

2022 Safety Seminar

Leurt Cochran, Director of Actuarial Services
Comprehensive Risk Management, Inc.
6480 Rockside Woods Blvd South, Ste 210
Independence, OH 44131
Phone: (216) 643-4532 Fax: (216) 902-0077
Email: leurt@crmi.com Website: crmi.com



2022 Safety Seminar

- General information
- Videos and mics off
- Q & A



2022 Safety Seminar

- BWC Updates
 - True Up Process
 - Deadline was 8/15
 - Grace period until 9/14
 - 2022 Estimated Annual Premium Notice
 - DFSP Safety Action Plan (DFSP-5)
 - August 31, 2020



2022 Safety Seminar

- BWC Rebates
 - Unlikely for 2022
- New BWC Reserve System
 - ACES
 - Effective on claims on or after 7/1/2022





The Hot Topic In OSHA

Protecting workers from HEAT

Meredith L. Ullman
(614) 654-4477
mullman@rbslaw.com
670 Meridian Way
Suite 233
Westerville, OH 43082



OSHA

OSHA has a new enforcement initiative (NEP) focusing on heat related illnesses.

OSHA

What is an NEP?

OSHA

OSHA's goals with the NEP:

- 1) Prevent heat related illnesses
- 2) Prevent other injuries caused by heat exposure

OSHA

The NEP will apply to:

- Out door workspaces in a local area experiencing a heat wave as announced by the National Weather Service
- Indoor workspaces near radiant heat sources such as iron and steel mills and foundries

OSHA

The NEP results in two types of inspections:

- 1) **Unprogrammed:** prioritized on-site inspections for heat-related injuries
- 2) **Programmed:** randomly generated inspections under certain heat conditions

The NEP will also expand investigations

OSHA

What industries are covered specifically under the NEP **Programmed** Inspections?

- NAICS codes listed in Table 1 of App. A of the NEP
- Other employers may be added to the list for random inspections based on Table 3 of App. A of the NEP
- OSHA can also add to the random list outside of the set tables

OSHA

Unprogrammed inspections

These inspections will be the highest priority and include investigations into fatalities/ catastrophes, complaints and referrals.

OSHA

What to expect during a Heat NEP inspection:

- OSHA 300 and 301 logs
- Worker Interviews
- Heat index
- Worker access to shade, rest areas and PPE
- Activities linked to heat related illnesses
- Employers' programs regarding heat related illness will be reviewed

OSHA

Citations

If sufficient evidence of a citation is found an employer may receive a citation under the General Duty Clause or a Hazard Alert Letter.

A HAL will be issued if all the elements of a General Duty Clause violation are not met.

OSHA

How can Employers protect themselves and their employees?

A written
PREVENTION PROGRAM

OSHA

The program should include:

- Temperature monitoring
- Easily accessible and unlimited water
- Hydration breaks
- Shade breaks
- Heat acclimation
- Buddy system
- Early start and stops times

OSHA

Additional practices to implement:

- Heat Monitor
- Hazard Analysis
- Review OSHA logs

OSHA

LINK TO FULL NEP

https://www.osha.gov/sites/default/files/enforcement/directives/CPL_03-00-024.pdf

OSHA

Current Maximum Penalty Amounts

- \$14,502 per violation – serious, other than serious, posting requirements
- \$14,502 per day for failure to abate
- \$145,027 per violation – willful or repeated

OSHA

Questions?

Meredith Ullman
mullman@rbslaw.com

Employment Issues Related to Workers' Compensation Claims

Presented by:
Lynn Schonberg
Ross, Brittain & Schonberg
August 17, 2022

Introduction

- Challenges in managing Claimants
 - Many require leaves of absence
 - Others require light duty or other changes to their job
 - Some really get under your skin!
- It is critical that you manage all claimants based on your policies, the law and, at all times, reasonably

22

Introduction

- Claimants Don't Get Preferential or Different Treatment
 - Ohio law does not entitle claimants to different, worse or better treatment
 - Apply general policies to claimants the same as they are applied to all others
 - Claimants remain employees entitled to **equal** application of policies

23

Review of Employment Laws

- Family and Medical Leave Act (FMLA)
 - 50+ employee threshold
 - Provides up to 12 weeks unpaid leave
 - Continue medical insurance and right to reinstatement
 - Applies to ALL leaves, including leaves due to workers' compensation injury
 - Intermittent and reduced hour leaves included

24

Review of Employment Laws

- Americans with Disabilities Act (ADA)
 - Applies to employees with a disability or who are perceived to have a disability
 - Disability includes walking, sitting, lifting, etc.
 - Minor, short-term conditions are not disabilities
 - But, short-term conditions with long-term complications **may** qualify as a disability
 - Disabled employee must be "qualified"
 - Must be able to perform essential functions of the job with or without reasonable accommodation

25

Review of Employment Laws

- Americans with Disabilities Act (ADA)
 - Be sure Handbook contains ADA/Reasonable Accommodation policy
 - Will assist in handling all disabled employees
 - Be sure Job Descriptions are in existence and updated
 - Best evidence of essential job functions
 - If in existence, can be provided to treating physician to determine ability to return to work

26

Review of Employment Laws

- COBRA
 - 20+ employee threshold
 - 18-month continuation medical insurance
 - Applies where lose coverage due to lack of hours or loss of employment
- Mini-COBRA in Ohio
 - Under 20 employees
 - Applies where lose coverage other than due to voluntary termination

27

Review of Employment Laws

- Ohio Rev. Code Section 4123.90 Protects Claimants from Retaliation
 - Cannot discharge, demote, reassign or take any punitive action against employees because they filed a workers' compensation claim
 - Showing that a claimant was treated the same as an employee without a claim is the best defense to a claim of retaliation

28

Managing Leaves of Absences

- In General
 - It is imperative that the injured employee is treated as any other employee in need of a medical leave
 - A workers' comp claimant is not entitled to better or preferential treatment unless a policy provides for such
 - If prefer to provide better benefits, publish a policy – perfectly legitimate to do so

29

1st Step in Managing Leaves of Absences

- Determine the Leave Policy
 - Review the Employee Handbook/CBA
 - Always ensure that the Handbook is up-to-date
 - Always ensure that employees have signed an Acknowledgment and it is in the personnel file
 - If no handbook exists, review any written leave policies/memos, etc. that may exist
 - If no written policies exist, determine how other employees needing medical leave have been treated

30

1st Step in Managing Leaves of Absences

- If FMLA Applies:
 - If the employer employs 50+ employees, the FMLA policy **must** be contained in the handbook
 - Also ensure the 8x11 FMLA poster is reproduced in the handbook
 - Ensure the regular sized poster is posted
 - Determine eligibility
 - Must have been employed 12+ months and
 - Worked at least 1250 hours in past 12 months₃₁

1st Step in Managing Leaves of Absences

- If FMLA Applies:
 - Must provide notice of eligibility within **5 days**
 - Use of the WH-381, while not mandatory, is best to utilize
 - Documents date leave to begin, etc.
 - Should be mailed to employee's home address
 - Use Certificate of Mailing

32

1st Step in Managing Leaves of Absences

- If FMLA Applies:
 - Determine whether to issue Cert. of Health Care Provider (WH-380)
 - In workers' comp cases, employer typically has full access to employee's records so oftentimes no need to issue WH-380
 - In all non-workers' comp cases, always issue
 - Issue FMLA Designation Notice (WH-382)
 - Also optional but should be used in all cases
 - Provides documentation of leave
 - **Issue within 5 days**

33

1st Step in Managing Leaves of Absences

- Medical Leave of Absence Policy
 - If injured worker is not eligible for FMLA or FMLA is inapplicable, determine if a Medical Leave policy exists
 - All employers with less than 50 employees should have a general medical leave policy
 - Establishes length, benefits, documentation requirements, etc.
 - Applies to all medical leaves for any reason

34

1st Step in Managing Leaves of Absences

- Medical Leave of Absence Policy
 - If exists and employee is eligible:
 - Draft letter to employee explaining length of leave, benefits (i.e. medical insurance), right of reinstatement, etc.
 - If no medical leave of absence exists, proceed to ADA determination
 - **Note:** In absence of written leave policy, must have a Maternity Leave policy
 - OCRC regulations require "reasonable leave" which is 12 weeks

35

1st Step in Managing Leaves of Absences

- If no Policy Exists, ADA is Applicable
 - Must provide a reasonable accommodation if the injured worker is disabled
 - Reasonable accommodation in this case is a reasonable leave – typically 12 weeks
 - You can decide on the benefits to provide, using prior medical leaves as your guide
 - Remember the no retaliation law – treat the injured claimant the same as others in need of a medical leave
 - Send letter explaining leave, etc.

36

2d Step in Managing Leaves of Absences

■ DO NOT FORGET ABOUT LEAVE

- Issue letter to employee near end of initial leave period
 - Remind that leave is ending
 - Request medical information on ability to return to work or if cannot, require medical information
 - Require response within certain time period – 5 to 7 days after date sent
 - Send by certificate of mailing

37

2d Step in Managing Leaves of Absences

■ DO NOT FORGET ABOUT LEAVE

- If employee needs additional leave of a month or less, always provide it
- Always considered reasonable under ADA
 - Depending on medical coverage contract, may need to issue COBRA notice
- If employee needs more than 1 month
 - Consider whether reasonable
 - Be sure that others have not been granted such long leaves in the past

38

2d Step in Managing Leaves of Absences

■ DO NOT FORGET ABOUT LEAVE

- If employee needs indefinite leave, deny
 - ADA law states that in virtually all cases, an indefinite leave is unreasonable
- If employee can return to work with restrictions, must compare with job description and determine whether it is reasonable to accommodate employee
 - If have different position for which he is qualified, may transfer to comparable job

39

2d Step in Managing Leaves of Absences

■ DO NOT FORGET ABOUT LEAVE

- If unable to accommodate restrictions and no other job available
 - Must determine how long the restrictions will last
 - Determine whether extension of leave is reasonable
- If extend leave, write letter stating length of extension, medical insurance status, etc.

40

Ending Employment

■ Unreasonable Extension of Leave

- Where leave becomes unreasonably long, must separate from employment
- Issue letter containing:
 - Reason for separation
 - Date that medical coverage will end
 - Invite to reapply for employment when he is able to return to work, with or without an accommodation

41

Ending Employment

■ Issue COBRA

- Extremely important last step
- Handling Requests for Reemployment
 - If position is vacant for which former employee is qualified, rejection could result in litigation
 - Highlights importance of applying policies during employment and documenting performance deficiencies

42

Creating the Record

- Following the 3 steps will ensure:
 - All applicable leave to which employee is entitled was provided
 - FMLA rights exhausted
 - Reasonable accommodation obligation met
 - Injured employee treated same as all other similarly situated employee
- Such a record creates exceptional defense

43

Recent Case

- Facts
 - Employer owns apartment buildings
 - John employed as a pest control tech. exterminating beg bugs
 - Essential job functions require heavy lifting of various equipment and objects and ability to carry heavy equipment up and down stairs
 - John was a good employee with no performance issues

44

Recent Case

- Facts
 - One day John's supervisor, Lisa, saw John wearing a brace on left wrist
 - Lisa had learned from other employees that John had been wearing the brace off and on for the past year or so
 - Employer was having a rash of WC claims and Lisa feared John could become a WC Claimant

45

Recent Case

- Facts
 - Lisa contacts HR for direction
 - HR instructs Lisa to do the following:
 - Send John home with the FMLA Cert
 - Remind him of the handbook policy that requires all employees to be able to work without restrictions
 - Do not permit him to return to work until he completes the Cert *and* receives 100% RTW release

46

Recent Case

- Facts
 - Lisa meets with John and provides the instructions
 - Lisa cannot answer John's questions as to why needs to complete the Cert
 - Lisa admitted at trial that she didn't know the answer to John's question
 - John calls HR everyday to obtain answers
 - HR never answered or returned his calls
 - Testified at trial that they intentionally ignored the calls

47

Recent Case

- Facts
 - About a week later, John calls Lisa to tell her his dr. refuses to complete FMLA paperwork since it would be "fraud" but he did obtain a full RTW release
 - Lisa told John to contact HR
 - HR tells John he violated the 3 day no show/no call policy
 - At trial, Lisa testified that employees on suspension don't have to call in daily

48

Recent Case

- John sues Employer for violations of FMLA, ADA, Section 4123.90 and emotional distress damages

49

Recent Case

- Held: FMLA not violated but damages awarded to John
 - Employer forced John to apply for FMLA leave when he did not need it
 - Because John never submitted the FMLA Certification, no violation
 - Jury found that Employer acted with ill will, hatred and disregarded John's rights and awarded damages based on behaviors

50

Recent Case

- Held: ADA Violation
 - John was found to not be disabled but held to be perceived as disabled
 - Employer neither engaged in the interactive process nor provided reasonable accommodation
 - Employer took adverse action against John because of his perceived disability

51

Recent Case

- Held: ADA Violation
 - Even though John had a former wrist injury, it did not prevent him from working
 - Wearing a brace does not equate to having a disability
 - But, because the Employer regarded John as being unable to perform his job simply because he wore a brace, violates ADA
 - Significantly, neither HR nor Lisa ever asked him about the brace!

52

Recent Case

- Held: No Section 4123.90 Violation
 - John never had a WC claim and neither filed a claim nor intended to file a claim
- Held: Employer acted recklessly and with ill will and awarded punitive damages
- Verdict: \$800K + attorneys' fees
 - Fully upheld on appeal

53

Lessons Learned

- Always keep lines of communication open
 - Lisa and/HR should have simply talked to John about why he was wearing a brace or whether he is ok to work
 - HR, composed of 2 individuals, ignoring John's calls poisoned situation
 - Open and honest communication is always best in handling all employment situations

54

Lessons Learned

- Never assume facts
 - If you question one's ability to perform the job, focus on *job-related* facts
 - There was no evidence John could not perform his job and/or that he complained
 - Had Lisa simply asked John if he was ok or "what's up with the brace," he would have said "I'm fine" and unless or until evidence to the contrary existed, it's over

55

Lessons Learned

- Understand the FMLA
 - Only hand out Cert where:
 - Employee requests it; or
 - Absence of 3+ consecutive days; or
 - Obtain knowledge of impending surgery, etc.
 - Never use FMLA as a tool/subterfuge to obtain medical information to which you are not otherwise entitled
 - Never demand submission of Cert

56

Lessons Learned

- Never promulgate policy that all employees must be able to work without restrictions
 - Definition of disability discrimination is *not* providing reasonable accommodation
 - RA means providing any change to one's non-essential job duties to enable employee to continue working
 - Refusing to consider restrictions that may not affect ability to perform job illegal

57

The End

For further information contact:

Lynn Schonberg
Ross, Brittain & Schonberg, Co. L.P.A.
6480 Rockside Woods Blvd. South - Suite 350
Cleveland, OH 44131
216-447-1551
216-447-1554 Fax
Email: Lynns@rbslaw.com
Website: www.rbslaw.com
