

By Mark Noonan

New workers' compensation topics continue to surface for employers. In this newsletter, we address how workers' compensation issues are sneaking into areas such as volunteerism, social networking, and business cell phone use while driving.

## **Volunteers: Workers' Compensation Exposure**

The kidnapping and murder of 10 doctors in Afghanistan in August highlights a risk for industries that are supportive of employees going to foreign countries to provide humanitarian aid in the form of services such as medical and construction.

It is the employer's responsibility to provide employees with a safe and secure working environment. But does workers' compensation cover employees whose volunteer work is approved or supported, like the doctors in Afghanistan, by their employer?

If the employer is financially supporting the volunteer, then the volunteer almost certainly will be considered an employee covered by workers' compensation. If the employer exerts some measure of control over where the employee may go, when the employee must return, and how the employee will travel to and from the destination, then the volunteer may be considered an employee covered by workers' compensation. And to the extent that the employer derives any financial or reputational benefit from such volunteerism, the volunteer may meet the definition of employee for workers' compensation purposes.

## **Social Networking: New Eye for Claim Fraud**

Popular social network web sites, such as Facebook and LinkedIn, are providing workers' compensation claims investigators new ways to find fraud and combat false claims. An employee alleging a workplace injury but who posts statements or photographs on a social networking site that contradicts the workers' compensation claim may be unable to collect. A recent study, "Social Networking and Workers' Compensation Law at the Crossroads" by Gregory Duhl and Jaclyn Millner, examines how social networking sites have influenced and will continue to influence workers' compensation law.

For example, in *EEOC vs. Simply Storage Management LLC (Case No. 1:09-cv-1223-WTL-DML)*, a judge ordered employees who were claiming emotional distress to produce copies of their social network profiles. The court deemed admissible all social networking content relating to, revealing, or referring to allegations of the legal complaint.

The Duhl and Millner report emphasizes, however, that workers' compensation lawyers must be able to prove that the information from an employee's social networking account was posted and/or written by the employee. There are no specific workers' compensation rules

that address the disclosure of social networking evidence (obtained through informal discovery), but in those situations, rules regulating disclosure of surveillance evidence may apply.

Just as an employee may be observed in a public place or on video surveillance, a workers' compensation attorney may be able to observe and search information that is publicly available online. Nearly half of all adult Americans have personal profiles on one or more social networking sites, so it is no surprise that social networking is playing an increasing role in the court or workers' compensation systems.

## **Employers Working Toward Safe Driving**

The National Safety Council (NSC) recently gave praise to employers for helping eliminate cell phone use and distraction while driving. The NSC estimates that cell phone usage is involved in 28 percent of all crashes, which is higher than any other distraction. This employee safety issue is being taken seriously: more than 500 NSC member organizations have banned employee cell phone use while on the job. This ban of cell phone use, an NSC survey in 2009 found, does not decrease work productivity.

Employers can expand their employee safety measures by establishing policies that prohibit the use of cell phones at work. Employers should communicate their commitment to safety and health, making it clear to employees that they should not talk or text on their cell phones while driving on company time or in company vehicles. Employers also can have employees sign a contract stating they will not violate the company's cell phone ban.

For more information and a safety kit, employers can access the NSC web site at [www.nsc.org](http://www.nsc.org). To view states with laws that already ban the use of cell phones while driving, go here: [www.distraction.gov/state-laws/](http://www.distraction.gov/state-laws/).

## **Head Trauma Linked to Diseases**

Recent evidence from a team at Boston University suggests that repeated blows to the head might be linked to a variety of brain disorders such as Alzheimer's, Parkinson's, and ALS (commonly known as Lou Gehrig's disease). Researchers examined the brain and spinal cords of deceased athletes and found a similar protein pattern. Previous research has shown that people without serious head trauma do not have this same pattern of protein. Although more research is needed, the protein deposit evidence suggests that conditions such as ALS may be linked to head trauma sustained from long-term, repetitive damage.

Earlier this year, a University of Pennsylvania football captain in the beginning stages of a degenerative brain disease committed suicide -- the second Penn player to commit suicide within the past five years. The disease, chronic traumatic encephalopathy, is the same one that has been found in more than 20 deceased players from the National Football League. The

Penn athlete provides evidence to suggest that the damage is not from a single traumatic hit to the head, but from many lesser hits or subconcussive collisions.

The linking of repetitive head blows to degenerative brain diseases opens up workers' compensation questions for employers. If an employee suffers seemingly minor hits to the head that appear insignificant, what happens if years later the employee develops a degenerative brain condition? Is the disease covered by workers' compensation? This may prove to be another thought-provoking workers' compensation issue to follow as more research is conducted.

## **Possible Federal Overhaul of Workers' Compensation**

There has been a movement among members of Congress to review the fairness of state workers' compensation systems, specifically occupational disease claims. In the 1970s, the mere suggestion of federal reforms led many states to enact workers' compensation reforms. Next year, it will be interesting to watch what happens inside and outside of Congress with regard to workers' compensation.

There are three main issues at hand. First, there is a growing concern about employers who, in order to stay compliant with governing guidelines, undercount work-related injuries for Occupational Safety and Health Administration (OSHA) reporting purposes. Second, injured workers may not be filing workers' compensation claims due to employer pressure, personal choice, or being unaware of their rights and benefits as an injured worker. Third, some occupational diseases (such as asthma or asbestos exposure) may take years to surface and be diagnosed. When discovered years later, health insurance plans may be covering the employee instead of the workers' compensation system.

These workers' compensation issues have grabbed the attention of Capitol Hill, which means employers should be keeping an eye on these subjects as well. It would not be surprising if Congress evaluates the variations of workers' compensation laws and regulations within each state with the aim of fostering a more consistent and centralized program. An attempt to create a federal workers' compensation statute won't happen overnight, but the seeds of change could be sown before the 2012 elections.

## **Brown v. Cassens**

In October 2008, the United States Court of Appeals for the Sixth Circuit ruled that six employees could proceed with their suit (*Brown vs. Cassens Transport Company, Case No.04-cv-72316*) where they sought to charge their employer with a violation of the federal RICO (Racketeer Influenced and Corrupt Organization) statute for termination of their workers' compensation benefits. The suit alleges that Cassens Transport, its third party administrator, and a doctor engaged in an illegal scheme to deny employees benefits for workplace injuries. Cassens Transport then petitioned the U.S. Supreme Court to review the decision made by the Court of Appeals.

The Supreme Court subsequently concluded that the exclusive remedy for plaintiffs resides in the administrative scheme set forth in the Michigan Workers' Disability Compensation Act. The Court also ruled that the plaintiffs' claims could not go forward because they failed to allege an "injury to business or property" as defined under RICO.

## Next Step for Employers

Workers' compensation represents a major potential cost to employers. Given that reality, an employer's workers' compensation program should be administered to maximize cost-effectiveness and productivity. But, as the legal system continues to be tested on the not-so-simple definitions of "injury" (from head trauma to occupational diseases) and "employee" (as it involves volunteerism), employers should take the extra time to the developments identified in this newsletter that may influence their workplace. Change seems to be the only constant thing in the world of workers' compensation.

## 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).

### Mark Noonan

Managing Principal

#### Integro Insurance Brokers

303 Congress Street, 3<sup>rd</sup> Floor

Boston, MA 02110

Tel: (617) 531-6855

Email: [Mark.Noonan@integrogroup.com](mailto:Mark.Noonan@integrogroup.com)

### James Bacon

Managing Principal

#### Integro Insurance Brokers

One Bush Street, 14<sup>th</sup> Floor

San Francisco, CA 94104

Tel: (415) 365-4230

Email: [Jim.Bacon@integrogroup.com](mailto:Jim.Bacon@integrogroup.com)

---

Integro is an insurance brokerage and risk management firm dedicated to serving the insurance and risk management needs of complex institutional risks. Integro has offices across North America, as well as in Bermuda and London. Its headquarter office is located at 1 State Street Plaza, 9th Floor, New York, NY 10004. 1-877-688-8701. [www.integrogroup.com](http://www.integrogroup.com).

(c) Integro USA Inc. 2010