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Obesity in the Workplace

By R. Mark Gottfried, Esq.

Macro-economic conditions due to the recession of recent years have been one of the biggest contributing factors driving an increase in workers' compensation indemnity costs. As a result, benefits administrators are forced to look for areas within their organizations where they can reduce expenses to protect their companies' bottom line. According to the National Council on Compensation Insurance, indemnity payments have risen by 3.2% over the period of 2002 to 2011. With these types of continuing increases in workers' compensation, companies are faced with developing creative strategies to reduce the cost of work-related employee injuries.

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Emergency Planning or Common Sense

By Roseann Jones

WorkersCompensation.com has recently report on a new study released by The Lawrence Livermore National Laboratory in California, which may cause major disruptions to employers across the country, as they scramble to revise and implement dramatically new emergency plans in the event of a nuclear detonation. The research determined that the best course of action in the event of a nuclear explosion is to "run to the nearest safe shelter". The study goes on to state that "it is better to run away from a nuclear detonation blast zone and the fallout, instead of taking shelter in a building with only limited protection from radiation." The study showed that if your current shelter is poor and a higher quality shelter is less than 5 minutes away, "you should run there as soon as you can."

Like us, you may be thinking that you didn't need additional research to tell you to run for cover in the event of a nuclear detonation. While common sense should prevail in this and other potentially dangerous situations, creating or updating your company's disaster plan may be in order.

Contact GottSommlaw to make sure that you and your employees have an appropriate disaster plan.

Obesity in the Workplace, *continued*

The results of a study published by the Centers for Disease Control and Prevention and conducted by the Washington State Department of Labor & Industries indicate that truck drivers, movers, and police and firefighters are likeliest to be obese. Doctors, scientists and teachers are the healthiest. The study also examined the percentage of workers in specific occupations who smoke, have adequate fruit and vegetable servings, participate in leisure time exercise, and report high physical demands of their job. The study found that nearly 1-in-4 workers statewide were obese.

The objective of this research was to identify occupations in need of workplace obesity prevention programs and to provide prevention, as well as to provide policy makers and health practitioners with a way to target and prioritize prevention and health behavior promotions.

This is the first state-level study using the Behavioral Risk Factor Surveillance System data to estimate occupation-specific obesity. All states within the U.S. could have this data if questions about occupation and industry were added to many state and national health surveys.

This study does have limitations, as researchers used self-reported height and weight, which may include an underestimate of obesity. Additionally, the body mass index results do not distinguish between fat and muscle mass. Police and firefighters, for instance, had a high prevalence of obesity but also had the highest proportion of vigorous leisure time physical activity.

Those with less education and an income less than \$35,000 had a significantly higher likelihood of being obese, according to the study. Workers who had regular servings of fruits and vegetables and adequate physical exercise were less likely to be obese.

Putting this information to use when compiling company policy may seem impossible. Contact Gottfried Sommers LLC for assistance in developing and implementing your company's policies and procedures.

Dress Codes and Protected Classes

One of the ongoing struggles many employers face is what seems to be an ever-broadening definition of "protected concerted activity" under the National Labor Relations Act ("NLRA"). Even seemingly neutral policies have been found to run afoul of the NLRA's protections. Take, for example, the case of *Medco Health Solutions of Las Vegas, Inc. v. National Labor Relations Board*, which demonstrated that even a company's dress code can - at least according to the National Labor Relations Board ("Board") - violate employees' rights under the NLRA.

Medco, a pharmacy benefits management company, sold pharmaceuticals from its mail-order facility in Nevada. To encourage superior employee performance, Medco initiated a "WOW program," which centered on voluntary weekly events at which selected employees received a "WOW Award." Employees with WOW recognition were not given money, but recent winners were named on the "Wall of WOW" in the employee cafeteria. Employees could decline WOW awards or choose not to attend WOW award presentations, and the awards carried no weight in determining promotions.

Medco had a dual purpose in developing the WOW program. It not only thought that employees would appreciate the gesture, but Medco also used the program to advertise itself to its clients. The Wall of WOW was a regular stop when managers showed customers and prospective customers around the

facilities. Medco also featured the WOW program in a slide show presentation that it showed members of tours. Tours were given about twice a week.

Not all of Medco's pharmacy unit employees, who were in a union, were enthused about the WOW program. In February 2010, one of them came to work in a T-shirt with a union logo on the front and the words "I don't need a WOW to do my job" on the back. A Medco client was scheduled to visit its facilities that day, and Medco found nothing amusing about the T-shirt. The offending employee was told to remove the T-shirt because it was insulting to the company. He was also told that if he could not support the WOW program, "there were plenty of jobs out there." The employee complied and did not wear the T-shirt again.

His union, however, filed an unfair labor practice charge alleging, in part, that Medco's acts had violated the NLRA because the T-shirt was a union-supported protest of a working condition protected by the NLRA and because Medco had unlawfully invited the employee to quit over a lawful protest about working conditions. In defense, the company invoked a provision of its dress code that prohibited employees from wearing clothing with "Phrases, Words, Statements, pictures, cartoons or drawings that are degrading, confrontational, slanderous, insulting or provocative." An administrative law judge agreed with the union, finding not only that the company committed an unfair labor practice by ordering the employee to remove the T-shirt, but also that the company's dress code policy violated the NLRA because its employees would read the policy to prohibit them from engaging in protected concerted activity under the NLRA. The National Labor Relations Board affirmed the finding.

On appeal, the United States Court of Appeals for the District of Columbia Circuit set aside the Board's finding that Medco committed an unfair labor practice by ordering the employee to take off his T-shirt and by banning clothing with provocative, insulting, and confrontational expressions. Although the appellate court found that the record supported a finding that the employee was engaged in concerted activity under the NLRA when he wore the T-shirt, the appellate court agreed with Medco that "special circumstances" warranted Medco's response to the T-shirt incident because the employee's T-shirt posed a threat to the company's client relationships. Medco provided ample evidence that the WOW program was an important element of the pitch it gave prospective and current clients and that Medco even assigned a full-time employee to manage the program. In its ruling, the court recognized the principle - previously followed by the Board - that an employee's message or action can harm an employer's customer relations by belittling or critiquing aspects of the employer's operations. The court further noted that it seemed natural for a company engaged in selling a service to be concerned over customers' appraisals of its employees' attitudes, including resentment over seemingly inoffensive company programs. Finally, the appellate court overturned the Board's ruling that the company's dress code was in violation of the NLRA, noting that the Board failed to offer any justification for its decision.

In making its ruling, the court noted that in the past, the Board had proven itself "remarkably indifferent to the concerns and sensitivity" that encourage employers to adopt

rules that are meant to "maintain a civil and decent workplace." Hence, even in a union environment, there can be circumstances where employees engaging in otherwise protected activity under the NLRA may cross the line when their actions risk adverse customer reaction.

While Medco's actions were vindicated on appeal, the message is not that employers can arbitrarily ban clothing that has pro-union messages or that is otherwise unfavorable to or critical of the employer. Employers must still be mindful not to infringe on the rights employees have under the NLRA. While even though the dress code at issue here was ultimately upheld, employers must carefully craft dress codes to avoid blanket prohibitions on "message" apparel that express viewpoints and slogans that are

negative towards the company. To minimize the chance of losing the battle over questions of acceptable dress, employers may want to consult with knowledgeable counsel to craft appropriate clothing policies in employee handbooks.

Ohio BWC News

Columbus, OH (WorkersCompensation.com) - The Ohio Bureau of Workers' Compensation (BWC) Public Employment Risk Reduction Program (PERRP) has launched new Safety Alert fact sheets for public employers to use as an educational tool. PERRP Safety Alerts (PSAs) are advisory in nature, informational in content, and intended to assist public employers in providing a safe and healthful workplace. The first PERRP Safety Alert - "Hazards of tree felling and trimming operations" - discusses reducing or eliminating tree work related accidents. Recent public employee fatalities during tree work operations have demonstrated a need to bring attention to these hazardous conditions. Since 2001, nine Ohio public employees have been fatally injured during tree felling and trimming operations.

Tree work operations can be dangerous and may result in severe injury or death when proper precautions and work practices are not developed and carried out in the workplace. Implementing the actions described in this new PERRP Safety Alert can help protect public employees from serious or fatal injuries during tree work operations.

Note that PERRP Safety Alerts (PSAs) are not a new standard or regulation and create no new legal obligations. Each PERRP Safety Alert will be available at www.bwc.ohio.gov and will have some or all of the following components:

- Purpose - explains the issue we want to alert people about
- Stats - national and statewide numbers showing why there is a concern
- Safeguards - suggested safeguards to reduce or eliminate workplace hazards
- Final thoughts - other helpful information on the topic from our internal experts
- Resources - a list of places to find more information and training we offer relating to the topic.