Leaderschoice
INSURANCE SERVICES

Leaders News Alert

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Litigation Study

California Tops for Employment Practices Lawsuits

IN APRIL, a 66-year-old man working for Staples was awarded $26 million by a jury that found he had been discriminated against and harassed based upon his age by his supervising managers.

The Los Angeles Superior Court jury found in favor of Bobby Nickel and awarded him $3.2 million in compensatory damages and more than $22.8 million in punitive damages. While this likely qualifies as one of the biggest awards of its kind in California, the case illustrates the dangers to employers from employee lawsuits in the Golden State and the associated liability.

And a recent study has found that California employers are especially susceptible to lawsuits by employees. A study of employment practices litigation data by Hiscox, an international specialist insurer, found California, Illinois, Alabama and Mississippi and the District of Columbia to be the top five riskiest areas of America for employee lawsuits.

Businesses in these states and jurisdictions face a substantially higher risk of being sued by their employees than the national average.

According to the study, on average, U.S. businesses with at least 10 employees have a 12.5% chance of having an employment liability charge filed against them.

But, businesses in several states face a much higher level of exposure to litigation.

California has the most frequent incidence of employment practices lawsuits in the country, with a 42% higher chance of being sued by an employee for establishments with at least 10 employees than the national average. In other words, if you operate a business in California, you need to be especially mindful of how you hire, discipline, fire and treat employees.

Employment practices lawsuits run the gamut from discrimination to harassment, and if a case ends up in court, it can cost your company dearly.

State laws can have a significant impact on risk. For example, the employee-friendly nature of California law in the area of disability discrimination may contribute to the high frequency of lawsuits in the state. Discrimination cases filed at the state level in California are brought under the Fair Employment and Housing Act (FEHA).

FEHA applies to a broader swath of businesses, covering any company with five employees, versus a 15-employee minimum for cases brought under federal law as outlined in Title VII of the Civil Rights Act.

"Not only are employment lawsuits more likely in those states, but the likelihood of catastrophic verdicts is also significantly higher," Mark Ogden, managing partner of employment at labor law firm Littler Mendelson, said in a prepared statement. "Unlike their federal counterparts, where compensatory and punitive damages combined are capped at $300,000, most state employment statutes impose no damages ceilings."

"Consequently, employers in high-risk states must ensure that their workforces are adequately trained regarding workplace discrimination, harassment and retaliation and that policies forbidding such conduct are strictly enforced," he said.

The average single-claimant lawsuit results in defense costs of $250,000 and a jury verdict of $200,000.

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Judgments and Settlements Costs

Settlement costs to resolve a FEHA claim are just one of many costs to an organization.

- The distraction of an organization's staff for months as documents are gathered and prepared, an internal investigation is conducted, and time is invested in fighting the claim,
- The loss of employee morale,
- The potential loss of an employer's reputation as an employer of choice for recruiting and retaining desirable employees, whether found guilty or innocent, and
- Attorneys' fees, which can cost as much as or more than an eventual settlement, if the employer is found guilty.

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Workers' Comp

State Mulls Rules to Curb Opioid Abuse, Misuse

CALIFORNIA'S DIVISION of Workers' Compensation is trying to tackle one of the biggest challenges in the workers' comp system: injured workers getting addicted to strong prescription pain killers and doctors improperly prescribing this class of drugs, known as opioids.

The DWC has proposed new guidelines that include provisions for increased screening and monitoring of injured workers that are prescribed opioids, guidelines for treating physicians to use other alternatives before resorting to opioids and starting opioid treatment with the lowest effective dose.

Opioid use and misuse by workers is a major concern for employers.

An increasing number of workers are prescribed these powerful and addictive drugs to alleviate pain, but frequently they are prescribed to treat the wrong kinds of pain and don't eliminate the source of pain, according to numerous studies.

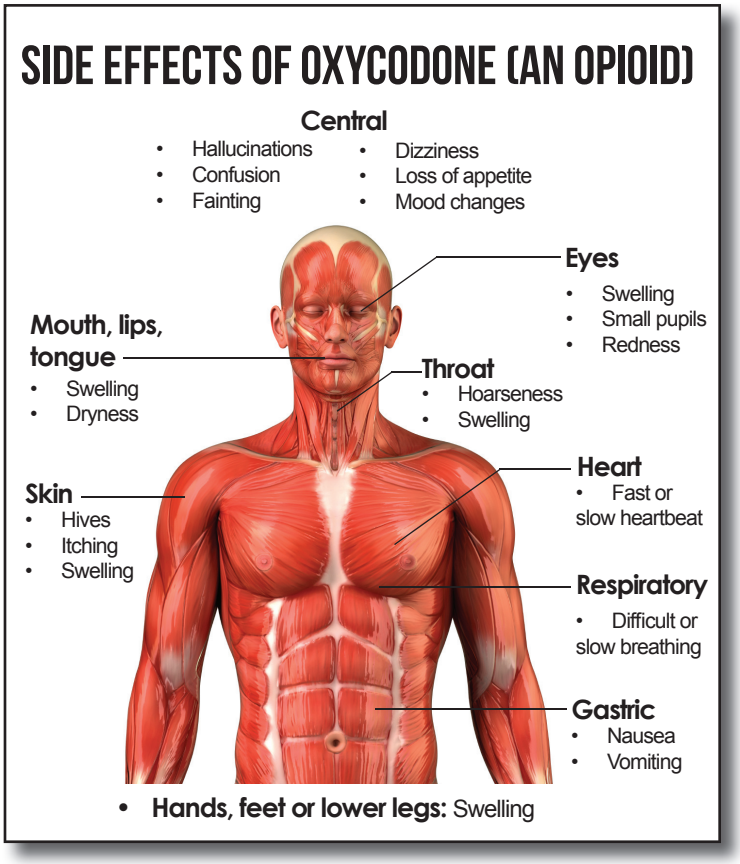
Too often, opioid use results in extended disability and additional medical concerns for claimants.

Studies by the California Workers' Compensation Institute and the National Council on Compensation Insurance, among others, have found that injured workers who were prescribed opioids took longer to return to work and had claims that cost more.

The guidelines state that:

- Opioids should not be the first choice for treating pain, particularly for mild injuries. "Other therapies, such as non-opioid medication, appropriate physical activity, and complimentary/alternative modalities should be used first," the guidelines state.
- For episodes of acute pain, the injured worker should be tapered off of the narcotics within two weeks whenever possible.
- For any longer-term use beyond an acute episode, patients should be monitored for both improvement in pain and function, as well as for indications that the treatment should be discontinued.

These signs include no reduction in pain, no functional improvement, severe adverse effects, and patient non-compliance. The guidelines also recommend urine drug testing at this phase of the treatment and at regular intervals for injured workers on chronic, long-term opioid use. ❖



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Implement Anti-discrimination Policies and Training

What you can do

Employers are advised to prevent employment discrimination and create a workplace culture that discourages employment discrimination, harassment and retaliation, with these actions:

- Implement and integrate a strict policy that makes employment discrimination of any type unacceptable in your workplace.
- Train your managers in the implementation of the anti-discrimination policy with the expectation that prevention is their responsibility.
- Employee training should address many of the same issues as the managers' training relative to employment discrimination.
- Establish cultural expectations and norms.
- Respond to an employee complaint about employment discrimination, harassment or retaliation in a timely, professional, confidential, policy-adhering manner. Address the complaint through to appeal, when necessary. ❖

Americans with Disabilities Act

One Misstep in Interactive Process Can Cost You

ONE SMALL misstep in the interactive process held to determine whether you can reasonably accommodate a "disabled" worker can land you on the receiving end of an Americans with Disabilities Act lawsuit.

A federal court ruled recently that an ADA case brought by a worker who was denied the opportunity to show she could perform essential job tasks can now go to trial. That's despite the fact that the employer had engaged in the interactive process with the disabled worker, but had called off a planned demonstration after a panel and experts had concluded that the planned accommodation would create a workplace safety hazard.

This case is applicable to any employer with more than five employees in California under the Fair Employment and Housing Act, and to employers of 15 or more workers under the ADA.

The decision by the United States District Court in the southern district of Indiana illustrates how one innocent misstep in the interactive process can end up costing you. At this point the case still has to go to trial, but it could result in damages against the employer in question, GE.

In the case, *English vs. General Electric Co.*, a woman had worked for GE as an assembler since 1985. She sustained an injury to her rotator cuff in 2007 and doctors permanently forbade her to reach above her shoulders with either arm.

Two years later, she was promoted to the position of repair job operator based on her seniority with the employer. Shortly thereafter, GE's medical staff concluded that her shoulder disability and doctors' restrictions prevented her from performing the essential functions of the job.

To ensure fairness, the employer initiated a formal ADA reasonable accommodation process and her case was referred to an accommodation review committee, which was charged with determining if she could perform the job with any specific accommodations.

The committee scheduled a demonstration during which the employee was going to show that she could perform the essential job functions with the assistance of a three-step stool. But that demonstration was canceled because the committee determined that the stool would create a safety hazard, as it would be too close to the assembly line tracks' ball bearings and pin rollers. They also said the stool would block workers' movements around the assembly line.

The position was awarded to another employee, and English sued under the ADA accusing the employer of failing to engage in the interactive process.

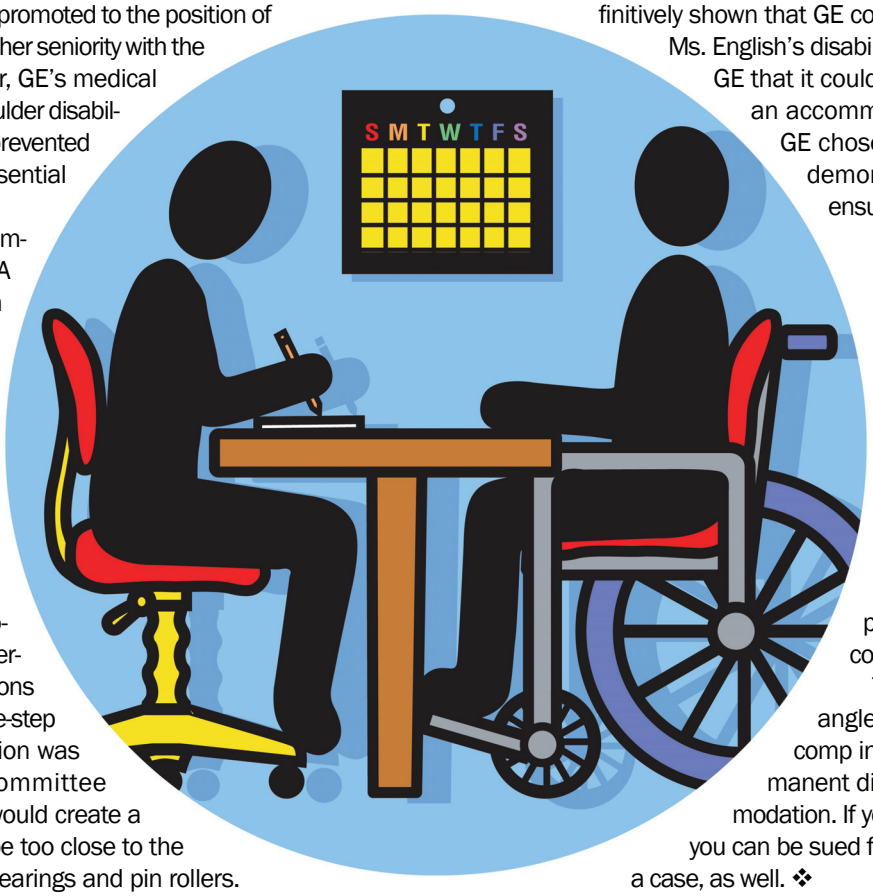
GE moved to have the case thrown out of court via a motion for summary judgment, but the local court denied the motion, which the company appealed to the US District Court. That court eventually upheld the lower court's decision, paving the way for the case to proceed to trial.

During the appeals process, GE presented testimony from the accommodation committee members that the employee still would not have been able to do the essential functions of the position, even if given the requested three-step stool.

The company also cited the opinion of a workplace ergonomics consulting firm that analyzed five possible accommodations for the employee and found that none of them would have completely eliminated the excessive shoulder flexion problems she would experience in this new position.

But the district court concluded that, nonetheless, the employer should have allowed the employee to demonstrate whether she could or could not do the job with the three-step stool.

The court wrote: "The scheduled demonstration could have definitively shown that GE could not safely accommodate Ms. English's disability, or it might have proven to GE that it could indeed provide Ms. English an accommodation. But unfortunately, GE chose not to go through with the demonstration, and this litigation ensued."



The takeway

If you have a disabled employee who requests reasonable accommodation to perform their job, you must enter into an interactive process and document all of the steps you take to determine whether you can or cannot accommodate the worker. You should have in place plans for how you would conduct the interactive process. There is also a workers' comp angle here, as a serious workers' comp injury can later turn into a permanent disability that requires accommodation. If you don't play your cards right, you can be sued for breaching the ADA in such a case, as well. ❖

WORKPLACE SAFETY

Summer's Coming, Protect Your Outside Workers!

AS SUMMER approaches employers with outside workers need to make sure that they are in compliance with Cal/OSHA's heat illness prevention standard to protect their employees, and also to avoid being cited.

Over the years the heat illness standard has evolved as more is learned about how heat illness works. The following covers the major elements of the standard.

Access to water

- Locate the water containers as close as practicable given the working conditions and layout of the worksite.
- Keep it readily accessible, move it with the workers!
- Encourage the frequent drinking of water.
- Remind workers not to wait until they are thirsty.

Shade up at 85 degrees

- When temperatures reach 85, you must have and maintain one or more areas of shade at all times, when employees are present.
- Locate the shade as close as practical to the area where employees are working.
- Provide enough shade to accommodate at least 25% of the employees on the shift at any one time. However, retain the ability to permit access to all workers that request it at all times.

High-heat procedures

When the temperature equals or exceeds 95 degrees:

- Ensure effective communication.
- Observe employees for alertness and signs and symptoms of heat illness.
- Give more frequent reminders to drink plenty of water.
- Closely supervise new employees, for the first 14 days.

Training

Ensure all employees and supervisors are trained before beginning work that should reasonably be anticipated to result in a heat illness. Make sure all employees and supervisors are trained in:

- The environmental and personal risk factors for heat illness, as well as the added burden of heat load on the body
- Your company's heat illness prevention procedures
- Importance of frequent consumption of small amounts of water
- Types of heat illness, common signs and symptoms
- Importance of acclimatization
- Reporting signs or symptoms of heat illness to a supervisor
- Procedures for responding to possible heat illness
- Procedures to follow when contacting emergency medical services, providing first aid, and if necessary transporting employees.

Written procedures

- Integrate your procedures into the IIPP.
- Maintain the procedures on site or close to the site, so that they can be made available to employees and Cal/OSHA inspectors.
- You can find sample procedures here: www.dir.ca.gov/dosh/dosh_publications/ESPHIP.pdf ❖

Paid Sick Leave Measure Advances in Legislature

A BILL IS wending its way through the California Legislature that would require all employers, large and small, to provide their employees with paid sick leave benefits.

AB 1522 provides for statutory penalties and the possibility of litigation for employers that violate the law.

California businesses do not have to provide paid sick leave to employees, but in recent years, paid sick leave has become a priority for labor groups, and their efforts have paid off in some cities.

In 2006, San Francisco passed a law requiring all businesses to provide sick days to all employees who work in the city – the first law of its kind in the nation. Since then, a number of cities throughout the country have followed suit, including Seattle, New York and Portland, Oregon. Connecticut was the first state to enact a statewide paid sick leave law.

In particular, AB 1522 would require that:

- An employee who works in California for seven or more days in a calendar year would be entitled to paid sick days, to be accrued at a rate of no less than one hour for every 30 hours worked.
- An employee would be entitled to use accrued sick days beginning on the 90th calendar day of employment.
- An employer could limit an employee's use of paid sick days to 24 hours or three days in each calendar year.
- An employer provide paid sick days, upon the request of the employee, for diagnosis, care or treatment of health conditions of the employee or an employee's family member, or for leave related to domestic violence, sexual assault or stalking.
- An employer be prohibited from discriminating or retaliating against an employee who requests paid sick days.

The measure would require employers to post provisions of the law in the workplace so that employees know their rights in terms of paid sick leave. It would also impose certain record-keeping requirements on employers.

The bill passed the Assembly Labor and Employment Committee in March and is awaiting a hearing in the Assembly Appropriations Committee. ❖