



Litigation Management: Four Ways to Improve Your Approach

Litigating workers' compensation is costly and complex. It can have a lasting impact on both the injured worker and their employer. But there are ways companies can better manage claims and help prevent litigation, resulting in better outcomes for both parties. The key is thinking differently about engaging people, sharing information and problem-solving. Traditional approaches have often lacked a focus on the worker, but evidence shows that a people-first approach is more likely to lead to a favorable claim experience and better settlement outcomes. At the same time, companies should be using the vast stores of data generated from claims to be more proactive and thoughtful about claims. For those claims where litigation is unavoidable, a data-driven approach has significant value. These four strategies can guide companies' litigation-prevention approaches.

1. Lead with Empathy

Organizations should start by putting the needs and concerns of an injured worker at the forefront of the claim activity — an advocacy-based model. Often the reason an employee will contact an attorney is fear. Common fears include losing their job, not getting medical treatment, not receiving wage replacement, not knowing where to send their medical bills, and not knowing how to navigate the process. Supervisors, HR managers and claim administrators must understand those fears and respond with empathy. It's important to build trust and rapport with the worker, communicate effectively, and avoid any adversarial dialogue. By creating a toolkit that guides the worker through the process from the time of the reported event, an organization can address frequently asked questions and provide key documents, forms and contact information to help tend to an injured worker's needs and concerns more quickly and proactively. That, in turn, can greatly improve the management process and outcome. Clear guidance and communication — starting from the event and

at every step of the way — benefits all stakeholders, even before a claim has been reported. This begins the process in a positive and productive manner for all involved. However, even with well-coordinated and empathetic communication, there are times when an employee may still retain an attorney. In those cases, it's important to continue with empathy and clarity.

Leading with empathy for the worker should be implemented by all members of the post-injury management team, including the employer and the claim administrator. All team members involved should address the worker with the same concern. Creating conversation scripts to guide the discussions can be helpful in applying an empathetic but effective approach consistently across an organization. An established framework can help manage the process through the continuum of communication while supporting all stakeholders.

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2. Address Multiple Dimensions of Wellbeing

Adopting an advocacy-based model means thinking of the worker's overall wellness. Employers should be cognizant of how an injury affects multiple dimensions of an employee's wellbeing — physical, mental, emotional, financial and social. Navigating the claim process, addressing medical needs, and returning to work can cause significant stress. In addition to that, the injured worker may have additional stressors if their injury compromises their day-to-day responsibilities outside of work — such as shopping for groceries, running errands, preparing meals, caring for children or the elderly, transporting others, or generally managing a household. Such a disruption can be stressful for them and their families, compounding the issue.

However, there are ways for employers to combat that stress, demonstrate their commitment to the employee's wellbeing, and help the employee recover faster. These might include housecleaning and meal services, both of which can be relatively low-cost ways to provide support to employees and their families. In addition to being a gesture of goodwill and empathy, providing these services for employees makes it less likely they'll exacerbate their injuries when trying to perform these tasks. If the injury prevents a worker from driving and they are normally responsible for driving others, employers can consider assisting them with rideshare services. Depending on the extent of the injured worker's needs, in-home assistance for housekeeping, cooking, and other household duties can further alleviate stress.

It's also important to keep lines of communication open and help employees understand the resources available to them. An employee may be feeling additional burdens related to their injury or illness, and a referral to an employee assistance program or a review for potential accommodations under the Americans with Disabilities Act may be warranted. When employees feel cared for by employers across all dimensions of wellbeing, it mitigates their fears and builds trust. As a result, they may be less likely to retain an attorney.

3. Use Technology to Take a More Proactive Stance

Advocacy is critical, but there is another tool companies should be using for predictive and proactive strategies: technology. Artificial intelligence (AI) and machine learning can help companies go through vast amounts of claims data to quickly identify claims that are at a greater risk of litigation. Aon's LAMBDA 2.0 tool, for example, uses predictive models to uncover relationships between data attributes that raise the risk of litigation. It can process structured data, which include injury and claim details such as job, tenure, age, nature of injury, and other data points — as well as unstructured data, which include claim notes, image scans, and other similar information. The tool uses the data to predict risk and relative complexity. Much of this data exists but was previously untapped; now, companies are using it to understand which cases are higher risk and to take the opportunity to intercede, ramp up the advocacy model, and be more proactive about building the requisite level of trust and rapport.

Avoiding litigation by deploying a robust advocacy model may not be enough, though. Understanding the potential complexity of a loss early can also shape strategies that can be deployed to help mitigate costs and shorten claim durations. Technology tools, such as AI, can quickly identify new claims that present significant complexity and severity risk. Understanding which claims pose the greatest risk of a poor outcome can lead to strategies aligned with early resolution and better outcomes.

4. Prepare For COVID-19 Uncertainty

The COVID-19 pandemic has increased uncertainty and complexity around claims, which is top of mind for many organizations. Implementing protocols to manage the continuum of employee considerations is critical. These include, for example, whether an employee tests positive for COVID-19, whether the exposure was work or non-work related, or whether the employee has not tested positive but is just fearful and hesitant to return to work during a pandemic. Managing the breadth of possibilities and employee responses to the COVID-19 pandemic will be key. It will take time to understand what the litigation trends look like and how they will take shape over the coming months. These cases are likely to have exceptionally long tails, as data emerges about residual and possibly lifelong health and medical issues. As the legislation unfolds by state, companies should begin coding and tracking trends but also preparing for some uncertainty in claims litigation. The experience of the COVID-19 pandemic will also help companies establish their approaches to future unforeseen risks, which will serve them well during other periods of uncertainty.

When litigation can't be avoided

In the unfortunate situation where litigation can't be avoided, companies must be strategic about which attorney will represent them and protect their assets. To do so, they should take a data-driven approach, using objective performance data and clear benchmarks of success. In our experience and research, outcomes vary significantly based on the quality of the representation—for instance, better-performing defense attorneys deliver better overall outcomes. Representation, especially based on the duration and complexity of the claim, is a large cost driver.

Similar performance considerations need to be applied to plaintiffs' counsel as well. Understanding the performance of one without the other may not result in the appropriate "match up." Consider that selecting a good-performing defense attorney to defend against an excellent-performing plaintiff attorney is unlikely to net the desired outcome. Reliable and fair performance assessments of all attorneys involved in your program is an important litigation-management strategy. Companies need to objectively assess performance and make thoughtful, outcome-driven selections. Using the data and applying technology has significant potential, both in the predictive capacity and in ongoing management and real-time decision making.

Effective claims and litigation management involves more modern, worker-centric and data-driven approaches. These strategies can not only help organizations to mitigate litigation and take care of their workers more effectively, but also to take a more proactive stance with an improved management process and sophisticated predictive-risk analytics. And as COVID-19 claims emerge and data begin to come in, companies that establish their approaches to these risks will be well positioned to handle other long-tail or unforeseen risks in the future. Data and analytics will also be critical if litigation is unavoidable. Ultimately, the companies that adopt new strategies can strengthen their workers' compensation programs and better serve their people.