

THE REPORT

Commercial & Workers' Compensation Insurance

Volume 2, Issue 1



INTRODUCING ATLAS GENERAL INSURANCE'S RISK MANAGEMENT CENTER

The all new GoSafe Risk Management Center maintains an extensive compilation of general and industry specific safety information, including online resources, full safety programs, and a video library. Access to GoSafe is free to all policyholders with our managed programs.



Benefits Include:

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ACA COMPLIANCE

Trimming Hours to Avoid Mandate Can Land You In Hot Water

EVER SINCE the Affordable Care Act was enacted, critics of the law have said that employers would cut staff or reduce workers' hours to avoid coming under the employer mandate requiring them to provide coverage for their staff.

A decision by a federal judge not to dismiss a lawsuit against an employer for doing just that highlights the legal rat-trap that employers may open if they go that route. In July 2015, workers at Dave & Buster's, a restaurant chain, filed a lawsuit in the Southern District of New York alleging that the national restaurant chain reduced their hours to keep them from attaining full-time status for the purpose of avoiding the requirement to offer them health coverage under the ACA's employer mandate.

In February 2016, the federal judge in the case, in declining the employer's motion to dismiss the case, cited its likely breach of the Employee Retirement Income Security Act (ERISA), which prohibits employers from interfering with a worker's right to benefits.

This case is significant because many other employers have implemented similar strategies striving to limit work hours for certain groups of employees for the purpose of avoiding penalties under the ACA.

Some Background

The ACA's employer mandate generally requires large employers (those with 50 or more full-time workers or full-time equivalent employees) to offer affordable and minimum value health coverage to their full-time employees (employees who regularly work an average of at least 30 hours per week).

Employers are not generally required to offer coverage to employees working less than 30 hours per week on average.

Since the employer mandate took effect, many employers have been moving employees to part-time status to avoid triggering penalties under the employer mandate.

Why The Case Is Important

The Dave & Buster's employees alleged that the company violated ERISA by cutting their hours.

They cited Section 510 of ERISA, which prohibits employers from discriminating against any participant or beneficiary for exercising a right under ERISA or an ERISA benefit plan.

The workers alleged that by reducing employees' hours to keep them below the 30-hour weekly average to qualify as a full-time employee, Dave & Buster's interfered with the attainment of the affected employees' right to be eligible for company health benefits.

Dave & Buster's in October 2015 filed a motion to dismiss the case, but the Southern District of New York federal judge later denied the motion.

The law firm of McDermott Will & Emery in its blog highlighted the importance of the decision, stating, "The opinion focuses on ERISA Section 510 and holds that the plaintiff has a viable claim that reducing her work hours was done for the purpose of interfering with her right to benefits under the company health plan.

"Second, the opinion finds that the complaint successfully alleged the employer's 'unlawful purpose' and intention to interfere with benefits, pointing to allegations that company representatives publicly stated that they were reducing the number of full-time employees to avoid ACA costs."

The law firm noted that the decision has given plaintiffs' attorneys a model for filing similar complaints when employers reduce hours to avoid their ACA obligations.

It also noted that if judges in other cases deny employers' motions to dismiss cases, it will put the employer in a more difficult position because the employees' attorneys will be able to take discovery and depositions, and to compel document production.

Any signs or proof of reducing hours to avoid their obligations under the ACA will make defending the case even more difficult, McDermott Will & Emery wrote.

If you have trimmed hours to avoid the mandate, or if you are contemplating doing so, it's best that you first discuss these plans with your company lawyer. ❖



MEDICAL MARIJUANA

Court Says Okay to Fire Pot User Who Fails Drug Test

AS MORE states legalize marijuana for personal or medical use, employers have grown increasingly concerned about what they can and cannot do to enforce their existing drug policies.

A federal court in New Mexico has dismissed a case brought by an employee who was terminated after testing positive for marijuana, despite the worker having a medical marijuana card. The worker had claimed disability discrimination.

The lawsuit is a victory for employers who maintain a zero-tolerance policy towards drug use, even if it's not being done at work.

In the case, *Garcia vs. Tractor Supply Company*, a new employee at a New Mexico company had told the hiring manager during his job interview that he was using marijuana for medical purposes (as allowed by state law) to alleviate his AIDS symptoms.

Despite that, he was hired and, like all new hires, he was administered a drug test, which he failed.

The next day he was fired in accordance with the company's zero tolerance towards employee drug use.

Shortly thereafter, the employee filed a lawsuit accusing the company of disability discrimination and that under the Americans with Disabilities Act the employer was obliged to accommodate his medical condition by allowing his medical marijuana use.

The judge disagreed and dismissed Garcia's claim.

What You Need To Know

While this case was in New Mexico, the court's ruling mirrors similar court decisions in other states with medical marijuana laws or outright legal pot use, including California, Washington, Oregon and Colorado.

In each of these states, the highest court in the jurisdiction ruled that employers did not have to accommodate the medical marijuana use by job applicants or current employees. All of the courts have also cited the fact that marijuana is still illegal under federal law.

But, even if you are located in a state where the law permits you to terminate anyone who fails a drug test, make sure that you are enforcing your policies consistently in order to avoid legal liability.

The court sided with Tractor Supply because it had enforced its policy consistently by terminating all others who had failed the drug test. It also found no evidence of disability discrimination on the part of the employer. ❖



THE MOST CONVENIENT PAYMENT METHOD IN WORKERS' COMP

Atlas General Insurance Services is excited to announce the launch of our new GoPay billing platform. This new platform is available for managed Workers' Compensation policies with effective dates of 3/1/2016 or later. GoPay will provide flexible and automated payroll reporting along with the ability for automatic payments and much more!

Features and Benefits Include:

- Quick on-line enrollment
- Customer support line for assistance and on-going support
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- Fast, safe and secure

NOTE: Direct Bill Installments and other payment options available in addition to GoPay. 0% down is approved for all accounts under \$25k except for Class Code 8827 (Homemaker Services) and any Agricultural Class Code.



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WORKERS' COMPENSATION

Cumulative Trauma Claims Increasing Quickly

A NEW AND costly trend is affecting workers' comp as more cases involve what's known as "cumulative trauma" – or injuries that develop over an extended period of time from repetitive or continuous motions.

Often these injuries are due to excessive wear and tear on tendons, muscles and sensitive nerve tissue that can leave a worker unable to perform their job due to pain. They can arise in any profession where a worker performs the same motion over and over again.

Interestingly, many of the new cases are being filed after employees are fired – and they are primarily being filed in Southern California.

A report by the Workers' Compensation Insurance Rating Bureau of California found that cumulative trauma cases accounted for 18% of claims in 2014, up from less than 8% in 2005.

According to the agency, the growth in cumulative injury claims beginning in 2009 has been concentrated in claims involving more serious injuries and multiple injured body parts.

The WCIRB noted that the median time before a claim is reported is 79 days from the date of injury. Also, 40% of cumulative trauma claims are filed after a worker is terminated. Of those cases, a whopping 98% are litigated and 90% are in Southern California.

These post-termination cumulative injury claims were much more likely to involve multiple insurers, psychiatric injuries or multiple body parts, according to the Rating Bureau.

Most cumulative injury claims also involve attorney representation or multiple body parts.

Approximately 10% of claims in 2014 that involve some time away from work were reported late (up to 18 months after an insurance policy inception), compared to less than 2% for 2007. A significant proportion of these late-reported claims are for cumulative injury claims, which are approximately four times as likely to be reported late as non-cumulative injury claims.

CUMULATIVE TRAUMA'S EFFECTS

- 30% of cumulative trauma claims involve multiple body parts
- 9.7% involve the lower back
- 6.2% involve body systems
- 5.7% involve the wrist
- 5.1% involve a shoulder
- 3.9% involve multiple upper extremities
- 3.9% involve the hand
- 3.4% involve hand and wrist
- 2.6% involve knees

What You Can Do

Ergonomics – the science of adjusting the job to fit the body's needs – can prevent cumulative trauma, also known as repetitive stress injuries (RSIs) in workplace safety parlance.

The following are examples of simple changes that can have significant impact in preventing repetitive motion injuries:

- Providing knives with curved handles for poultry workers so they don't have to bend their wrists unnaturally
- Encourage employees to take frequent, short breaks to rest their muscles.
- Provide lifting equipment for healthcare workers to prevent back strains from transferring patients.
- Vary tasks and break up work routine by rotating employees.
- Train employees so they understand the importance of following these procedures and using new tools or equipment to prevent injuries.

One large airline took some simple steps to reduce the number of RSIs, including hiring an ergonomist to redesign the workstations, developing work/rest regimens, and eliminating electronic monitoring that included disciplinary action based on productivity, among other actions. Since then, the incidence of RSIs has dropped, underscoring the lesson that ergonomics can prevent RSIs.

A nationally known poultry producer instituted an ergonomics program and after two years its workers' compensation claims had fallen to \$1 million a year, compared to \$4 million prior to the program, according to a report by OSHA on its RSI page. In one facility, days missed due to cumulative trauma disorders declined from 552 to 24 per year after two years of the program, and days of restricted work went from 1,717 per year to just 48.

Each workplace is different and you will have to use methods that are unique to your workers' jobs when designing an ergonomically friendly workplace. If you're unsure about how to evaluate your worksite, the best bet is to hire an ergonomic consultant. ❖

Report Injuries Immediately
atlas.us.com/claims 



WORKPLACE SAFETY

Hearing Damage Is Real; Protect Your Workers

ALMOST 25% of workers who are exposed to noise in the workplace later have hearing problems, according to a new study by the National Institute for Occupational Safety and Health.

Hazardous noise levels in the workplace affect approximately 22 million workers in the United States – or 23% of the workforce. Many cases of hearing loss among these employed adults are attributable to occupational noise exposures, and can have substantial adverse impacts for work, interpersonal relationships and general quality of life.

Besides often causing permanent damage to workers, hearing damage is costly. An estimated \$242 million is spent annually on workers' comp for hearing loss disability, according to NIOSH.

The study also looked at tinnitus, which is the perception of sound in one or both ears – or in the head – when there is no other source of sound in the environment, and often occurs together with hearing loss. It's often referred to as "ringing in the ears." It found that 7% of U.S. workers who were never exposed to occupational noise experienced hearing difficulty, 5% had tinnitus and 2% had both.

The study found that:

- Workers in life, physical and social science occupations and personal care and service occupations had significantly higher risks for hearing difficulty.
- The problem persists especially in the manufacturing, construction, agriculture, auto repair and forestry industries.
- Workers in architecture and engineering occupations had significantly higher risks for tinnitus.

Dangers from hearing loss

- Workers with hearing loss often have trouble localizing sounds or hearing warning signals, which puts them at risk of accidents.
- Hearing loss impedes communication and often leads to isolation in social situations, impediments in career progression, reduced autonomy, poor self-image, fatigue, frustration and depression.
- Tinnitus can disrupt sleep and concentration. That in turn increases fatigue, reduces alertness, degrades performance, and potentially increases risks for accidents on and off the job.

Engineering Controls

- Choose low-noise tools and machinery.
- Maintain and lubricate machinery and equipment.
- Place a barrier, like a sound wall or curtain, between the noise source and employee.
- Enclose or isolate the noise source.

Prevention Programs

Fortunately, noise-induced hearing loss can be reduced, or often eliminated, through the successful application of occupational hearing loss prevention programs.

Engineering controls are the best defense. The use of these controls should aim to reduce the hazardous exposure to the point where the risk to hearing is eliminated, or at least minimized.

Engineering controls that reduce sound exposure levels are available and technologically feasible for most noise sources. Engineering controls involve modifying or replacing equipment, or making physical changes at the noise source or along the transmission path to reduce the noise level at the worker's ear.

Earmuffs and plugs are considered an acceptable but less desirable option to control exposures to noise. ❖

