

By Mark Noonan

*Do employees on certain prescribed medicines pose a safety hazard? What risks are involved with using a PEO? Should undocumented workers be covered by workers' compensation? In this newsletter, we tackle these growing workers' compensation issues.*

### Prescription Drugs and Workers' Compensation

Prescription drugs have been a significant driver of workers' compensation medical costs for many years. The volume of prescription drugs dispensed by physicians to workers' compensation claimants has risen sharply in recent years, putting an increased and upward pressure on workers' compensation costs. A recent study by the National Council on Compensation found that utilization change, instead of price change, was the dominant factor affecting per-claim workers' compensation pharmacy cost increases in 2008.

The issue has sparked attention from the federal government, whose growing concern about the risks associated with narcotic drugs is expressed in a recent report from The Department of Health and Human Services Office of the Inspector General. The report states, "Schedule II drugs have a high potential for abuse, have an accepted medical use with severe restrictions, and may cause severe psychological or physical dependence if abused."

Many companies perform drug testing as part of their effort to reduce workers' compensation costs. It is common for companies to use pre-employment (post-offer) drug and alcohol testing, as well as post-accident and random drug testing. In "mandatory states," if the employer chooses to conduct workplace drug/alcohol testing, the employer must follow state rules. In "voluntary states," there are incentive programs designed to encourage workplace drug/alcohol testing programs. (Visit the [Department of Labor](#) website for state drug testing listings and laws.)

As prescription utilization increases, so will the amount of workers who show up at work with pain medications in their systems ... and would fail a drug test. A provider of workplace drug tests, Quest Diagnostics, said the rate of employees testing positive for prescription opiates rose more than 40 percent from 2005 to 2009, and rose by another 18 percent in 2010. Quest Diagnostics data also showed that workers who were tested for drugs after accidents were four times more likely to have opiates in their systems than those tested before being hired.

As the reliance on prescription medicine grows, employers must struggle for ways to approach and handle prescription drugs in the workplace. Do employees on certain prescribed medicines pose a safety hazard? Should employees be fired for testing positive for certain legal medications? How can this workers' compensation safety issue be handled without violating the Americans with Disabilities Act?

### Tips When Using a PEO

A professional employer organization (PEO) is a service provider for companies that want to outsource their human resources, employee benefits, payroll, and workers' compensation programs. According to the National Association for Professional Employer Organizations, the industry's gross revenue for 2008 was \$68 billion. If a company decides to use a PEO, there are steps they can take to avoid or minimize any possible liabilities.

- Hire an experienced, reputable, and legally insured PEO. Check references. Remember, a court may determine that the company and the PEO are joint employers. In that case, the company is also jointly responsible for the PEO's mistakes and noncompliance.
- Make sure the PEO is paying payroll taxes. See if the PEO's financial statements are audited by a CPA, and ask to see a copy. Verify that the PEO has appropriate insurance coverage for liability and workers' compensation. Make sure the PEO meets all state requirements and proper licenses and/or registrations are in place.
- Find out what services the PEO will offer. Determine and define who is responsible for such things as tracking hours worked, paying wages, and withholding and remitting applicable employment related taxes.
- Carefully review the service agreement. The term "employee" should be clearly defined. What guarantees are provided? What provisions allow the contract to be cancelled? Agreements between the company and the PEO should state responsibilities, including all aspects of the workers' employment and compliance with all federal and state laws.

A company that leases employees must comply with the laws of each state it operates within. Realizing the ambiguities created by PEO arrangements, many states have enacted statutes that specifically address these issues. Other states rely on case law to resolve the issue of who is the official employer for the purpose of workers' compensation. To utilize all the advantages of using a PEO, and to avoid all possible risks, the company must understand the legal obligations and risks involved. Structuring the PEO relationship in a way that addresses those obligations will help minimize legal risks.

### NCCI Report: Gauging the Economy

In January, the National Council on Compensation Insurance (NCCI) released its quarterly report on the economic outlook and its impact on workers' compensation.

- *Employment Growth:* The employment growth continues to be weak, suggesting that downward pressure on exposure and claim frequency is likely to continue until the labor market begins a full recovery.

- *Wage Growth:* A continued sluggish labor market points to weak growth in wages, which implies that the growth in indemnity severity will also be limited.
- *Medical Inflation:* Medical price increases are expected to remain fairly strong, keeping a continued upward pressure on medical severity.
- *Interest Rates:* Investment income will be constrained since the Federal Reserve is keeping short-term interest rates at low levels.

From last quarter's report, NCCI also covered premium growth, frequency, and indemnity and medical severity.

- *Premium Growth:* NCCI predicts that workers' compensation premium growth will remain weak because the growth in payroll will also remain weak, especially with the lack of growth in the construction industry.
- *Frequency:* For changes in frequency, NCCI research indicates a long-term downward trend that will continue. An increased pace of new hires and an increased rate of layoffs are associated with the upward pressure on frequency. During our economic recovery, the pace of layoffs should ease and the rate of new hires should increase.
- *Indemnity Severity:* Driven by changes in the duration of temporary total claims and by changes in the average weekly wage, indemnity severity will modestly increase. Uncertain changes in duration, which NCCI states will depend on the strength of the job market recovery, adds to the uncertain outlook for indemnity severity.
- *Medical Severity:* Medical price inflation continues to be the key driver of changes in medical severity. Utilization will also add a bit of upward pressure.

For a copy of either "NCCI: Gauging the Economy" reports, visit [www.ncci.com](http://www.ncci.com).

### Undocumented Workers

A number of states are considering bills that would deny workers' compensation benefits to undocumented workers who become injured in the workplace. The issue becomes complex as state statutes clash with the federal immigration law. Under Federal law, undocumented immigrants cannot lawfully work in the United States and employers are prohibited from knowingly hiring them. Once hired, however, most states do provide workers' compensation benefits regardless of immigration status.

It can be argued that providing workers' compensation benefits to an undocumented worker rewards, instead of punishes, the injured worker. But without workers' compensation's exclusive remedy provision, employers are left unprotected from lawsuits charging them with negligence and an unsafe workplace.

On the flip side, denying benefits to an undocumented worker encourages dishonest employers to hire illegal immigrants since they could avoid the cost of workers' compensation claims. Allowing employers to avoid paying benefits to these workers could also undermine the goal of encouraging employers to create and maintain a safe workplace.

State workers' compensation laws are designed to provide (among many other things) wage replacement for periods of disability caused by workplace injuries or illnesses, and promote return to work if possible. Although federal law can still impact what benefits they may receive, courts have generally ruled in favor of entitling workers' compensation benefits to the undocumented worker, some with limitations.

Each state has a current position on the issue. (Wyoming is currently the only state that has a statute prohibiting illegal immigrants from receiving workers' compensation benefits.) It's essential to be familiar with your state's workers' compensation statutes, and to keep an eye on key court decisions throughout every state for the scope of benefits allowed for injured undocumented workers. In addition, it is prudent to review safety and wellness programs to prevent injuries and protect all employees.

### Next Step for Employers

As we celebrate the 100<sup>th</sup> anniversary of workers' compensation, let's not forget the intent – providing injured workers with benefits to assist them as they recover while freeing the employer from the threat of litigation, thus allowing both sides to achieve a positive result.

### For More Information

At Integro, we aspire to be a client's broker of choice by consistently exceeding expectations and building intimate trust. If you need assistance or more information on any of the workers' compensation issues discussed, please contact an Integro representative or visit us online at [www.integrogroup.com](http://www.integrogroup.com).

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