August 2016 Volume 4, Issue 12

Curry Insurance Agency

WORKERS' COMPENSATION

New X-Mod Rules to Reduce Effect of One Large Claim

ONE OF the most common employer complaints in workers' comp – that one large claim can skew an employer's X-Mod – is about to finally be addressed in California.

The Workers' Compensation Insurance Rating Bureau's "split-point" experience rating system, in which an employer's workers' comp claims are divided into primary losses and excess losses, will be overhauled for 2017.

The Bureau will replace the current static $7,000 split point for all industries and employer sizes with a variable split-point system.

This change is expected to limit the impact of one large claim on an employer's (particularly a small business's) X-Mod. At the same time, an employer's X-Mod would be more affected by the frequency of claims.

In other words, an employer that had one large $50,000 claim over three years would likely see a lesser impact on its X-Mod than a like employer with five $6,000 claims during the same period. This is because one large claim is not necessarily indicative of an employer's safety efforts, which more claims are.

Under the current system, the first $7,000 worth of losses for each claim are considered primary claims costs, which count fully when calculating an employer's X-Mod. Any losses above $7,000 are considered excess and have less weight in the experience rating formula.

Under the new system, the split point will vary from $4,500 to $75,000, depending on the size of the employer and their industry. The Rating Bureau predicts that there will be up to 90 different split points.

The effects

According to the Rating Bureau, the effects of the change to the variable split-point system include:

- There will be no overall pure premium impact (no impact on average X-Mod).
- Impacts on any individual employer's X-Mod will depend on their claim and exposure history.
- The variable split-point plan will generally be less volatile. It will be more sensitive to claim frequency and less sensitive to large claims.
- The overall impact of the new plan will be generally modest.
- Net movements of modifications above/below key thresholds – such as 100%, 125% and 200% – are expected to be less than 1%.
- Modifications over 200% for small risks will be significantly reduced.

See 'Eligibility' on page 2

LAWSUITS AGAINST EMPLOYERS SURGE

Discrimination, unequal pay, worker misclassification and wage theft lawsuits are growing fast.

What are the threats and what can you do to protect your business?

Find out on page 4

HIGH-RISK EMPLOYERS QUALIFY MORE EASILY FOR EXPERIENCE RATING

Source: Workers' Compensation Insurance Rating Bureau

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COURT RULING

EEOC Can Inspect Firms without Consent, Warrant

A FEDERAL COURT has ruled that the U.S. Equal Employment Opportunity Commission has the right to conduct on-site inspections of businesses without a warrant or consent from the owner.

This new development could put employers in the crosshairs of the EEOC anytime the agency deems a complaint worthy enough to visit a company's premises over an allegation of discrimination. And legal experts predict that the agency will cite this case whenever an employer tries to refuse an EEOC request for an on-site inspection.

"This decision arms the EEOC with precedent that it may conduct on-site investigations regardless of whether an employer consents, something employers should consider when contemplating whether to deny the EEOC access to its business during an investigation," the law firm Seyfarth Shaw LLP wrote in a blog.

In the case in question, a man sued Nucor Steel Gallatin Inc. for discrimination, alleging that the company rescinded a job offer after it had learned of his disability history. He later filed a complaint with the EEOC, which subsequently informed the company that it would conduct an on-site visit to interview other personnel who were involved in the hiring process.

Gallatin refused, telling the EEOC "We simply do not feel that coming on-site is necessary or relevant to your investigation." After that, the commission issued a subpoena to visit the premises and in turn Gallatin said it could not enter the worksite without a court warrant.

At that point, the EEOC asked the U.S. District Court in Frankfort, Kentucky, to intervene in the case. In its decision rendered on April 28, 2016, but published in July, the court ordered Gallatin to let the investigator perform the inspection, but ruled that the investigator limit the inspection to evidence directly related to the Hot Rolling Department Shift Manager position and its associated responsibilities.

It also said that requiring a warrant would essentially duplicate the same procedures for enforcing a subpoena.

The court noted that the EEOC regulations contained comprehensive safeguards for a company that refuses a subpoena.

It also stated that the EEOC cannot enforce a subpoena without obtaining approval from a federal district court and that the court will approve the subpoena after determining if the inspection is in the agency's "authority, procedurally sound, relevant to the specific charges filed, and not unduly burdensome."

Seyfarth Shaw wrote in its blog that "if the EEOC ever did have any hesitance about conducting an on-site investigation without an employer's consent, this ruling likely alleviates any such concern."

The law firm recommends that employers tread carefully if they are considering challenging an EEOC subpoena. ❖

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X-Mod Eligibility No Longer Based on Premium Level

One thing that won't change under the new rules is that X-Mods with only one loss in the calculation will continue to be limited to no more than a 25-point increase.

Right now the rating values have not been set. The Rating Bureau will include them in its rate-change filing for 2017, which it is scheduled to submit to the state's Insurance Commission in August.

X-Mod eligibility

The Rating Bureau has also changed the way X-Mod eligibility is determined for California employers.

Starting in 2016, qualification is based on payroll over the past three years and on expected loss rates for the employer's industry. Prior to 2016, X-Mod eligibility was solely based on premium level.

As a result, some single-employee companies in high-risk industries could be eligible.

For example, in the logging industry, an employer would need just one employee earning more than $60,000 a year to qualify for experience rating, while it would take an accounting firm 82 $60,000-a-year workers to qualify.

That's because expected claims for logging are so much more significant than those for accountants.

One of the main reasons for the change in X-Mod eligibility was that the Bureau was unable to issue X-Mods for an upcoming year until only after the insurance commissioner had approved the rates for that year. Sometimes that didn't happen until November, which left precious little time for calculating X-Mods.

Under the new regimen, X-Mods can be issued as early as September for the upcoming year. As a result, the expected loss-rate-based eligibility for 2016 was $10,300. That figure will change every year based on claims cost inflation. ❖

OSHA BEEFS UP

New Penalties May Apply Earlier Than Expected

THE HIGHER fines that federal OSHA implemented Aug. 1 can actually start applying to any workplace safety violations that were cited in inspections as early as February of this year.

That's because OSHA can take as long as six months after an inspection to issue citations and the penalties it proposes for the employer. This sobering news comes as OSHA finalizes new regulations regarding electronic reporting of injuries and has started conducting more probing investigations than it has in the past.

NEW OSHA PENALTIES

Starting on Aug. 1, OSHA is significantly increasing its maximum penalties for the first time in decades.

Violation	Now	Was
Serious and other than serious	$12,471	$7,000
Willful and repeat	$124,709	$70,000

In regard to the requirements for recording and submitting records of workplace injuries and illnesses, once the new rule takes effect, you will be required to electronically submit the recorded information for posting on the OSHA website if you have 250 or more workers.

This new rule will also cover those establishments with 20 to 249 employees that are classified in 67 specific industries which have historically high rates of occupational injury and illness. These businesses must also electronically submit information from their 2016 OSHA 300A Summaries to OSHA by July 1, 2017. Beginning in 2019, the submission deadline will be changed from July 1 to March 2 for the previous year.

Meanwhile, OSHA is set to approach inspections differently, trading frequency for rigor, which could mean that once a company is being inspected there's a chance it will incur multiple penalties.

Specifically, it will switch from trying to reach a certain number of inspections per year to conducting more rigorous inspections. That could mean more penalties per company because more can be uncovered during longer inspections.

More detailed inspections will likely mean more employee interviews by OSHA investigators, providing the time to wait for sample results and make return visits, and generally diving deeper. That can mean more citations and bigger penalties.

What you can do now

Companies that want to ensure they're in compliance should consider getting a hazard assessment.

You can also arrange for a compliance audit that will identify any gaps and create an action plan to close them.

Companies should also look at a trend analysis of the most common injury types that happen with their employees and create safety activities around those, which is a step toward mitigating or eliminating accident occurrences.

Those activities combined should keep you from popping up on OSHA's radar. ❖

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EMPLOYMENT LIABILITY

Lawsuit Threat Grows; What to Watch Out For

ONE OF THE biggest lawsuit threats businesses face is from their own employees. Any company with employees can be sued, and even if the case never goes to court, it can create a major burden for your business.

While most cases are settled out of court, they can drag on for as long as two years. Even if they are dismissed as meritless, the employer is often out thousands of dollars as a result.

To best protect your business from these types of claims and more, you need to learn how to identify potential claims, avoid practices that can expose you to litigation, and create formal polices for your personnel and management. The current litigation trend includes the following claims:

Discrimination

There are a number of protected classes in the U.S. workforce and, as we march forward, more are being added. Have policies that treat everyone equally in your firm, ensure that certain groups of people are not kept from advancing in their jobs, and ensure a harassment-free workplace.

Unequal pay

Most of these actions are filed under the California Fair Pay Act, which bars employers from paying workers of one gender less than those of another for "substantially similar" work. Violations can result in fines for the wage differential, plus interest and liquidated damages.

To reduce liability, you should conduct a self-audit:

- Have you updated job descriptions, including established criteria for assigning values such as skill, education, seniority and responsibility?
- Are you consistent in your pay for similar jobs performed by individuals with similar skills, education, seniority and responsibility?
- Are your male and female employees given projects or clients with commission or bonus potential on a consistent basis?

Worker classification

The federal and state governments and the IRS have been cracking down on employers that misclassify workers as independent contractors.

Worker classification lawsuits are growing. UPS and FedEx face class-action suits from drivers they classified as independent contractors.

What you can do:

- If you are considering classifying anybody as an independent contractor, you should be sure of their status and check to see if they pass federal and state labor, IRS and workers' comp tests for classifying workers.
- Classify workers who perform similar tasks consistently.
- Conduct classification audits on a regular basis.

Wage theft

These kinds of lawsuits typically involve accusations that the employee was not paid what they were due.

Some of the more common allegations include:

- Requiring staff to work off the clock
- Not providing meal and rest breaks as required by law
- Failure to pay overtime

To avoid being sued, you should write clear and consistent policies and train managers and supervisors on them. ❖

DON'T FORGET INSURANCE

Employment practices liability insurance should be your final backstop. Even if you are the subject of a frivolous lawsuit, you will still spend time and money fighting it.

An EPLI policy will cover you for:

- Legal costs, including costs of defending a lawsuit in court, whether your company wins or not
- Judgments and settlements