

The Wright & Kimbrough Report



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WORKERS' COMPENSATION

Cumulative Trauma Claims Increasing Quickly

A NEW, COSTLY trend is now affecting workers' comp as more cases involve "cumulative trauma" – or injuries that develop over an extended period of time from repetitive or continuous motions.

Often these injuries are due to excessive wear and tear on tendons, muscles and sensitive nerve tissue that can leave a worker unable to perform their job due to pain.

They can arise in any profession where a worker performs the same motion over and over again.

Cumulative trauma cases accounted for 18% of claims in 2014, up from less than 8% in 2005, according to the Workers' Compensation Insurance Rating Bureau of California.

The WCIRB, in a 2015 study, found that 40% of cumulative trauma claims are filed after a worker is terminated. Of those cases, a whopping 98% are litigated and 90% are in Southern California.

These post-termination cumulative injury

claims were much more likely to involve multiple insurers, psychiatric injuries or multiple body parts, according to the Rating Bureau.

Most cumulative injury claims also involve attorney representation or multiple body parts.

Fraud investigators say that a good majority of the cumulative trauma claims that are filed post termination are fraudulent. That may be why some 60% of them are denied by the insurance company handling the claim.

Cumulative injuries are four times as likely to be reported late as typical injury claims.

What you can do

Ergonomics – the science of adjusting the job to fit the body's needs – can prevent cumulative trauma, also known as repetitive stress injuries (RSIs) in workplace safety parlance.

While in some cases redesigning the workplace is the best way to prevent RSIs, often many simple and inexpensive remedies will eliminate a significant portion of the problem.

For instance, providing knives with curved handles to poultry workers, so they won't have to unnaturally bend their wrists; taking more frequent short breaks to rest muscles; providing lifting equipment, so nursing home workers won't strain their backs lifting patients by themselves; or varying tasks to break up the

routine of activities.

One large airline's flight reservation facility, with 650 employees, had 250 cases of RSIs over a two-year period. An alarming 30% of these cases resulted in surgery.

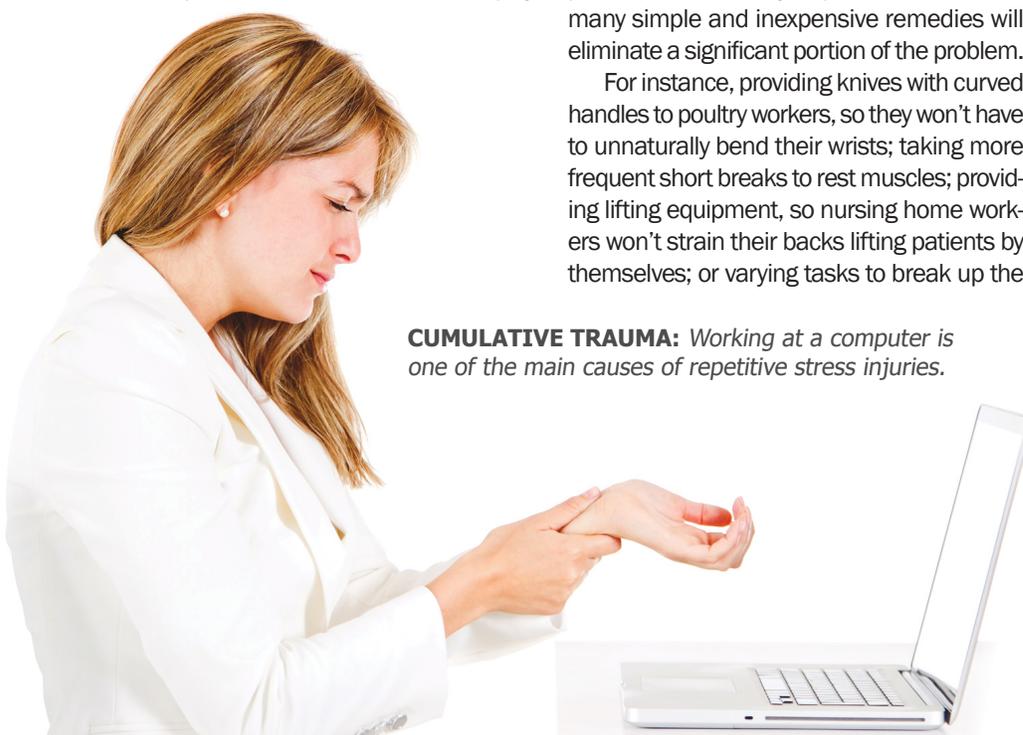
The company took some simple steps to reduce the number of RSIs, including hiring an ergonomist to redesign the workstations, developing work/rest regimens, and eliminating electronic monitoring that included disciplinary action based on productivity, among other actions.

Since then, the incidence of RSIs has dropped, underscoring the lesson that ergonomics can prevent RSIs.

A nationally known poultry producer instituted an ergonomics program and after two years its workers' compensation claims had fallen to \$1 million a year, compared to \$4 million prior to the program.

Finally though, if you suspect that a cumulative trauma claim is not legitimate, you should contact your insurance company's claim administrator and voice your concern. ❖

CUMULATIVE TRAUMA: Working at a computer is one of the main causes of repetitive stress injuries.



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New Workplace Notice Requirements Take Effect

IF YOU have more than five employees you are required to have in place as of April 1 anti-discrimination, anti-harassment and complaint investigation policies.

You are also required to post starting April 1 a notification to your employees about California's pregnancy disability leave law.

The regulations, updated by the California Fair Employment and Housing Council, were spurred by recent court decisions. If you have not done so, now is the time to review your anti-harassment, discrimination and retaliation policies. ❖

Anti-harassment policy requirements

- Set the policy in writing.
- List all current protected categories covered under the Fair Employment and Housing Act.
- Indicate that the FEHA prohibits not only supervisors and managers from engaging in prohibited conduct, but also co-workers and third parties with whom employees come into contact.
- Create a complaint process to ensure that complaints receive the following:
 - Designation of confidentiality, to the extent possible.
 - Timely responses.
 - Impartial and timely investigation by qualified personnel.
 - Documentation and tracking for reasonable progress.
 - Options for remedial actions and resolutions.
 - Timely closure.

Steps you need to take now

- Include a mechanism that permits employees to complain to someone other than his or her immediate supervisor, such as a human resources manager or other supervisor, a complaint hotline, or an ombudsperson. It should also include contact information for the California Department of Fair Employment and Housing and the U.S. Equal Employment Opportunity Commission as additional avenues for employees to lodge complaints.
- State that you will conduct a fair, timely and thorough investigation and that all parties will be given due process.
- State that you will ensure that you will keep the matter confidential to the best extent possible, but not that it's completely confidential.
- Require supervisors to report complaints of misconduct to a designated person, such as a human resources manager.
- Have a mechanism for remedial measures if you find misconduct.
- Assure your workers that you will not retaliate against them for filing a complaint.



Pregnancy disability notification

Starting April 1, if you have five or more employees you are also required to post the "Your Rights and Obligations as a Pregnant Employee" notice alongside all of your other mandatory employment-related postings at your workplace.

You can find a copy of the new poster from the state at this website: [www.dfeh.ca.gov/res/docs/Publications/Brochures/2016/DFEH-100-20%20\(04-16\).pdf](http://www.dfeh.ca.gov/res/docs/Publications/Brochures/2016/DFEH-100-20%20(04-16).pdf)

Employers with 50 or more workers will continue to be required to post the "Family Care and Medical Leave and Pregnancy Disability Leave" notification that has been required since July 2015.



NEW LAW

Wage/Hour Violations Can Create Personal Liability

A NEW LAW gives the state labor commissioner new powers to go after employers that have judgments against them for non-payment of wages, including issuing stop-work orders and holding officers personally liable.

The Fair Day's Pay Act, which took effect Jan. 1, adds a new section to the state Labor Code aimed at reducing wage theft and making employers pay for skirting wage and hour laws. Specifically, those violations relate to:

- Final payment of wages at termination.
- Issuing wage statements.
- Meal and rest break laws.
- Overtime.
- Expense reimbursement.
- Payment of minimum wage.
- Attorney's fees for complainants.
- Waiting time.

The new law is likely to increase litigation against employers and it comes at a time when overall wage and hour cases have ballooned 58% between 2013 and 2015.

The average value for these types of claims in California is \$6 million.

The new law gives the labor commissioner tools to enforce collection of judgments in wage and hour law cases. It adds a new level of liability to companies, as well as the individuals who run these enterprises as they can be held personally liable for judgments.

Officers in the crosshairs

The law imposes criminal and personal liability against individuals who act for the employer, such as owners, officers, directors and managing agents. Because of this new law, those individuals have potential personal liability for a liability that didn't exist before.

With this new area of liability opening up, and in light of the boom in wage and hour litigation anyway, it's important for all employers to consider director's and officer's liability insurance and employment practices liability insurance.

Typically, EPLI policies have excluded coverage for unpaid wages and associated fines and penalties. Some insurance companies, though, will carve back a sublimit of coverage for wage and hour claims, but that is usually only for related defense costs.

There are also some novel options available from Bermuda and London insurers that blend a wage and hour policy with an existing EPLI policy. These policies vary in price and are still evolving.

Unfortunately, your typical D&O policy includes an exclusion for wage and hour claims.

But there is an option in specialty products called Side A "Differences in Condition" policies that can be attached to a D&O policy. Differences in condition policies generally don't include an exclusion for wage and hour claims.

Depending on how the terms of these policies are written, they could include coverage for defense costs and possibly for settlements and judgments in suits that name directors and officers.

As the highly litigious area of wage and hour law evolves, please talk to us to evaluate your coverage and minimize your exposure.

Also, now is the time to revisit all of your wage and hour policies, including breaks and waiting time, to make sure they comply with state law.

Don't get left blindsided by a lawsuit that can bankrupt your company. ❖



LABOR COMMISSIONER'S STICKS FOR OFFENDERS

- Issuing stop orders against employers.
- Issuing levies against employers' bank accounts and accounts receivables.
- Placing liens against an employer's real and personal property.



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Crashes on and off the Job Cost Employers Dearly

THE COSTS for businesses when their employees are involved in car accidents on and off the job are staggering, at \$47.4 billion a year, according to a new study.

The “Cost of Vehicle Crashes to Employers – 2015” study, by the Network for Employers for Traffic Safety, looked at how much car crashes cost U.S. businesses in terms of workplace disruption and liability costs.

While the costs to companies when their workers are in on-the-job automobile accidents are easily measured, the costs to businesses when their employees miss work after accidents while off the job are almost as steep.

Employers end up paying in some way for injuries to their employees on and off the job, and to their dependents. They also pay for injuries caused to third parties who are injured when an employee is involved in an accident while driving on the job.

In 2013, motor vehicle crashes killed 1,620 people and injured an estimated 293,000 while they were working, the study found. More than half of the injuries forced people to miss work.

The report found that:

- Costs totaling \$20.6 billion were due to property damage, workplace disruption and liability costs.
- Another \$26.8 billion in costs to employers was due to health-related fringe benefits, including sick leave, health insurance and insurance covering work losses. They cover contributions to workers’ compensation insurance, health insurance, sick leave, Social Security disability insurance, life insurance, and private disability insurance, as well as insurance administration and overhead.
- Of those costs, fringe benefit costs of off-the-job crash injuries were \$21.8 billion, accounting for 81% of the health-related fringe benefit bill.
- The fringe benefits payments were divided roughly equally

Instill good driving habits

The U.S. Centers for Disease Control recommends:

- If you have a fleet, implement a fleet driver safety program and maintain complete and accurate records of workers’ driving performance.
- Check driving records of prospective employees and conduct periodic rechecks after hiring.
- Ask workers to periodically provide proof of their insurance and report suspensions, revocations and convictions for driving offenses.
- Establish schedules that allow drivers to obey speed limits and follow hours-of-service regulations where they apply.
- Require newly hired workers to attend performance-based defensive driving courses, with refresher training at regular intervals.
- Implement a driver safety program that emphasizes the link between driver safety at work and off the job. Safe driving lessons learned on the job can be used outside of work hours.
- Emphasize the need for wearing a seat belt at all times.
- Require that any employee who needs to make a call, pull over first when it’s safe to do so.

between health care expenses and wage replacement, such as sick leave and life insurance, according to the report.

• On- and off-the-job motor vehicle crashes involving employees or their dependents cost employers more than 1.6 million lost work days in 2013, and 90% happened outside of work, according to the analysis.

The top four causes of the accidents were speeding, distracted driving, driving under the influence of alcohol, and not wearing a seat belt. ❖

