2021 CLM Workers Compensation and Retail, Restaurant & Hospitality Conference
May 12-14, 2021
Chicago, IL

Changing the Employee Safety and Wellness Mindset to Reduce Workers' Compensation Costs and Avoid Liability

The challenges we face in a litigious society is often daunting. While the inherent costs associated with maintaining a business are inevitable, workplace injuries and liability exposures can be real threats to the bottom line. According to the Department of Labor and Industry, statistics have shown that employers spend approximately $1 billion per week in workers' compensation costs. These costs include workers' compensation benefits, medical expenses, and necessary corrective measures. Similarly, employers are facing rising employment-related claims. The direct cost associated with employee lawsuits is increasingly high and not only results in damage to a company's reputation, but also leads to loss of morale, diminished productivity, lost trust, and exorbitant legal fees.

Due to the rise in costs associated with workers compensation claims, it is imperative that employers take a proactive approach to control risks and the associated exposures. When promoting safety and wellness, it is important to not only consider direct consequences (loss of life, serious injury and potential lawsuits), but also indirect consequences (interrupted operations, loss of productivity, re-hiring, retention and retraining of employees, and reduced morale). The focus on safety and health consciousness has dramatically increased over the last decade on both a national and international level. Employers can take steps to go beyond state laws to minimize the impact of high-risk health issues, including implementing safety practices and workplace health initiatives.

Employee Safety, Occupational Health and Wellness Programs

Workplace Health Programs are defined by the Centers for Disease Control and Prevention (CDC) as a coordinated, comprehensive set of health promotions and protection strategies implemented at the worksite that consist of programs, policies, benefits, environmental support, and links to the surrounding community designed to encourage the health and safety of all employees.

According to the CDC, there are four major categories of intervention to address health issues:

1. **Health-related programs** – opportunities available to employees at the workplace or through outside organizations to begin, change or maintain health behaviors.
2. **Health-related policies** – formal or informal written statements that are designed to protect or promote employee health. They affect large groups of employees simultaneously.
3. **Health benefits** – part of an overall compensation package, including health insurance coverage and other services or discounts regarding health.

4. **Environmental support** – refer to the physical factors at or nearby the workplace that help protect and enhance employee health.

In addition to improving employees' overall health behaviors, workplace health promotion reduces absenteeism, improves productivity, builds, and sustains morale, lowers health risks, decreases healthcare costs, and often provides positive impact on employee recruitment and retention.

Driving Down Costs/Mitigating Exposures in Workers' Compensation Claims

Developing a strategy of engagement in employee safety, care and wellness efforts in the workers' compensation arena is an effective strategy for improving the culture and behavior of company personnel. A key component toward success is ensuring that employees are not just recipients but actively involved in identifying safety and health issues. The most successful model of cultural commitment is leader led and population empowerment. Having employees participate in developing and implementing solutions creates a supportive, inclusive culture.

Employers should focus on reinforcing health and safety initiatives to help prevent injuries and enhance workers' compensation outcomes – it is imperative that employees see and feel the support. Consider an employee self-reporting program for workers' compensation and safety issues. In addition, having a workers' compensation advocacy support system to answer employees' questions regarding workers' compensation concerns will enable employees to have direct contact with a live person to shorten the response time. This will require maintaining a trained staff skilled in delivering positive communication and messaging to employees. Investing in a dedicated medical case management and absence management team will help reduce costs, ensure immediate quality medical care, and promote and expedite return to work. Every case is different, yet it is imperative to establish a team to conduct quick assessments, address immediate needs, establish short- and long-term goals, and develop customized approaches and frequent monitoring to formulate a resolution and strategy.

While the role of the workers' compensation system varies from state to state, taking a proactive approach in the workplace will effectively control exposure. Proactive claims management procedures and detailed post-injury investigations are critical tools to minimize workers' compensation costs. Most claims are minor and resolve with minimal medical treatment. The employer should work with their carrier/third-party administrator to ensure that claims with potential high medical exposure are handled timely and appropriately. An organized investigative approach includes gathering detailed facts, determining the root cause, identifying corrective action plans, addressing ergonomic issues, implementing appropriate risk control measures, identifying subrogation opportunities, and eliminating recurrence. In addition to an effective post-injury investigation, claim review meetings involving all key stakeholders help to maintain control over the claim by gathering insight from all perspectives. The timing, attendees and scope of the review meetings will vary and should be conducted throughout the life of the claim.

While issues and challenges can always arise, the above approach serves to enhance and strengthen efforts for limiting exposure, reducing costs, and closing claims.

Employer Liability for Companies Crafting and Implementing Wellness Programs

Exposure to employers arising from the creation and implementation of a wellness program comes in two different varieties: (1) exposure to direct statutory challenge to the wellness program in the form of employment discrimination claims and (2) potential ancillary claims that arise out of alleged tort liability.

Statutory Claims Based on the Wellness Program
It is important to note how federal statutes, specifically the Healthcare Insurance Portability and Accountability Act (HIPAA), Affordable Care Act (ACA), Genetic Information Nondiscrimination Act (GINA) and Americans with Disabilities Act (ADA), interact with corporate wellness programs. A review of the applicable statutory language is useful in this regard.

1. **Federal Discrimination Claims (HIPAA and ACA**)
   Under both statutes, there are limits on incentives or penalties for wellness programs that are beyond participation-based programs. In other words, if the wellness program is simply made available and the only requirement is that the employee participate in it, there is no limit on the penalty or incentive. Where, however, there is a performance measurement as a component of the program, such as actual cessation of smoking, weight loss goals, reduction in body fat percentage, blood pressure measurements, etc., there are limits in place. To be legal under the ACA, wellness programs must meet these four criteria:
   a. Employees must be allowed to qualify for the reward at least once per year.
   b. The reward may not exceed 30% of the total cost of coverage under the employer's healthcare plan (this amount goes up to 50% for smoking cessation programs).
   c. The program must be reasonably designed to prevent disease or promote health. In other words, it may not be a cover for discrimination, it may not be overly burdensome, it may not be based on highly suspect methods (such as crash diet programs), and it must have a reasonable chance of improving the health of those who participate; and
   d. The full reward offered by the program must be available to all similarly situated employees.

   If participation in an activity would be unreasonably difficult or unsafe, the employer must offer a reasonable alternative activity. If an employee is unable to meet a wellness goal (such as reducing weight), the employer must offer a reasonable alternative goal. The alternative must accommodate the recommendations of the employee's doctor, among other things.
2. **Federal Discrimination Claims (GINA and ADA)**
   Pursuant to the ADA, an employer may "not require a medical examination and shall not make inquiries as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. 1211(d)(4)(A). However, an employer "may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site." 42 U.S.C. 1211(d)(4)(B).

   Under GINA, it is an "unlawful employment practice for an employer to request, require, or purchase genetic information with respect to an employee or family member of the employee." 42 U.S.C. 2000ff-1(b). GINA provides an exception to the prohibition on requesting genetic information where "health or genetic services are offered by the employer, including such services offered as part of a wellness program," but only where "the employee provides prior, knowing, voluntary, and written authorization." 42 U.S.C. 2000ff-1(b)(2)(A), (B).

   The key word with respect to both statutory provisions is the word "voluntary." The definition and scope of this word was the source of a massive litigation effort that culminated in the United States District Court for the District of Columbia handing down, in 2018, its decision in the case of *AARP v. EEOC*. While there has been a plethora of analysis about the suit and the

Court's decision, the basic premise is that AARP was able to convince the Court that EEOC's rules as to incentives in place to foster participation in wellness programs to not exceed 30% of the cost of program should be struck down. In essence, the Court stated that participation in the wellness programs had to be truly voluntary. In response, the EEOC, without guidance as to when new rules would be put into place, simply vacated rules as to any percentage incentives. There is no firm information as to if, or when, new rules will be put into place by EEOC. This has resulted in a somewhat frantic search for how to address this issue in fashioning wellness programs to comply with the ADA and GINA.

A health program that includes disability-related inquiries or medical examinations (such as a health risk assessment or biometric screening) will be considered voluntary if the program meets certain requirements.

a. Employees may not be required to participate.
b. The employer may not deny coverage or limit the extent of benefits under any of its group health plans or package options for employees who do not participate.
c. The employer cannot take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees who do not participate.
d. And the employer must provide employees with a confidentiality notice that:
    i. Is understandable.
    ii. Explains the type of medical information that will be obtained and the specific purposes for which the medical information will be used; and
    iii. Describes the restrictions on the disclosure of the employee's medical information, the employer representatives, or other parties with whom the information will be shared, and the methods that the covered entity will use to ensure that medical information is not improperly disclosed (including whether it complies with the HIPAA privacy and security regulations).

One important item to stress is that a wellness program that does NOT include HRA or biometric screening as described above will not run afoul of either ADA or GINA. Therefore, concerns about whether the program is voluntary or not do not exist in that context.

3. **State Discrimination Claims (analogous statutes to federal and lifestyle discrimination statutes that may exist in certain states)**

Currently, 29 states and the District of Columbia have laws that prevent employers from discriminating against employees for using tobacco products. Although laws vary from state to state, employers are generally prohibited from either refusing to hire or firing an employee for using any type of tobacco product during non-working hours and off the employer's property. In four states (California, Colorado, New York, and North Carolina) there is no specific law related to employee tobacco use, but smokers are protected under broader statutes that prohibit employers from discriminating against any employee who engages in a lawful activity. California also has a law that protects employees who engage in lawful activity, but it has been interpreted by the courts as not creating any new substantive rights but instead set forth a process to pursue claims for violation of existing Labor Code protections before the state Division of Labor Standards Enforcement. Most of these laws were first enacted in the late 1980s and early 1990s, however, as discrimination against smokers in the workplace has become more widespread in recent years, several states have enacted such laws more recently. In states without smoker protection laws, some employers have begun refusing to hire new employees who smoke. While

many of these employers are using the honor system to enforce these policies, a few of them are requiring that employees be tested for nicotine. Many of the businesses with these policies are in the healthcare industry, but some county and municipal governments have also enacted such policies.

Potential Claims Related to Employee Participation in Wellness Programs
In addition to possible direct employment actions taken by employees as described above, there is also the possibility of claims being made by employees related to the implementation of the wellness program and/or the employees' participation in them. Such claims arise from acts and/or omissions of the employer, or by third parties acting on behalf of the employer. In either case, care should be taken in terms of insulating, to the greatest extent possible, the employer from such claims. The principal defense to such a claim may, indeed, be to classify such claim as barred as against the employer because of the exclusivity provision of the applicable workers' compensation statute as will be described further below. However, where that is not possible, it is useful to consider what steps can be taken to prevent liability.

1. **Claims Related to Activities of Third Parties**
   Wellness programs that include testing or prophylactic measures usually require an outside vendor or consultant to work with the employer and its employees to provide the specific services at issue. Such vendors could be phlebotomists providing blood or drug testing or screening, or nursing staff doing diagnostic work such as taking blood pressure measurements or sugar testing. Additionally, some wellness programs provide for onsite flu shots or other inoculations. Further, some wellness programs provide dietary consultants, fitness trainers or other lifestyle coaches.

   In all such cases, the principal concern should be in partnering with reputable, and, in the case of anyone doing anything that is within the province of allied healthcare testing or evaluation, certified vendors and personnel. Appropriate licensure or certification should be verified before any service is made available through a wellness program. Additionally, it is beneficial to have in place suitable indemnity arrangements, or to ensure that additional insured status, where appropriate, for the employer as to any such third parties.

   In terms of legal analysis and defense of such claims, it is anticipated that any claims made resulting from an accident or mishap associated with the work of a consultant or allied health professional would follow the course of a traditional general liability and/or professional malpractice claim. Negligence standards would apply, however, there would also be issues such as negligent hiring or retention, agency/vicarious liability issues, etc. This underscores the need for clear demarcation at the outset of any such aspect of a wellness program to maintain the best possible position for the employer, as well as to maintain the ability to shift risk and exposure away from the employer.
2. **Premises Liability Claims**
   In addition to diagnostic testing, screening or physical exams, wellness programs could include items such as gym or pool memberships, seminar invitations or attendance or other events and activities that require an employee to participate either on or offsite. One can envision any number of potential outcomes that could occur involving slip/trip and falls, exercise equipment mishaps or accidents/incidents of other types.

As in the case of the vendor/provider issues referenced above, clear roles and appropriate protection in terms of indemnity agreements and additional insured status, if appropriate, should be pursued. Also, it is anticipated that the claims made of the nature referenced immediately above would follow traditional negligence claims, which would require a claimant to demonstrate a duty on the part of the employer, breach of that duty, causation, and damages.

3. **Possible Workers Compensation Defense**
   Depending on the nature of the program, a third-party claim could be steered back into the realm of the first party through an exclusivity provision of a state's workers' compensation laws. The principal question in any type of exclusive remedy argument of this type is whether the employee was acting within the course and scope of his or her employment. Factors to consider are (1) the extent to which the activity is encouraged by the employer; (2) the employer's level of participation in sponsoring or advertising the activity; (3) whether the employer manages or actively participates in the event or program; and (4) whether the activity or event occurs on or off site, among other factors.

The Claims Perspective and Pre-Litigation Considerations
Prior to any lawsuit being filed, there are several areas of concern that can be addressed by the claims professional team assigned to handle potential claims in this area. While each claim will bring with it a unique set of facts and circumstances, the following is a basic summary of what to look for and what the claims professional would be looking for in terms of populating the claims file with information and documents necessary to set up for the most effective defense of any such claim.

Contract and Insurance Documents
Given the variety and type of vendors providing wellness program services, it is imperative to obtain all contracts and/or other agreements in place as to the services to be provided by those vendors. Such contracts will typically include indemnity and insurance provisions that address allocation of risk between the parties, and it is important to review those and determine whether a tender of defense and indemnity is appropriate, or if one should be expected to come the way of the assured. Closely linked to the contract documents as to defense and/or indemnity, there is typically an insurance provision requiring the vendor to not only maintain suitable insurance coverage, but also to name the assured as an additional insured on that policy. The claims professional should, therefore, look to verify not only that a Certificate of Insurance has been issued, but also that an Additional Insured Endorsement exists, and that the AI Endorsement provides coverage mirroring that which is required under the services contract.

Investigation Documents
Tort claims arising from the implementation of wellness programs, despite their origin, are, at their essence, simply personal injury claims, so the usual avenues of investigation exist and should be utilized. Incident/accident reports, witness statements, photographs, medical records, etc. are all items that the claims professional will want to obtain. Use of field or independent adjustors to secure same should be considered as with any other personal injury claim, particularly those of the premise's liability variety.

One area of investigation particular to the type of third-party claim that might arise from an employee participating in a wellness program, health screening or other related activity has to do with licensure and/or certification of providers/vendors employed by the insured to implement their programs. Research and investigation into whether appropriate licenses and certifications were in place, as well as

information as to other claims that may exist against vendors, and what, if any, knowledge the employer had as to this are key elements of claim investigation.

COVID-19 Issues for Employers

Employers potentially face claims made not only by their employees related to COVID protocols and potential exposure, but also from third parties such as customers, vendors, clients, etc. that may frequent or attend their place of business.

Potential Workers' Compensation Claims

While the massive slowdown of the economy has negatively impacted the number of workers' compensation claims overall, there has been a rise of COVID-19 related workers' compensation claims. Determining whether an incident arises out of the course and scope of employment is fact specific and thus, it is imperative for all employers and their carriers/ TPAs to conduct prompt and thorough investigations of any COVID claims using a trained and informative investigative team.

Typically, injuries that arise out of, and during employment, are compensable. In most states, it is the injured worker's burden to prove that they have suffered a compensable injury. An employee who contracted COVID at work would likely receive workers' compensation benefits. However, the fact that an injury occurs in the course and scope of employment does not automatically result in an award of workers' compensation benefits. Depending on the facts and the state workers' compensation laws, a COVID-19 infection could also be considered an occupational disease. Some states have specific enumerated occupational diseases which if established, provide a presumption that it was sustained in the course and scope of employment. Specific states also have an omnibus provision covering occupational diseases not enumerated, where the employee must prove the following elements: (1) exposure to the disease by reason of employment; (2) the disease is causally related to the industry or occupation, and (3) there is substantially greater incidence of the disease in that industry or occupation than in the general population.

Many states across this country have signed new legislation lowering the burden of proof for certain employees who contracted the coronavirus at work, i.e., "essential workers." However, this lower burden of proof is rebuttable by the employer, providing they can show the employee was not exposed to the coronavirus at work pursuant to certain evidentiary standards. It is undisputed that the employee's burden of proving causation is an uphill battle and challenging. Thus, an employer who fact gathers, traces, and retains appropriate medical experts to provide causation analysis is in a better position to defend a coronavirus claim.

Another area of future litigation will be the impact of mandatory and non-mandatory COVID-19 vaccinations. The analysis of a claim based on an adverse reaction to the vaccine will likely be dependent on whether the vaccinations are mandatory or non-mandatory. If the vaccine is mandated, it is likely that compensability for the adverse reaction will be found. Since the COVID-19 vaccine is new, we do not have any precedents regarding reaction to the vaccine and its impact on workers' compensation eligibility.

Potential EPL Claims by Employees

A variety of potential claims, some that strain credulity and any semblance of fairness, are being contemplated or have been pursued since the pandemic began. These claims not only derive from how

an employee would be treated within the workplace, but also regarding testing, vaccination and other seemingly less employee-centric issues.

1. **Testing**
   As they have brought employees back into the workplace, some employers have opted to require COVID testing as a prerequisite for an employee to resume in-person work. While requiring a negative COVID test appears not to have run afoul of any statutory or regulatory issues, in June of 2020, the EEOC issued guidance indicating that requiring antibody testing would violate ADA protections afforded to employees.
2. **Vaccination**
   Since December 2020, when the first of the COVID vaccines were made available, employers have begun requiring their employees to obtain vaccination as a prerequisite to beginning or continuing in-person work. Challenges to this on religious grounds are sure to come as vaccine requirements have in the past been successfully challenged. As of December, the EEOC has issued guidance advising employers that they cannot exclude employees with legitimate objections to vaccination related to disability or religious grounds from the workplace. The key issues for any potential litigation will be the existence and nature of the alleged disability or the sincerity of the religious belief held.
3. **Traditional EPL Claims**
   To some degree, the CARES Act influenced any potential claims related to FMLA leave and other claims by addressing medical leave issues related to COVID. Still, we have begun to see efforts to pursue claims by employees, some more creative than others. For example, one of the most prevalent types of EPL claims relates to alleged wrongful termination and/or retaliation by employers against employees seeking to enforce their rights pursuant to FMLA, ADA or safety guidelines (statutory or internal). Claims made by those employees who may be at higher risk for contracting COVID under the ADA are also among those which have been pursued.

Potential Third-Party Claims

In addition to claims having their genesis in COVID protocols and their implementation, employers are going to be subject to potential claims from those outside of their businesses.

1. **Nature of Claims**
   The third party claim most anticipated is one where a customer, patron, vendor or other visitor to a business or company alleges that he or she has contracted COVID because of improper conduct by the business owner. The claim could be that the business did not take steps to exclude employees that had COVID or other visitors that were carriers of the virus. These claims will require critical review of the safety and hygiene procedures and protocols in place by a particular business, and, as with any COVID claim, will have a heavy emphasis on causation. The burden will be on the claimant to show that he or she contracted the virus at a particular location.
2. **Potential Defenses**
   a. Causation – Perhaps the most available and strongest defense will be as to causation. As in any personal injury claim, a claimant seeking to recover damages related to contracting COVID will need to prove that not only are their injuries and damages related to their contraction of the disease, but, perhaps more importantly, and far more difficult to prove, that they contracted the virus at the business or location being sued. Those defending these suits will no doubt rely on the concept that COVID is what has been described in similar litigation in the past as an "ordinary disease of life," and,

therefore, not amenable to being described or proven to have been contracted at a specific location.

b. Waivers – Many businesses, mostly restaurants and gyms, were requiring patrons to sign waivers releasing the businesses from liability for contracting COVID as a prerequisite to enter their establishments. Most states have specific law concerning the viability and effectiveness of a waiver, and most allow consumers and patrons to waive claims at least to some degree. The waiver in question and a particular state's law will need to be reviewed to determine whether the waiver will be effective, however, the wording of the waiver and whether there are factors that would not support the notion that the waiver was given knowingly and voluntarily are commonly proffered arguments to vitiate the waiver's effectiveness.

Status as to Liability Protection and Insurance Coverage

From the outset of the pandemic, efforts were underway to assist employers about the effect of the pandemic on their business operations and financial status, as well as protection against potential claims and suits.

1. **Early and Ongoing State Legislation Efforts**

   Several states either issued Executive Orders, or passed laws, early in the pandemic granting immunity to healthcare providers against COVID claims. Some states have gone further and have already passed laws giving protection to other businesses that face claims related to contraction of the COVID-19 virus. Review of a particular state's statute is necessary to fully understand the parameters of the law, the scope of the protection, and whether any businesses would remain exposed to suit related to COVID claims. However, while each state's law will differ to some degree, some common themes have developed. For example, there would be no protection under the various laws for conduct rising to the level of gross negligence or wanton or willful, or reckless conduct. Additionally, many of the state legislative initiatives limit protection to what they describe as frivolous suits, although there is precious little to describe what constitutes that type of claim.

   Some statutes have been in effect since the early stages of the pandemic. For example, North Carolina, Oklahoma, Utah, and Wyoming were among the first to move immunity beyond the healthcare field. North Carolina's statute provides immunity to essential businesses, such as grocery stores and restaurants, from liability for any harm caused by COVID-19. Oklahoma, Utah, and Wyoming provide immunity to a broader group of business, so long as safety rules are followed, and no laws are broken.

   As of the end of 2020, more than half of the states in the country had passed or were considering some form of liability protection. It is safe to assume that by the time this presentation is underway, more states will have considered and/or passed legislation that will be based on the concepts enumerated and describe above. Reference to a particular state's statute is necessary to gain a more complete understanding of the scope of protection and any nuance in terms of achieving the immunity provided.

2. **Ongoing Congressional Efforts**

   Prior to the end of 2020, there was an effort led by Senate Republicans to include liability protection in a comprehensive funding law that did not ultimately make it into the final version of the law passed. Liability protection remains a focus for future discussions, but, as of the

writing of these materials, no such legislation is pending for consideration by the full Congress and/or the President.

3. **Insurance Issues as to Business Interruption**
   Legislation that was introduced starting in the weeks following the first stages of the pandemic to attempt to make insurers liable for COVID business-interruption claims has barely moved. Bills were introduced in Louisiana, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, and South Carolina. To date, it appears that none of the measures introduced in any of the state legislatures have moved out of committee. Legislators have seemingly abandoned these efforts as it appears that no action has been taken on most of the bills since mid-2020. On the federal level, there had been rumbling from some Congressman of similar bills. However, despite very early suggestion that a bill would be introduced, it appears Congress has moved on to other pandemic issues.