

Memorandum

To: House Committee on Commerce and Economic Development; Senate Economic Development, Housing and General Affairs

From: Anne M. Noonan, Commissioner, Vermont Department of Labor

Date: 1/15/2015

Re: WORKERS COMPENSATION FRAUD STUDY AND REPORT

I. Statutory Directive and Responsibilities

The Department of Labor was directed in 2014 Acts and Resolves No. 199 with preparing a study of best practices to detect and deter workers' compensation fraud by employees, employers, and other persons involved in the workers' compensation system, and to issue recommendations.

Sec. 64. FRAUD STUDY AND REPORT

The Department shall initiate a study of the best practices to detect and deter workers' compensation fraud by employees, employers, and other persons involved with the workers' compensation system. The study shall include investigation procedures, penalties, and recapture of fraudulently obtained payments in a timely and cost-effective manner. On or before January 15, 2015, the Department shall report its findings and recommendations to the House Committee on Commerce and Economic Development and the Senate Committee on Economic Development, Housing and General Affairs.

This report addresses the types of workers' compensation fraud, focusing specifically on fraud committed by claimants and employers, and the costs that such fraud imposes on the workers' compensation system as a whole. It outlines best practices to detect and deter fraud in the workplace, and identifies "red flags" that often indicate fraud. Finally, the report makes a number of recommendations on how to reduce workers' compensation fraud.

II. Background: The workers' compensation system and costs of workers' compensation fraud

Vermont requires all employers to have workers' compensation coverage for their employees. Workers' compensation is a statutorily-mandated, no-fault insurance system that provides various benefits to an employee who suffers a work-related injury or occupational disease. The benefits include wage replacement, medical treatment and vocational rehabilitation. Workers' compensation benefits are limited by law, but the program ensures that employees who are injured or made sick at work receive basic remedies for work injuries while avoiding costly negligence lawsuits.

Workers' compensation fraud undermines a system designed to assist injured workers. Workers' compensation fraud places substantial pressure on the system's infrastructure, and creates significant loss for employers and insurers, higher insurance premiums, lower revenues for insurers, and a potential lack of coverage for employees. Since September 2014, the Department has issued 25 workers' compensation citations and collected over \$64,000.00 in penalties.

III. Types and “Red Flags” of Workers’ Compensation Fraud:

Workers’ compensation fraud is generally of two types: (1) Claimant fraud and (2) Employer fraud.

Claimant fraud generally occurs when an employee fakes an injury or exaggerates the extent of an injury in order to receive benefits.

Employer fraud generally occurs in three ways: (1) by misclassification, (2) by miscoding of employees, or (3) by under reporting payroll or paying workers “under the table” to lower reported payroll costs to obtain a lower Workers’ Compensation premium. Misclassification occurs when an employer treats an employee as an independent contractor in order to avoid paying workers’ compensation insurance premiums. Miscoding occurs when an employer miscodes an employee for the purpose of obtaining a lower workers’ compensation premium, such as claiming an employee working on a roof is doing clerical work in an office.

The following are common “red flags” that may indicate Claimant fraud.

1. The accident or type of injury is unusual for the applicant’s line of work.
2. The applicant fails to report the injury in a timely manner.
3. There are no witnesses to the accident or the testimony of witnesses to the accident conflicts with the applicant’s.
4. The applicant has a high risk activity as a hobby.
5. The alleged injury relates to a non-work related, pre-existing injury or health problem.
6. The applicant reports an injury immediately following disciplinary action, notice of probation, demotion, or being passed over for promotion.
7. The applicant took unexplained or excessive time off prior to the claimed injury.
8. The applicant has a history of personal injury or workers’ compensation claims.

The following are common “red flags” that may indicate Employer fraud.

1. The employer pays workers’ salaries and/or overtime in cash and does not provide a payroll stub or maintain proper payroll records.
2. The employer has a worker who is injured on the job and tells the employee not to report the injury and/or promises to pay the medical bills rather than report the injury to the Department of Labor.
3. The employer gives workers a 1099 form (instead of a W-2), which may indicate that the employer is attempting to misclassify them as independent contractors.
4. The employer hires multiple “subcontractors” to perform work but does not report them as employees.
5. The employer works only for cash.
6. The employer submits bids on jobs well below the industry standard.
7. The employer pays workers by means other than cash or check.
8. The employer appears to be performing work in a manner such as to be non-monitored or undetected, (extremely unusual work schedules or requiring workers to leave before others arrive).

IV. Best Practices to Help Eliminate Workers’ Compensation Fraud

1. Employers and Workers should report claims promptly.

Prompt reporting of claims is critical to allow for the timely delivery of benefits and the timely investigation of claims. Early involvement in the claim allows for better claim management and ensures that the injured employee knows that the employer is actively involved in the claim. Employers should designate a workers’ compensation representative to be available to help the injured employee, and should train managers and supervisors to report injuries immediately.

2. Employers and Insurers should investigate all injuries promptly.

This should be done for two reasons: (1) to find out what happened in order to prevent its reoccurrence, and, (2) to determine whether the alleged injury actually happened.

The employer should contact the injured employee within 24 hours, help explain compensation benefits, and maintain regular contact with the employee. This contact and follow up allows the employer to identify the facts of the injury, allows for timely delivery of benefits, and establishes an appropriate communication/dialogue with the injured employee. Further, when employees know that all injuries will be investigated, and are kept in contact with the employer, the potential or ability to falsify an injury is reduced.

3. Supervisors and Managers should be trained in workers' compensation policy and procedures. Training will allow supervisors and managers to ensure that injuries are reported and investigated promptly. Training also allows for supervisors and managers to spot potential "red flags" that may indicate fraud.

4. Employees should be educated about their rights under the workers' compensation program.

Employers should clearly explain procedures for filing workers' compensation injury reports. Fraud is reduced when employees understand that workers' compensation is designed to protect their rights if injured on the job. Employees should be made aware that workers' compensation fraud hurts the workers' compensation system as a whole. Supervisors and managers should meet regularly with employees to listen to employees' concerns and solicit their input on safety and health protocols. Giving employees a stake and a voice in the management of the workers' compensation program reduces any incentive an employee might have to manipulate it.

5. The employer should create productive "Return to Work".

Employers should commit to a return to work policy and identify the essential functions of all job classifications. The employer should make reasonable efforts to accommodate injured workers and give employees a role in establishing return to work programs. Bringing employees back to work is important. A return to work program will reduce fraud by ensuring that employees return to work sooner. Return to work programs also reduces the cost of claims, returns the injured employee to work sooner, and often improves company morale and employee satisfaction.

6. Insurance Carriers should establish greater communications

Insurance carriers need more/timely communications with healthcare providers, and should review all medical and hospital bills for fee schedule adherence, reasonableness and appropriateness.

A closer relationship with health care providers allow the insurance carrier to determine when an employee is able to return to work as well as the nature and extent of the employee's injury. This helps to ensure a cost-effective workers' compensation program.

7. Employers should encourage the reporting of fraudulent claims.

Employers should encourage the reporting of suspected fraud. Employees should know how to report fraud and have an assurance that their reporting will be protected.

8. Employers should review and refine their workers' compensation and anti-fraud programs regularly.

All programs should be reviewed periodically to determine what aspects of the programs are working. Adjustments to the programs should be made as needed.

V. How the Vermont Department of Labor can assist with the efforts to reduce and prevent fraud:

1. Increase education and outreach to employers regarding best practices to detect and deter claimant fraud.

The Department should work with employers to recognize the signs of workers' compensation fraud and to implement best practices. Many states have posters and handbooks for employers outlining best practices and how they can be implemented.

2. Outreach to employers to implement return to work programs.

Return to work programs have been shown to be effective in reducing workers' compensation fraud. The Vermont Legislature in Act 199 directed the Department to adopt rules promoting the development of return to work programs. The Department is currently adopting rules outlining best practices for establishing these programs.

3. Require Insurance carriers to file copies of their anti-fraud programs with the Department.

The Department should receive an annual report from each insurance carrier outlining their anti-fraud programs, the number of complaints of fraud received, and the number and outcome of any investigations.

4. Insurance carriers should send the Department the fraud audit reports they have conducted.

In 2014, the Legislature enacted 21 V.S.A. Section 663(b) requiring the Department to order Insurers to investigate specific allegations of claimant fraud and report to the Department. The Department has ordered investigations of fraud and has received reports from insurers. As of this date these orders to investigate have not resulted in findings of fraud. Requiring the submission of audit reports will allow the Department to identify and prosecute cases of workers' compensation fraud.

5. Increase referral of fraud cases for criminal and or civil prosecution.

The Department recommends that cases involving fraud be referred to the Attorney General for possible criminal prosecution. Robust criminal prosecutions will send a message that fraud is taken seriously and may deter future cases of fraud. In cases where the Department has found that benefits were fraudulently obtained and has levied penalties and ordered repayment, and the benefits are not repaid, the Department should refer the cases for possible criminal prosecution, in addition to pursuing civil collection remedies and encouraging the insurer to pursue a collection action to obtain repayment.

Vermont law should be amended to require that the employer purchasing workers' compensation insurance, swear under penalty of perjury to the accuracy of the information provided to the insurer. This would have the effect of deterring fraud by requiring the employer to swear to the veracity of the information provided and will also make it easier to prosecute individuals for making false statements under either 21 VSA §708, or 13 VSA §2024, or both.

6. The Department should ensure staffing of their fraud investigator positions.

The Department is continuing to work to fill two investigator positions. Staff is issuing citations and stop-work orders against employers who fail to carry required Workers' Compensation insurance.

VI. Recommended Best Practices

1. Implement effective safety and health programs involving the workforce
2. Report all claims promptly to the insurer and the Vermont Department of Labor
3. Ensure the prompt investigation of all injuries and illnesses
4. Determine if any off-sets such as subrogation might apply
5. Train supervisors and managers in safety and health procedures and workers' compensation filing procedures
6. Educate employees about their rights, responsibilities, and importance of prompt reporting of claims
7. Create effective "return to work" programs
8. Develop a cost management program
9. Review and refine the company workers' compensation and anti-fraud program regularly

VII. Conclusion

Workers' compensation fraud imposes great costs on the system resulting in higher premiums, losses to employers and insurers, and a potential lack of coverage for employees. Claimant fraud is best addressed by instituting best practices, staying involved in all workers' compensation claims, and instituting effective return to work programs. Reducing employer fraud requires continued investigation and enforcement by the Department of Labor.

Appendix 1

Materials consulted

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