

# Risk ADVISOR



## The Transition Wave Begins

### Risk Management Best Practices for New Executive Directors and Managers

A wave of generational change has begun for the community centers of Texas. Over the past year several new executive directors have assumed positions in community centers. Other top departmental managers have also assumed new roles. Most of these people have long experience at community centers and familiarity with operations, finances, services and people. However, the step up the organizational ladder also brings unfamiliarity and a broadened perspective of the center. Moving from a position of mastery of a limited area to the broad perch of responsibility for everything that goes on can be daunting. One of the responsibilities a new manager may assume for the first time is risk management. Risk management involves the recognition of risks facing the organization and development of ways to eliminate, transfer, mitigate or tolerate those risks. Although comprehensive risk management is a cooperative effort, authority and responsibility for risk management resides at the top of the organization. Specifically, the executive director is the ultimate risk manager assisted by his or her executive management team. This article will describe several best practices that form the foundation of effective risk management for managers and executive directors of community centers in Texas.

1. The ultimate responsibility for managing risk belongs to the Executive Director. The ED must endorse risk management by communicating its importance throughout the organization. One of the most important elements of risk management requiring public and unequivocal endorsement is safety. Another important element is compliance. By making it perfectly clear to all staff that these are important to the new manager, everyone in the organization will begin to make them important too. Both of these should be values within the culture of the center. Part of the endorsement process for safety is a written statement of safety policy signed by the ED and the chair of the Board of Trustees. Another crucial part of the endorsement is the delegation of responsibility for safety to all managers, supervisors and if the position exists at the center, to the safety officer.
2. The endorsement of safety, compliance and risk management includes a constant show of commitment through action. For instance, if it is center safety policy that cell phones cannot be used while operating a vehicle, the executive director can't be seen driving around town or on the road talking on a cell phone. (Pull over to a safe place and then take the call or have someone else drive.)

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## Loss Control Briefs

### When an Accident is a Crime

Political subdivisions in Texas are fortunate to have effective protection against many kinds of liabilities based on the sovereign immunity granted in the Texas Constitution and the Texas Tort Claims Act. There are, however, significant and costly exceptions in several areas of law. Allegations of violations of federal statutes related to discrimination in employment actions or wage and hour disputes can impose large settlements and attorney's fees. Another less common but more serious exposure to risk is an allegation of criminal liability related to the workplace. Fraud and embezzlement are perhaps the most frequent criminal activities related to operating a public entity in Texas. Another rare, but very serious kind of criminal liability can arise from workplace accidents resulting in injury or a fatality. Recent examples of criminal liability resulting from workplace fatalities include:

- ★ In 2013 a building being demolished in downtown Philadelphia collapsed onto a Salvation Army Thrift Store killing six people. The contractor was indicted on six counts of murder and 13 counts of reckless endangerment. The operator of an excavator being used in the demolition was indicted on six counts of manslaughter and the 13 counts of reckless endangerment. The contractor had removed the interior structure of the building to salvage joists that he could sell. Without the interior structure the building collapsed killing those in the thrift store next door. (*Workplace Safety and Health Update, December 2013, Jackson, Lewis, Attorneys*)
- ★ In October 2013 the owner and president of the Port Arthur Chemical and Environmental Services Company, LLC was convicted on Federal charges of falsifying documents and lying to investigators in the death of a truck driver who was transporting hazardous waste for the company. The waste contained hydrogen sulfide, a lethal gas that asphyxiated the driver. The district attorney who prosecuted the case cited the owner's responsibility for the operations of the company, directing the transportation of the waste, his responsibility for purchasing and providing safety equipment and allowing the transport of hazardous materials without proper placarding. (*Justice News, United States Department of Justice, October 2013*)
- ★ In a case settled in June of 2014, a chemistry professor at UCLA was given a deferred adjudication sentence for his responsibility in not adequately training a laboratory assistant who died of burns suffered in the chemistry laboratory he supervised. The original indictment was for "four felony counts of willfully violating state occupational health and safety standards." (*Chemistry World, June 2014*)



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## Workers' Compensation Cost Containment in Texas

The Workers' Compensation system in Texas has been characterized as a method of transferring an employer's money to lawyers, doctors, chiropractors and injured workers. The employer had very little recourse and few tools to try to reduce the amount of their money flowing into a system that was stacked against them. Before 1989 the Workers' Compensation system in Texas was rife with litigation, life time indemnity payments and large awards. If a claimant and his or her attorney didn't like a ruling by the Workers' Compensation regulator (then the Industrial Accident Board) they could appeal to the state district court in a process called trial de novo. A huge percentage of claims wound up being decided in district court and the Industrial Accident Board almost became irrelevant. Attorneys were involved in claims that were not in dispute and would take huge fees and large percentages of settlements from injured workers. The system was broken, getting more and more expensive and hurting economic growth in the state.

In 1987 the Texas legislature appointed a committee to study the Workers' Compensation system and recommend changes. The recommendations for reform were adopted by the Texas Legislature and upheld by the Texas Supreme Court in 1989. This started a process of evaluation and reform that continues to this day. The reforms implemented since 1989 have made the Texas Workers' Compensation system one of the most effective in the country in terms of cost, medical outcomes and worker and employer satisfaction.

One of the key reforms made in 1989 that still benefits the system was the elimination of trial de novo. Getting attorneys out of every claim and almost every board action reduced costs and improved the amount of lost time benefits injured workers received. Employees still had access to the court system for matters of law; they just couldn't go to court because they didn't like an impairment rating or having to get a second opinion. Other very significant changes included new medical fee schedules, increased weekly benefits, an administrative appeal process, improved health and safety monitoring and a stronger disciplinary function for all of the participants in the system. All of these actions began to decrease system costs and improve outcomes for injured workers.

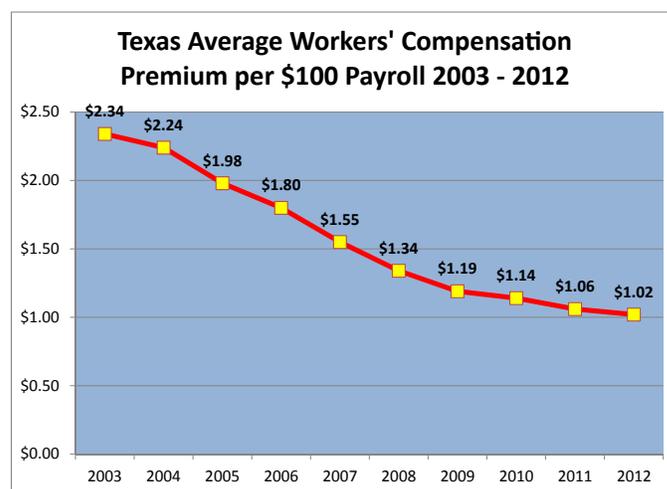
As medical inflation accelerated in the late 1990's and early 2000's, the legislature again established a committee to study the Workers' Compensation system. Reforms implemented in 2005 went even farther than the 1989 changes in reining in medical costs and bringing the medical treatment of injured workers more in line with the evolving medical landscape. Medical treatment could now be delivered by members of health care networks so that the pricing and

accessibility advantages of networks could benefit the workers' compensation system. Reforms also included rolling the administration of the system into the Texas Department of Insurance in a Division of Workers' Compensation (DWC), limiting the duration of lost time benefits and establishing an Office of Injured Employee Counsel.

Since 2001 there have been several additional measures implemented either through legislation or administratively by the DWC. These measures include:

- ★ Implementation of treatment guidelines and adoption of Medicare reimbursement, payment and coding protocols, 2001
- ★ Streamlined dispute resolution procedures adopted, 2005
- ★ Workers' Compensation Health Care Networks began in 2006
- ★ Implementation of Medical Fee Guidelines in 2007
- ★ Adoption of evidence based treatment guidelines, 2007
- ★ Adoption of a closed pharmaceutical formulary, 2011
- ★ Implementation of pre-authorization procedures for use of narcotic drugs, 2011

The net effect of these changes in the law and how the Workers' Compensation system is administered has been a steady decrease in the cost of Workers' Compensation for Texas employers. The first chart illustrates the decline in the average premium cost of Workers' Compensation in Texas for all employers. The data is taken from the Texas Department of Insurance, Division of Workers' Compensation "Biennial Report to the 84th Legislature for 2014."



### Transition Wave, continued from front cover

3. Another part of showing commitment is the constant receipt of information and reports about safety and risk issues. These items can be included in the incident reports that come out of Compliance or as separate items. Information about accidents and claims should also flow to the ED as well as the manager or director of the department affected by the incident. This information should inform actions and decisions by the executive management team regarding the causes of accidents and injuries and what to do about them.
4. Risk management and safety should be on the agenda of every executive management team meeting.
5. Risk management issues should also be addressed as part of the consideration of any new service, operation, joint venture or facility. This is especially true as centers enter new relationships and provide new services in the integrated care environment. Centers are very familiar with psychiatrists and speech therapists and the contracts used to engage their services. They are not so familiar with all of the specialties and services associated with a medical clinic and the corporate entities that own them. The contractual relationship, safety issues arising from the operations and facilities, medical malpractice exposures and other risk related issues should all be considered during the planning and negotiation stages of implementing integrated care.
6. Risk transfer through contracts is another important tool of risk management that the ED and management team should use. Unfamiliar and unfavorable contracts may be presented to the center that impose risk on the center. Real estate contracts, operating agreements with medical practices and interlocal agreements may not be common contracts to the center. They should be reviewed carefully and negotiated to achieve favorable terms. If possible, avoid contracts presented to the center by vendors, contractors or medical entities. Use the center's own contract form that provides for an equitable allocation of risk between entities.
7. Insurance coverage provided by the Fund is very broad and tailored to the community center system in Texas. The new manager with responsibility for risk or insurance matters should become familiar with the coverages, limits of liability and values of covered buildings, contents and equipment. The Fund is constantly evaluating the adequacy of coverage and responding to developing exposures among its members. Recent modifications to coverage include an expansion of professional liability to include the medical services provided by integrated care and a requirement for arbitration agreements with all employees to reduce the impact of wage and hour claims and other employment related actions.
8. The executive director and management team should establish the appropriate safety and risk management structure for the center if one is not already in place. At a minimum there should be a safety officer, safety coordinators in every department and major locations and an active safety committee. The reporting chain for safety should reach to the executive director though the safety officer may be a direct report to someone else. In larger organizations it may be effective to have a risk manager. A risk management committee composed of involved managers such as compliance, facilities, human resources and finance is also a good mechanism for dealing with risk issues. Careful consideration should be given to where the risk manager or safety officer reports so status and influence are enhanced.
9. The resources of the Fund are also available to new management staff as a part of the coverage provided and contributions paid by the center. Some of the expertise available includes legal, loss control and risk management consultants. Safety seminars are offered to help train center staff who are engaged as safety officers. Liability Workshops are offered four times a year focusing on risk management issues related to employment, integrated care, privacy, compliance, legislative and regulatory developments and other emerging trends affecting community centers. A minimal fee is charged for the Liability Workshops.

Risk management is an integral part of running a community center. Effective risk management should make life easier, not harder, as risks are identified and the negative effects of risk events are reduced or eliminated. The Fund is ready to help you deal with risk in any way we can.

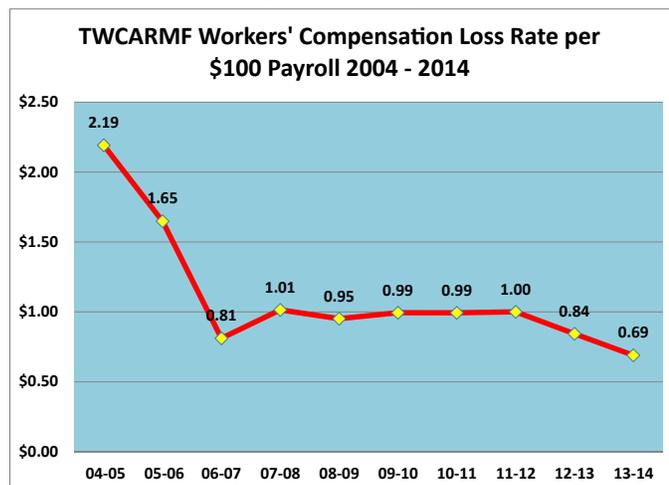


## Worker's Comp, continued from page 3

The first chart is the aggregate premium rate for all insured employers in Texas that includes claims, expenses, profits and commissions.

In addition to the measures taken by the Texas Legislature and Texas Department of Insurance, the Fund has also implemented policies and changes to take advantage of the improved climate for Workers' Compensation in Texas. These measures include aggressive use of medical bill review, pre-authorization for medical procedures, use of nurse case managers and participation in the most effective health care network in Texas, the Political Subdivision Workers' Compensation Alliance.

The next chart from data in the 2014 Annual Report for the TWCARMF shows the dramatic decrease in the Fund's loss rates since 2003. Unlike the first chart, this one shows the cost of claims as a rate per \$100 of payroll



The chart not only illustrates a significant decrease in claim costs, it also shows rate stability over time. Pricing stability is one of the goals of the Fund and is the result of the efforts of its members to control on the job injuries.

Although the measures taken by the Legislature and Texas Department of Insurance have had an impact on workers' compensation claims and costs, it is the members of the Fund who have had the most effect on the loss costs illustrated above. The members establish the priority for safety at their centers and set up the infrastructure for a safe work place for their employees. They implement the safety programs and make the opportunities available for an early return to work for their employees. Without the commitment of the members to reducing the negative impacts of on the job injury, all of the reforms implemented in Texas would not make much of a difference.

*Sources: Texas Department of Insurance, Division of Workers' Compensation, Biennial Report to the 84th Legislature for 2014, Annual Report for Texas Water Conservation Association Risk Management Fund*

## Loss Control Briefs, continued from page 2

In all three of these cases, the owner or responsible party made decisions that placed employees or the public at risk. OSHA bear the responsibility of deciding how the work is done, training the employee, choosing safety equipment and deceiving others. In all three cases the responsible parties were aware of the hazards and that consequences of accidents could be catastrophic.

## OSHA, Political Subdivisions in Texas and the Fund

Governmental entities are not subject to OSHA's jurisdiction. A community center is not required to admit them to your premises to do an inspection or investigate an accident. The center is not subject to their fines or sanctions. The following is an excerpt from an October 11, 2006 letter from OSHA to a volunteer fire department in Sodus, New York:

*This letter is in response to your request of August 28, 2006, addressed to the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA), regarding a fire truck operator's ability to safely respond during emergencies. Your letter has been referred to the Directorate of Enforcement Programs (DEP) for a response. You want to know whether Federal OSHA has any regulations that pertain to fire truck operators in a fire department.*

*Please be advised that Federal OSHA neither has regulations, nor jurisdiction, over State, municipal, or volunteer fire departments. Section (3)(5) of the Occupational Safety and Health Act of 1970 specifically excludes Federal OSHA's authority over employees of State and local government. The Act provides for States to assume responsibility for occupational safety and health programs under the State's own plan, which must be approved by the U.S. Department of Labor. Each State-plan must include coverage of public employees of the State, and it must be "at least as effective" as Federal OSHA's protection of private sector employees.*

This leaves governmental employers in Texas subject to state jurisdiction under the Texas Department of Labor. The Fund, however, often refers to OSHA guidelines and regulations in its loss control consulting and in some of the articles presented in newsletters and bulletins. The reason for this is that OSHA regulations and standards provide minimum benchmarks for safety. We use OSHA for guidelines to establish a foundation that can be built on to achieve best practices. In many cases their standards are based on the best available science used in establishing safe levels for exposure to toxic or life threatening chemicals, particulates, noise and other extremes. OSHA also pulls in standards from other entities

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such as the American National Standards Institute, National Institute of Occupational Safety and Health, National Fire Protection Association and the Centers for Disease Control and Prevention. Their rules and regulations also provide a framework for administering programs related to key safety areas such as personal protective equipment, lock-out/tag-out, confined spaces and numerous others. In summary, OSHA is a resource that provides a minimum framework for building a great safety program that incorporates your own best practices for a safe workplace.

## The 2015 Flu Season

The 2015 flu season is in full force. The flu has spread to nearly all areas of the United States including Texas. As with most strains of the influenza virus, it affects the very young and very old most seriously. One of the problems this year is that the vaccine developed in anticipation of the season is not as effective as hoped. The choice of viruses to protect against for the 2014/2015 flu season was made in February 2014. At that time the strain that is most prevalent now was not selected because it had just appeared and there was no way to predict that it would become the more dominant strain

this year. Receiving the vaccine is still highly recommended though it does not specifically target the H3N2 type flu strain that has become most prevalent. Despite this fact the vaccine still protects against other strains and does have some effect in reducing the severity of the prevailing strain. One other recommendation from the Centers for Disease control and Prevention is to seek anti-viral drugs early in the onset of disease. Drugs such as Tamiflu will help reduce the severity and duration of symptoms. This is particularly important for people younger than 5 years old, over the age of 65 or with underlying health conditions such as diabetes or heart disease.

*Source: Centers for Disease Control and Prevention*

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