

# Post-Termination Claim Investigations

Critical Mass Strategies for Handling Workers' Compensation Claims

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It's all but impossible of late to tune into any news broadcast that isn't dominated with stories documenting the grim state of the U.S. economy. Those of us who investigate workers' compensation claims in the field became aware of this phenomenon some time ago, based on signs that have been in clear evidence for well over two years. The looming recession was especially apparent in both the construction and hospitality industries.

The measuring stick, for our purposes, has been group layoffs and the escalation of post-termination claim filings that currently dominate the claim industry. Now that the downturn in the economy appears to have reached a state of critical mass, it is clear that the time has come for both carriers and self-insured entities to adopt specialized means by which to investigate these claims and address this crisis head-on. The following strategies will ensure the control of company loss ratios and will also aid in curtailing the associated ripple effects that often accompany post-termination claim filings during recessions.

## **Isolate Suspected Post-Termination Claims**

It would be ideal to separate suspected post-termination report files from other claims for the sake of uniformity. This defense strategy also will frequently lead them to a much shorter shelf life than other litigated files at the Workers' Compensation Appeals Board (WCAB).

A most-effective means of handling would be to assign these files to a small group of adjusters in a specialty post-termination claim unit, not unlike a triage team. These individuals, with a minimum of training, would apply the following series of protocols in tandem with a small group of field investigators and defense firms in addressing these specific claims.

The objective of the post-termination unit would be to use an approach from day-one towards the common objective of proving or disproving a post-termination defense. Confining this program to a small group also provides an excellent opportunity for the unit and its field staff to develop strong alliances with the client. These policyholders are also sure to appreciate the uniformity and consistency in the approach used by the team members they would work with both in the claim department and in the field. This is the essence of good customer service and reduces costs — both in time and expense — for both the claim department and the insured facility as a whole. This intimate approach is favored because many common factors and patterns become easier to identify through repetition.

Another benefit with this approach is that a familiarity is established with specific law firms that are involved in pursuing of these types of claims, as well as their general approaches. One

commonly noted fraud indicator is the practice by several prominent applicants' attorneys of listing identical affected body parts — typically in the same order — ending with allegations of psychological stress in cases involving numerous clients.

This is a clear indication that a form-letter DWC-1 application was used, with the claimant's name and information added after the fact. It provides us the first clue in identifying questionable claims. If the department follows through and develops these connections between their own policyholders and also with other affected insurers, they are often provided the foundation for a post-termination claim defense at the WCAB level. Close monitoring of these patterns enable the tracking of specific law firms involved in such practices and create a united front among affected insurers that can share the costs involved in pursuing legal action against such firms at the state or federal level.

### **Field Investigation Procedures**

It is advisable to limit the number of firms involved in field investigations for these post-termination claim units. Each of the selected firms would be assigned to handle the investigations of all claims originating from a selected group of policyholders. This would help ensure that the insured's staff would develop a strong comfort level with their assigned investigator and the process in general. Confining accounts to specific firms would also serve to enhance the investigator's ability to identify and report any and all claim patterns or ripple effects noted in the field as they develop over time with their assigned accounts.

The specific investigative steps in the first 30 days would include the following:

1. Obtain the recorded statements of the applicant, if unrepresented, and his immediate supervisor. In specific-date claim reports, rule out any eyewitnesses to the incident in question and obtain confirming negative statements from their closest co-workers at the employer level.
2. In continuous trauma investigations, pursue negative statements from the closest co-workers to confirm that there was no mention made by the applicant of any injuries or illnesses in, or outside of, the workplace prior to the last day worked. It is also critical in the development of the post-termination defense to obtain confirming statements from anyone who was present during the applicant's exit interview process to confirm that there was no mention made of any work-related injury during those meetings.
3. If the applicant or attorney is alleging psychological stress in the workplace as part of the claim, it is critical to also follow up with the statements of co-workers who shared similar job duties to those of the applicant in order to gauge their impressions of the stress levels inherent to the position. During those interviews it is also important to obtain the statements of any parties with knowledge of the applicant's non-industrial stressors, habits, or issues outside the workplace. The applicant's financial and family issues are also very critical here because they aid in correlating the specter of termination with the overall ratio of the applicant's stressors in and outside of the workplace.

4. Obtain a complete copy of the applicant's personal file as well as any records of write-ups, conference memos or file notes pertaining to attendance, performance, and possible legal/family issues.

5. Index, to confirm or deny, whether the applicant or his attorney has filed a state disability claim with the Employment Development Department that is concurrent with the filing of the DWC-1 paperwork for workers' compensation benefits. If so, obtain a copy of the filing notice sent to the employer. This document by definition calls into question the credibility of allegation that the injury occurred in the course and scope.

6. Once the claim decision is made and the applicant has been deposed, obtain a copy of the transcript and obtain statements from any remaining staff members identified as parties of knowledge by the applicant. Oftentimes, they will refute all statements made by the applicant in that deposition, which again affects overall credibility, a key issue in any post-termination claim matter.

Once the field investigation is complete, the investigation report and all corresponding enclosures should be digitized and placed on CD or DVD, then forwarded to the attention of house counsel with a copy to the handling adjuster in the post-termination claim unit. This will ensure the confidentiality of the report through the discovery process and will also simplify the transcribing of the statements, as well as the duplication of photos and any and all documentation obtained. Sharing evidence in this manner eliminates the need to burden policyholders for additional copies of records following the initial investigation as the matter proceeds through the litigation process.

### **Advantages of an Early Investigation**

The importance of gathering evidence and obtaining witness statements as early as possible following receipt of a suspected post-termination claim cannot be overstated. In today's economic climate, layoffs are occurring in waves, which suggests that we must strive to obtain the critical statements of co-workers and potential witnesses while they are still employees and willing to cooperate. Of equal importance are the negative statements, as they are useful in ruling these individuals out as witnesses should they, themselves, become layoff casualties and adopt a hostile disposition toward the insured facility.

An early and active field investigation conveys the message to the co-workers in post-termination filings that there will be inquiries made. This process can often stem the ripple effects in a crowded workplace. This is due in no small part to the "pillow talk" among co-workers about the process and the questions asked during interviews. Witness recruitment among co-workers, in anticipation of pending layoffs and reactionary post-termination filings, is not at all uncommon. A properly overt and thorough on-site investigation will serve to communicate to the staff that workers' compensation claim filings in response to layoffs will be closely examined and questioned by the employer and insurer alike.

History suggests that there is little-to-no investigation, or even preliminary analysis, being employed on the applicant side, so these prompt investigations will provide insurers with a

considerable defensive advantage in such matters. Additionally, companies will realize tremendous savings in their defense costs when post-termination defenses are accepted early in the litigation process at the WCAB.

Another benefit of these early defense judgments in post-termination claims would be a resulting reduction in the overall pending rates of claim departments as a whole. In addition to freeing up other claim representatives within a department, the resulting savings in unpaid benefits and attorneys' fees would be considerable.

From a customer service perspective, the policyholder would certainly appreciate this proactive and innovative approach in protecting their interests, particularly in this down economy, which clearly presents new challenges, not seen in recent history.

### **Stemming the Tide**

This approach of aggressive investigation and early analysis ensures that benefits are not paid to an applicant who unjustly submits a post-termination claim report. The AOE/COE decision in these matters could not be more critical, due to the challenges posed by the current job market. Current exposure levels must be viewed with consideration to possible benefits paid through an extended period as the applicant seeks alternate employment following his termination from the insured facility.

Another common contributing factor pertains to the immigration status of the applicant. There is a growing trend emerging that involves the use of falsified or borrowed Social Security numbers. This situation makes it impossible for these employees to file for unemployment or state disability benefits, which often leads them to file for workers' compensation as a last resort. Effective investigations help stem this growing tide and reduce the considerable litigation costs associated with it. This is due to the fact that the evidence gathering in the early stages typically results in a quick dismissal, once an iron-clad post-termination defense has been established in the field and then submitted at the WCAB level.

Most economists predict that the current recession will continue for the foreseeable future. This suggests that the associated rise in post-termination claim filings will also continue. Aggressive investigations, coupled with specialized claim-handling procedures, will aid greatly in minimizing the impact of these trends on insurers and their policyholders. The costs for such a program would be nominal and — even if used on a temporary basis — would ensure that policyholders won't be burdened with massive rate hikes in their workers' compensation premiums. This creative response to an industry-wide crisis, if taken on the part of carriers, self-insured entities, and third-party administrators, will distinguish them from their competitors. Their efforts in this vein will surely be appreciated in the long term by their policyholders. Those participating are certain to be rewarded with both policy renewals and referrals when the economy corrects itself in the years to come.

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