 30 days after the damage is repaired to allow the company to regain lost business. If your business has an extended closure, it likely won't resume a pre-loss level of business the day repairs are completed. Buying an **extended period of indemnity** will extend your business income coverage period. This coverage gives you extra time to do the marketing and production needed to recapture your income base and for income to return to pre-loss levels.

Extra expense coverage goes into effect immediately after an insured disaster damages your premises. It covers any additional expenses needed to continue business operations, if they will reduce the length of the business interruption or enable the business to stay in operation after a covered loss. Eligible expenses would include such things as data restoration services, renting a temporary location or buying a generator to keep powering the company after a covered loss.

Another coverage, called **contingent business interruption,** protects businesses that depend on other businesses for their survival. These could be suppliers, key clients or even a neighboring business that draws customers to the area, such as an anchor store in a mall. If a covered loss closes or slows business at one of these "dependent properties," your business income policy will not respond, because your insured property has not been damaged. Contingent business interruption coverage will cover your lost income due to business interruption at these properties. You can buy this coverage on a named property basis, which would cover you for losses at specific locations, or on a blanket basis.

Sometimes, a catastrophe causes such tremendous damage to the area surrounding the insured business that the public cannot reach it or authorities might prohibit access. When this occurs, you could suffer big income losses—even if your premises are undamaged. However, without damage to your own property, your business income coverage will not trigger. **Loss of ingress/egress coverage** protects you from losses sustained because a peril not excluded by your policy prevents ingress to or egress from your property.

We can help you analyze your business operations to develop a disaster recovery and business continuation plan. We can also review your current business continuation policies to determine whether you have the type of coverage you need. The future of your business could depend on the preparations you make today—please call us for more information.

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Know Your Enemy

Natural hazards

Meteorological - flooding, dam/levee failure, severe thunderstorm, tornado, windstorm, hurricanes and tropical storms, winter storm (snow/ice)
Geological – earthquake, tsunami, landslide, subsidence/sinkhole, volcano
Biological – pandemic disease, foodborne illnesses

Human-Caused Hazards

Accidents – workplace accidents, entrapment/rescue, transportation accidents, structural failure/collapse, mechanical breakdown
Intentional acts – labor strike, demonstrations, civil disturbance (riot), bomb threat, lost/separated person, child abduction, kidnapping/extortion, hostage incident, workplace violence, robbery , sniper incident, terrorism, arson, malware attack, hacking, fraud, denial of service.

Technological Hazards

Information technology – loss of connectivity, hardware failure, lost/corrupted data, application failure
Utility outage – communications, electrical power, water, gas, steam, heating/ ventilation/air conditioning, pollution control system, sewage system
Fire/explosion – fire (structure, wildland), explosion
Hazardous materials – hazardous material spill/release, radiological accident, transportation accidents, nuclear power plant incident, natural gas leak
Supply chain interruption – supplier failure, transportation interruption.

Insurance programs can protect your business from financial loss due to many of these hazards; others can be managed with risk controls. For more information, please contact us. ■

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