Shaw Insurance Services REPORT
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Seasonal Risk

The Holidays Have Their Own Workplace Perils

ON-THE-JOB accidents may increase during the holidays as distractions in the workplace rise and decorations can pose safety issues.

Normal routines and schedules are disrupted, and your staff — like everyone else — are also rushing around to crowded and chaotic stores and malls after work and on weekends.

Be aware that accidents may be more likely to happen at this time of the year at the workplace, on the road or at home. Employees tend to take extra physical risks — such as when hanging lights and lugging trees around. And if you hold a holiday party, it opens up a new set of potential liabilities.

In-office safety

When planning decorations for the office, it is important to keep holiday safety in mind.

Decorating the office helps workers enjoy the spirit of the season together, but remember that proper safety precautions should be observed at all times.

Reducing the chances of workplace accidents

- Be mindful of potential fire hazards when selecting holiday decorations and where you place them.
- Be careful of stapling holiday lights, do not add too many strings of lights and make sure illuminated items are turned off.
- Verify that all fire extinguishers are in place and fully charged and accessible.
- Do not block exits, hang decorations on fire extinguishers, fire alarms or fire hose boxes, or obstruct the view of exit signs.
- Do not hang decorations from sprinkler heads or electrical panels.
- Without proper planning, holiday decorations can create tripping hazards. Extension cords should not be run through traffic areas where they pose trip hazards and, if you have to use an extension cord, use the proper one.
- Avoid placing trees, freestanding decorations and presents in traffic areas.

Holiday party

The holidays bring office parties and, if alcohol is being served, keep in mind the liability involved.

Provide plenty of alternatives to alcohol, such as soft drinks, coffee, tea, water and cocoa. Hire a professional bartender who can cut people off if they have too much.

Enforce the same workplace rules of etiquette at the party as you do in the workplace.

If you serve alcohol, also serve food.

Stop serving alcohol a few hours before the party ends. Offer to cover the cost of an Uber or Lyft ride home for anyone who needs it.

The takeaway

If you keep in mind that the holidays put extra pressure on everyone, it may help you to keep your workplace free of accidents.

By following a few simple safety tips, it will be easy to enjoy the holiday and the events at work without dealing with injuries or damage to property.

When planning for the holidays, incorporate safety precautions into the planning process. ❖

Shaw Insurance Services

If you have any questions regarding any of these articles or have a coverage question, please contact your broker at:

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HR Liability

Pregnant Workers Fairness Act Lawsuits Spike

SINCE THE Pregnant Workers Fairness Act took effect in June 2023, there's been a huge spike in lawsuits against employers alleging failure to reasonably accommodate workers covered by the landmark legislation.

In the first 11 months following enactment of the law, the Equal Employment Opportunity Commission received 1,869 complaints from workers who allege their employer failed to provide them with reasonable accommodation under the PWFA, according to an article in *Business Insurance*, a trade publication.

As a result, the EEOC has taken action and between Sept. 10 and Oct. 11, 2024 it initiated four federal lawsuits against companies over alleged violations of the law.

The recent activity should be a wake-up call to employers to put as much effort into complying with this new law as they do the Americans with Disabilities Act, which is similar to the PWFA in that it requires employers to initiate an interactive process with a worker who seeks reasonable accommodations under the act.

The law

Essentially, the PWFA requires employers to make reasonable accommodation for workers covered by the act if they request it, particularly if they are temporarily unable to perform one or more essential functions of their job due to issues related to their pregnancy or recent childbirth.

"Reasonable" is defined as not creating an "undue hardship" on the employer. "Temporary" is defined as lasting for a limited time, and a condition that may extend beyond "the near future." With most pregnancies lasting 40 weeks, that time frame would be considered the near future.

What's required

The law requires employers, absent undue hardship, to accommodate job applicants' and employees' "physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions."

The condition does not need to meet the ADA's definition of disability and the condition can be temporary, "modest, minor and/or episodic."

The PWFA covers a wide range of issues beyond just a current pregnancy, including:

- Past and potential pregnancies
- Lactation
- Contraception use
- Menstruation
- Infertility and fertility treatment
- Miscarriage
- Stillbirth
- Abortion.

Reasonable accommodation

The law's definition of reasonable accommodation is similar to that of the ADA.

Easy solutions to accommodation

The regulation lays out four predictable accommodations, which would not be deemed an undue hardship in virtually all instances:

- Carrying or keeping water nearby and drinking, as needed;
- Taking additional restroom breaks, as needed;
- Sitting if the work requires standing, or standing if it requires sitting, as needed; and
- Taking breaks to eat and drink, as needed.

The takeaway

The PWFA poses an employment liability risk and employers will need to ensure that they properly handle and respond to accommodation requests under the PWFA.

Employers should ensure that personnel who are responsible for handling accommodation requests under the ADA are also trained in how to respond to requests under the PWFA. ❖

An Employment Practices Liability Policy *may cover the cost of lawsuits filed under the PWFA. Talk to us about your options.*

Workplace Safety

OSHA's Confined Spaces Standard Can Be Misleading

MANY CONTRACTORS and agricultural employers mistakenly believe that they are not required to comply with OSHA's Permit-required Confined Spaces Standard (29 CFR 1910.146), which, as the standard states, applies to "general industry."

This mistaken notion arises from the wording contained in the standard's "scope and application" paragraph, which states: "This section does not apply to agriculture, to construction, or to shipyard employment."

However, this can be extremely misleading. When the work being performed is of a construction nature, the agricultural, construction or shipyard operator is exempt. However, when the work can be classified as repair or maintenance, the company is required to follow the standard.

The best way to understand this duality is to study the enforcement directive for this standard — CPL 2.100 — that OSHA wrote for its compliance officers. The directive states that permit-required confined spaces that are undergoing maintenance or modifications that do not require construction are bound by the general industry standards.

However, if a confined space is created during construction, is the outcome of construction activity, or is entered to perform construction, then the work performed is not subject to the standard until the confined space is turned over for general industry operations, the directive explains.

Types of confined spaces

- Tanks
- Underground vaults
- Water and sewer pipes
- Storage bins
- Pits
- Silos
- Boilers
- Industrial trash compactors
- Hoppers

Examples of confined space maintenance covered by standard

- Lining a tank that is in need of restoration, either to prevent the structural part of the tank from deteriorating or prevent the housed product from becoming contaminated. In either case, the partial patching or total removal of existing lining and replacement is considered maintenance.
- Relining a furnace with new refractory material is maintenance.
- Tuck pointing and individual brick replacement in a manhole is maintenance.
- Relining of a sewer line with a sleeve, which is pushed through a section of the existing system, is maintenance.
- Repainting, which is part of a scheduled program to maintain a system or prevent its deterioration, is maintenance.

Clearly, it is the type of work being performed, not the core business of the company performing it, that determines if a task is maintenance or construction.

That's why it makes good business sense to follow the general industry standard, especially when there is doubt as to how the task may be classified.

The one caveat

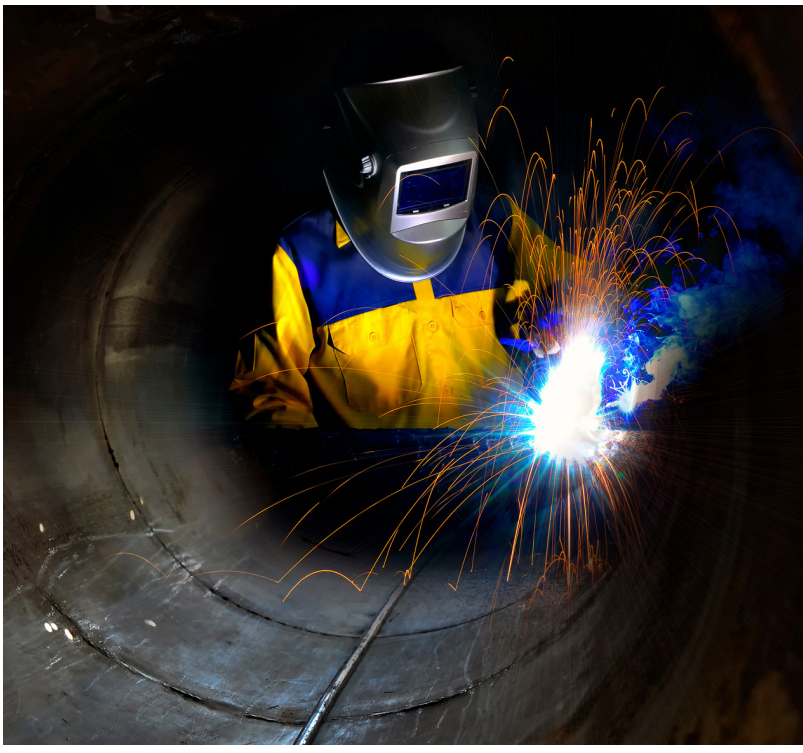
Contractors should also keep in mind that OSHA's enforcement policy states that those companies not covered under the general industry standard must comply with the American National Standards Institute (ANSI) Standard Z-117.1 Safety Requirements for Confined Spaces.

This standard parallels 29 CPR 1910.146, so in point of fact, a construction company would be following the general industry standard. ❖

The dangers

Hazards that may be present in confined spaces include:

- Toxic atmospheres,
- Oxygen deficiency,
- Oxygen enrichment,
- Flammable atmospheres, and
- Excessive heat.



Class-Action Trend

Lawsuits Target Health Plan Tobacco Surcharges

A NEW WAVE of class-action lawsuits is targeting employers that apply health insurance premium surcharges to employees who use tobacco, accusing them of discrimination and violating the Employee Retirement Income Security Act (ERISA), according to two new blogs by prominent law firms.

The lawsuits, according to Chicago-based Thompson Coburn LLP, assert that the surcharges are violations of fiduciary duty rules under ERISA, as well as discrimination regulations under the Health Insurance Portability and Accountability Act (HIPAA).

The law firm says these cases are being filed across the country on an almost daily basis and to date no courts have ruled to have the cases dismissed.

The fast-developing lawsuit trend is notable, considering that tobacco surcharges are widely used, and if any of the new lawsuits are successful, they could set a precedent that could expose thousands of employers to legal action. Most of the lawsuits are against self-insured plans, but even employers who purchase health insurance and also impose surcharges for tobacco use could be targeted as they are considered "fiduciaries" under ERISA.

The lawsuits hinge, in part, on a HIPAA prohibition on group health plans and wellness plans discriminating on the basis of health status. For example, health plans are barred by the law from charging higher premiums to group health plan participants with pre-existing conditions.

However, HIPAA has one exception to the rule: It allows plans to charge different premiums for employees who enroll in and adhere to "programs of health promotion and disease prevention." You can find HIPAA's non-discrimination rules for wellness plans here.

In the crosshairs

The lawsuits target a common practice: requiring employees who use tobacco to pay higher health plan premiums than their colleagues who certify that they don't use tobacco products (cigarettes, e-cigarettes, chewing tobacco and similar products).

Common themes

Typical lawsuit allegations:

- The plan did not provide an alternative standard for tobacco users to obtain a discount because the premium reductions for participating in the wellness plans are only available on a prospective basis, in violation of ERISA Section 702, and
- The plan failed to provide information on the existence of such alternatives in "all plan materials."

The lawsuits typically seek:

- Declaratory and injunctive relief.
- An order instructing the employers to reimburse all persons who paid the surcharges, with interest.
- Disgorgement of any benefits of profits the businesses received as a result of the surcharges.
- Restitution of surcharges.

It should be noted that as of the end of October, no court had ruled on a motion to dismiss a case, according to the blog. At least one case has settled as a class action and the employer and plaintiffs in another class-action case had informed the court that they were working on a settlement agreement and would both ask the court to dismiss the case.

In addition to these private actions, the Department of Labor has sued several employers targeting premium surcharges, including in 2023 when it brought action against a firm whose health plan was charging tobacco users a $20 per month surcharge, according to a blog by Washington, D.C.-based Groom Law Group.

The takeaway

Thompson Coburn said in its blog that these types of cases are snowballing: "It is highly possible that any group health plan that applies tobacco surcharges ... faces the possibility of a lawsuit."

The law firm recommends reviewing your health plans to ensure that they comply with HIPAA's non-discrimination rules for wellness plans, which allow tobacco surcharges when applied properly, such as charging different premiums for workers who enroll in and adhere to a program that's focused on promoting health and preventing disease.

This is a newly evolving threat to employers. We will keep you updated on developments. ❖