

Risk Advisor



FALL 2019

Employment Liability Claims, the Most Costly Fund Claims

Claims costs are part of each member’s “cost of risk.” Cost of risk includes amounts paid for insurance coverages, claim deductibles, salaries and benefits of safety and risk management staff, time spent by any center employee dealing with a claim, suffering a claim or investigating a claim. Cost of Risk also includes reporting to management and their time dealing with claims, accidents and investigations and responding to reports. Much of the cost of risk can be reduced by eliminating claims. Prevention

other negative employment action. Anger, bitterness, a desire for revenge and insecurity about a future without a center job often lead to litigation. The other major factor is that the Fund defends these claims vigorously with diligent and experienced attorneys. Attorneys’ fees account for a large percentage of the total cost with usually very little being paid out in settlements. As of August 31, 2019, legal fees paid in defense of the 185 employment liability claims totaled \$2,990,189. Payments to claimants totaled \$1,394,225. The defense

TCRMF Claims 7/1/2014 -8/31/2019			
Coverage	Number of Claims	Total Incurred Cost	Average Cost per Claim
Workers' Compensation	2,936	\$13,194,000	\$4,493.87
Automobile Liability	606	\$5,434,705	\$8,968.16
Employment Liability	185	\$4,384,413	\$23,699.53

is the best way to reduce cost. So, how do we reduce the cost of employment liability claims, the costliest type of claim for the Fund? The table above compares workers’ compensation, automobile liability and employment liability claims over the most recent complete five year period.

Although the Fund is healthy with a current surplus of over \$25 million there is still some bad news in the table. The almost 3,000 workers’ compensation claims over the five year period is a huge number that costs the Fund almost \$4,500 each time someone gets hurt on the job.

The other number that jumps out is the average cost of an employment liability claim. There are a couple of reasons for this. One is the nature of the claim itself. An employment related action that leads to a claim being filed is often a contentious and unhappy occasion. Most of these claims usually develop after a termination, demotion or

of these claims is to protect the center and the efficacy of its human resources function and employment policies. Most employment related actions come at the end of a long chain of corrective actions, disciplinary actions and attempts to salvage an employee who is not meeting standards. Sometimes the action is an immediate response to an egregious breach of center standards or an unavoidable reduction in force due to loss of funding. Whatever the reason and no matter how careful human resources staff have been, EEOC complaints and litigation may result.

How does a center prevent employment liability claims? Best human resources practices should include:

- ★ A thorough, well written and up to date human resources policy manual
- ★ Thorough and current job descriptions
- ★ Adoption of consistently applied best hiring practices

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- ★ Constant attention and resources devoted to hiring the best people available
- ★ A comprehensive and effective new employee orientation process
- ★ Effective training for frontline supervisors as well as directors and executives in employment practices
- ★ Effective documentation of every contact with an employee related to job performance, training, improper behavior, compliance and anything that bears on quality of work. This includes vacation, other time off, workers' compensation, ADA, FLSA matters
- ★ Avoidance of any actions that are discriminatory or could be construed as retaliatory in nature
- ★ Awareness of an individual's status regarding protected classes
- ★ A philosophy of fairness emanating from the top of the organization and prevailing at every level of management throughout the center
- ★ Consultation with center counsel and Pam Beach before any termination or other serious employment action.
- ★ Thorough Documentation!

The Fund's Leadership Training, Legal Consulting through Fund Counsel, Pam Beach and its risk management consulting can help members navigate the complexities of employment law and claim prevention.



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Lifting, Pulling, Pushing

Add reaching, grabbing, trying to maintain balance, stepping over and carrying to lifting, pulling and pushing and you have many of the physical movements that lead to strain injuries to backs, limbs, necks and joints. Strain injuries are among the most common injuries faced by community center employees. They account for 12% of the number of claims and 19.5% of the total amounts paid and reserved during the last five complete Fund years. Out of 5,463 claims for the six year period of 7-1-2014 through 8-31-2019 there were 584 strain injury claims resulting in \$2,735,315 paid and reserved. The following table illustrates the history of strain related claims. The cost of these claims to the center also includes lost productivity, loss of center knowledge if someone is off work for long period of time and the time cost of other employees dealing with the accident, reporting the claim and keeping up with the injured worker while they are out on leave.

TCRMF Strain Injuries 2015 - 2019			
Year	Total Incurred	Number of Claims	Average Claim
2014	\$ 430,016.64	108	\$ 3,981.64
2015	\$ 501,245.60	111	\$ 4,515.73
2016	\$ 446,766.84	122	\$ 3,662.02
2017	\$ 807,092.52	89	\$ 9,068.46
2018	\$ 340,637.40	80	\$ 4,257.97
2019	\$ 209,556.48	74	\$ 2,831.84
Total Strain Claims	\$ 2,735,315.48	584	\$ 4,683.76
Total All Claims	\$ 13,291,872.00	5,463	\$ 2,433.07

Each center should determine what causes their strain claims and work to eliminate the conditions and behaviors that contribute to the causes. The Fund's Risk Control Consultants have been conducting the series of Safety Workshops this summer that includes an analysis of claim causes. Here is their deeper analysis of what causes strain injuries. Some of the most common actions that lead to strains are:

- ★ Assisting clients with mobility or balance impairment
- ★ Lifting or assisting clients with daily activities
- ★ Trying to catch off balance or falling clients
- ★ Reacting to client aggression
- ★ Practicing or applying PMAB
- ★ Carrying too much weight by yourself (not asking for help)
- ★ Poor posture
- ★ Work station ergonomic issues
- ★ Poor mechanics of lifting

Another cost of workers' compensation injuries is calculated as lost days from work. Think about your best case worker. What is she worth per day in terms of hours billed and therapies provided to her clients? What if there was not anyone else who could do the work? Work slows or grinds to a halt.

The accumulated lost days from strain injuries over the same six year period was 10,655, or over 48 years' worth of work days or the number of days 48 people work in a typical year (220 days est.). The cost to the center of that lost time far exceeds the workers' compensation dollar amounts paid by the Fund on the center's behalf when you consider all the other cost factors mentioned above. One caution applies to the data in the two tables. The most recent claim years are still developing as injured employees advance through their medical recovery and may still be off work. In other words, the numbers are green and may increase significantly until they are closed.

The Fund's recommendations for responding to your own claim history in the Lifting, Pulling and Pushing category of causes include a comprehensive approach to the problem involving the people affected by the claims: supervisors, managers, and human resources. The process of responding to claims and preventing them includes:

- ★ Analysis of the specific causes of your center's claims and near misses
- ★ Involvement of the injured worker in explaining what happened in a no-fault discussion included in the root cause analysis process
- ★ Use of data supplied by the Fund
- ★ Development of specific recommendations about how to perform work that has caused injuries with prevention as well as efficiency in mind
- ★ Involvement and endorsement of the process by the Executive Director
- ★ Take an ergonomic approach to the work by training for proper lifting, client movement and assistance

Remember the basics of lifting:

- ★ Plant your feet firmly - get a stable base.
- ★ Bend at your knees - not your waist.
- ★ Tighten your abdominal muscles to support your spine.
- ★ Get a good grip - use both hands.
- ★ Keep the load close to your body.
- ★ Use your leg muscles as you lift.
- ★ Keep your back upright; keep it in its natural

posture.

- ★ Lift steadily and smoothly without jerking.
- ★ Breathe - If you must hold your breath to lift it, it is too heavy.
- ★ Use lifting devices such as Hoyer Lifts or ask for help from a co-worker
- ★ Make sure clients have belts to provide secure “handles” for your assistance

TCRMF Lost Day Strain Claims 2014 - 2019			
Year	Total Lost Days	Number Lost Day Claims	Average Lost Days per Claim
2014	1941	21	92.4
2015	2227	20	111.4
2016	1829	17	107.6
2017	3212	17	188.9
2018	1105	12	92.1
2019	341	8	42.6
Totals	10,655	95	112.2

We all know how to lift improperly. It’s usually because the object is too heavy, it’s too high or too low and we’re in a hurry. If you encounter any of these “Do Not’s” stop the lift, reassess and get help:

Do Not...

- ★ Lift from the floor.
- ★ Twist and lift.
- ★ Lift with one hand (unbalanced)
- ★ Lift loads across obstacles.
- ★ Lift while reaching or stretching (especially over your head).
- ★ Lift from an uncomfortable posture.
- ★ Don’t fight to recover a dropped object.
- ★ Don’t hold your breath while lifting - GET HELP.

Preventing Workplace Violence

The terrible mass murders perpetrated by young men in schools across Texas and the United States have captured our attention, and rightly so. The lessons of these tragic events are universal but not always applicable to the workplace. Liability workshops and Safety Training conducted by the Fund have primarily focused on the Run-Hide-Fight model endorsed by

the FBI, Homeland Security and local police departments. This may be an effective strategy in response to an active shooter event. But, that’s what it is, a response. What can we do proactively to help prevent workplace violence and better prepare for a possible event?

According to the AFL-CIO publication “Death in the Workplace,” a compilation of Department of Labor, Bureau of Labor Statistics in 2017 showed that “Workers in nursing and residential care facilities experienced the greatest number of injuries from violence, followed by those in hospitals, social assistance and educational services. Nursing, psychiatric and home health aides, registered nurses and personal care aides were the occupations at greatest risk of injuries from violence, and patients were responsible for 49% of reported injuries related to violence.” The BLS reported 28,870 incidents of workplace violence in 2017. How have the Fund and others in the Safety field responded to workplace violence?

The Fund’s Summer Safety Workshops have included a presentation on the Security and Threat assessments that the Fund conducts that have numerous recommendations for improving security. Many of the recommendations describe improvements to controlling access to the center. Most of the recommendations about points of entry and first point of contact relate to clients and visitors to the center but they apply as well to someone with violent intent who may enter a lobby with a firearm or other weapon ready to start shooting. Some of the defensive measures recommended like glass partitions, wide front desks, locked doors into all other parts of the building with keypad or other entry systems, cameras and the presence of security or law enforcement in the lobbies serve important defensive purposes. They serve to delay access of an active shooter to the rest of the building and may give time to issue an alarm or warning. They can also provide physical barriers and limit movement of the shooter so he can be neutralized by responding law enforcement. Law enforcement officers in the lobby space may become the first targets but they also have the capability of stopping the intruder. Camera systems also play a role in tracking the shooter and providing evidence after the event. Fund Risk Control and Risk Management Consultants are available to conduct security assessments for member centers. The assessments are a comprehensive look at security measures, threats faced by the center and a set of recommendations for improvement.

Another important aspect of prevention of workplace violence is having a plan to deal with it. The Run-Hide-

Fight model recommends that organizations have a plan and each individual know what they will do if faced with an active shooter situation. Fund Risk Control and Risk Management Consultants recommend an Emergency Action Plan that includes the center's response to active shooter, violent incidents (client or visitor) fire, flood, tornados and other weather events. The plan should include drills, drill debriefing and involvement of the whole location in any drill or table top exercise.

Recent presentations at the National Safety Council Congress in San Diego discussed significant enhancements to the emergency action plan. The basic elements involve employee



awareness of threats of violence, a reporting requirement and a threat assessment team to evaluate the threat and respond to it. In a presentation at the National Safety Council meeting on September 9, 2019 Lev Pobirsky, Philadelphia-based senior director of safety and security for Pepsi-Cola and National Brand Beverages Ltd., said “An active shooter incident in the workplace is never ‘out of the blue.’” At Pepsi any threat is taken seriously. Pobirsky said that “no threat is too small. If you say something, write something, text something, tweet something violent, the threat assessment team convenes to discuss the issue and determine next steps.” The company also promotes a culture that supports the anonymous reporting of threats by any employee. They are the ones most likely to be aware of the threat whether it is something written, tweeted or exhibited behaviorally or verbally in the workplace.

The Fund recommends the Threat Assessment Team as a way to augment the effectiveness of a center's workplace violence prevention response. Top management should endorse the formation of the team and the kind of reporting that it receives. Key elements of the reporting process should include anonymity and immediacy. E-mail is a good system but the

urgency of the threat may necessitate a more direct response. Training for the staff should include Porbisky's mantra of “no matter how small” the threat and a list of behaviors or verbal cues that violence is imminent. The training and drilling should include a mental exercise recommended by Porbisky to “help train their employees to conduct 10 to 15 second assessments that entail considering what they would do if an incident occurred, such as looking for exits, what they could use for cover, and where their car is parked.” This training if repeated regularly helps overcome the immediate “freeze” that most people experience when first confronted with a real active shooter event. Reducing the amount of time in a freeze condition could mean the difference between being able to run and having to hide or fight. As Law enforcement people have told us, the best result is escape from the building to a safe place. The mental drill should reinforce awareness of the nearest exit, how to get there, alternatives and how to hide effectively if that is the only option.

Sources: “TCRMF Security and Threat Assessments,” 2019 TCRMF Safety Workshops presented by Risk Control Consultants Joe Salazar, Jeremy Wade and Michael DuBose. Business Insurance, September 11, 2019, “Train Employees to Spot Preventable Signs of Workplace Violence.” “Death on the Job,” April 2019 compiled by the AFL-CIO. Department of Labor, Bureau of Labor Statistics, Survey of Occupational Injury and Illness, 2018.

FLSA Changes in 2019

Since 2014 the U.S. Department of Labor has been trying to raise the exemption level for overtime pay from its current level of \$23,660. First, a level of \$47,000 was proposed during the Obama administration. That was struck down by the courts in 2016 and a new rule began working its way through the Department of Labor's Wage and Hour Division. In March 2019 they proposed a new rule which was sent to the White House for review on August 12, 2019.

The proposed new threshold is \$35,308 (\$679 per week). Any worker who does not make more than this amount would have to be paid time and a half, regardless of their classification as an exempt employee. The \$679 per week amount is aligned with the 20th percentile of earnings of full-time salaried workers in the lowest-wage census region (then, and now, the South) and in the retail sector.* The definitions of exempt or non-exempt do not change under this rule. The threshold amount will be subject to revision every four years to keep track of inflation and real wage growth. The last time

the threshold was raised was in 2004. A shorter time frame for review will reduce some of the shock effect experienced by employers in 2014.

The rule also recognizes that some employees receive part of their pay as commissions or bonuses. Employers may use bonus or commission amounts to satisfy up to 10% of the threshold amount. For example, if an employee makes only \$34,000 a year, they are subject to receiving overtime pay under the proposed rule. If they were paid an additional amount of \$2,000 in bonus or commission they would exceed the \$35,308 threshold. Centers should examine pay levels to determine if it makes sense to raise salaries to avoid having to pay overtime to employees who are already near the new threshold. Many centers went through this process when the previous attempt to change the threshold was proposed in 2014.

The Department of Labor estimates that the new threshold will bring an additional 1.2 million employees under the overtime rule. Most centers should examine their pay levels and classification policies to see if they are affected by the new rule. The rule is expected to go into effect in January 2020.

*Sources: U.S. Department of Labor Wage and Hour Division, *SheppardMullinLaborandEmploymentLawBlog, March 8, 2019, ADP Spark Newsletter, "What you Need to Know about Proposed Overtime Rule Changes," 2019*

Webinars and Workshops

Each year the Fund stages a series of Liability workshops developed and sponsored by the Risk Managers Advisory Committee. This year two of the series have been presented in the usual hotel based format. The first two workshops were about Employment Law and Cyber Liability. In response to feedback from members and the numerous conflicts with personal vacation schedules in the summer, the RMAC decided to stage three hour long webinars to address "hot" topics that are always in demand in August. The three webinars were:

- ★ Procurement and Contracting, presented August 7th, by Lisa Laky, General Counsel, Integral Care
- ★ Subpoenas and other Law Enforcement Requests for Information, presented August 28th, by Pam Beach, General Counsel TCRMF

- ★ Consents and Confidentiality, Children's and IDD Guardianship Issues, presented August 29th by Pam Beach, General Counsel TCRMF

The webinars were "attended" by over 200 people on the GoToWebinar platform. During the webinar attendees could submit questions, receive handouts and do an evaluation. We also sent copies of the power point presentation being used by the presenter to all attendees before the second and third webinars. All three were recorded for your later access.

Based on the feedback we have received we will continue the webinar series in the future. The webinars will not replace the Liability Workshops but serve as a supplementary way to get important risk related information out to the members. The Risk Manager's Advisor Committee is evaluating how the webinars will evolve, so if you have any feedback for us please call or e-mail Richard Wigzell at 512-427-2438 or richard.wigzell@yorkrisk.com. Many of you suggested topics in the evaluation forms and commented on the quality of the production. These comments are very valuable to us as we try to improve what we are offering. Also please forward the flyers we send out about the webinars and workshops to others in your center that you think would like to attend. When they register we will add them to the e-mail list.

The next Liability Workshop is "Employment Law" on January 17, 2020 at the Sugar Land Marriott Town Square, 16090 City Walk, Sugar Land, Texas 77479. This workshop will be in association with the HR Consortium. More information will be sent when flyers go out in December.

Topics will include the risk management considerations involved in employment actions including hiring, termination, workers' compensation, whistle blower considerations, recent court cases and other developments (Bill Helfand). Other topics will include the nexus between FMLA, ADA and workers' compensation, implications and implementation of VOCA, preventing workplace violence and other very current employment considerations. Pam Beach will present along with Helfand, Catherine Greaves and other favorite presenters. Keep this date on your calendars and watch for the flyer. Sign up for this workshop on our website at www.tcrmf.org.

We will also be developing new webinar topics for presentation during the year. Please let us know your suggestions.

**REGISTER ONLINE AT:
www.tcrmf.org**