

Hiring or expanding?

Four take-aways can help you make good business decisions and avoid unexpected workers' compensation costs

Some organizations anticipate adding to staff or expanding production in the coming months.

They may also be inviting additional workers' compensation claims later unless they take steps now to improve their hiring or planning processes.

That's SFM's experience with firms experiencing growth. Typically, out of the thousands of workers' compensation claims SFM manages each year, it sees claims and costs that employers likely would have avoided had they followed more careful hiring practices or been more safety-conscious in expanding production.

Here are some take-aways from those experiences.

1. Doing due diligence when hiring may require you to expand into additional areas of fact-checking.

Prior claims

For starters, one thing you can't ask a job applicant about is prior workers' compensation claims with other employers.

In addition to the federal Americans with Disabilities Act, most states including Minnesota, Iowa, Nebraska, South Dakota and Wisconsin have state discrimination laws that prohibit employers from asking about an applicant's prior workers' compensation claims. You are prohibited from asking about prior work-injury claims on the application form, during the interview or through any other source. If you do, you risk being sued for discrimination by applicants who didn't get the job, and that's likely to be a lawsuit you would be hard-pressed to defend successfully.

But you can cover a lot of other bases.

The application form

Look at updating your form. One item of growing importance is the applicant's signature consenting to background checks. If that's missing from your application form, this may be the time to add it.

Your application form is a legal document. Have it reviewed by an employment attorney, who can see things that may no longer align with changing laws relating to discrimination and other employment practices, or who may suggest additions useful to you in making hiring decisions.

Every employer, including small firms, should have a form for job applicants. If you haven't developed one, consider making it a priority and using it for everyone you hire, regardless how well you already know the person.

Job description

You may need to add more detail to it. You want to be able to present the applicant with a job description that gives the physical requirements of the job in sufficient detail so you can find out whether the applicant can do them. Among other things, this can help you avoid injuries. Remember that, because discrimination laws govern how you talk about this, you must confine yourself to asking the applicant whether he or she can do the essential job functions "with or without special accommodations."

For more, see SFM's "Americans with Disabilities Act" *Legal Advisory*, available at www.sfmic.com > Employers > Resources > Resource catalog.

Criminal background check

This is becoming a more important pre-hire tool for certain industries and types of jobs. SFM sees questionable and even fraudulent workers' compensation claims filed by employees with felony convictions that their employers apparently had been unaware of. Criminal background reports are generally available from state corrections departments. Consult with your employment attorney before obtaining them, and be aware you may be required to disclose your use of them.

Pre-employment physical

Making a job offer contingent on the results of a physical examination gives you a professional medical opinion about the person you selected. It's a prudent step for many jobs involving physical labor.

Be aware that the exam will test only for the job's essential capabilities. You will need to apply the physical exam requirement to everyone you hire for the same job.

For more, see SFM's "Pre-employment physical examinations" *Legal Advisory*, available at www.sfmic.com > Employers > Resources > Resource catalog.

Drug and alcohol testing

Making a job offer contingent on the results of a test for illegal use of drugs and alcohol is a sensible practice for many employers. It should be a standard in many trades, where promoting a drug- and alcohol-free workplace correlates directly with fewer work injuries, lower injury-related business costs, lower absenteeism, fewer problem employees, and higher-quality workmanship.

Nebraska, South Dakota and Wisconsin—unlike Minnesota and Iowa—do not have extensive regulations on drug and alcohol testing in the workplace. However, certain principles are good practice regardless of your business location. Set up a drug and alcohol testing policy in consultation with your employment attorney. Be aware that, due to discrimination laws, you will need to apply your testing requirement to everyone you hire for the same job. There may also be legal requirements regarding the confidentiality of test results.

For more, see SFM's "Alcohol and drug testing

of employees and job applicants" *Legal Advisory*, at www.sfmic.com > Employers > Resources > Resource catalog.

College degrees

More employers appear to be alert to job applicants fabricating educational achievements. Calling schools to verify what's on the application form is worth the small investment of time.

Driving record

Checking an applicant's driving record can reveal red flags such as DUI convictions. You can obtain a motor vehicle record through your state's motor vehicle licensing department. Cost typically runs \$10 to \$15 per record.

Reference checks

Statutory changes relieving employers of liability when giving reference information in good faith seems to be resulting in employers being more forthcoming when prospective employers call. So your reference checks with prior employers may be more fruitful than they used to be.

If an applicant is new to the state, track down the work history and the reasons for the move. If the applicant's work history shows periods of unemployment, track down the reasons for the gaps.

Social Security numbers

Federal law requires you to verify that your employees are legally eligible to work in the United States. E-Verify is a voluntary internet system operated by the U.S. Department of Homeland Security that enables you to do that free of charge. It checks the Social Security number your job applicant gives you against the records of the Social Security Administration. Many states including Minnesota require the use of E-Verify for certain state contracts.

Whether required or not, making employment contingent on verification of the Social Security number is good business practice. As far as workers' compensation is concerned, state courts have ruled that illegal aliens injured on the job are eligible for workers' compensation benefits. Since an injured illegal alien cannot go back to work in the United States, he is likely to continue receiving expensive workers' compensation wage-loss benefits for as long as the law allows, and that may

have significant impact on your workers' compensation premium.

For more, see SFM's "Immigrant workers" *CompTalk*, available at www.sfmic.com > Employers > Resources > Resource catalog. See also "Illegal alien employees" in the October 2007 *Companion* in the *Companion* online archives.

2. New employee training is an investment in your organization's future.

Without training, people who are new to their jobs have higher rates of injury. You can reduce that risk through your orientation process. Your new employee needs to understand your expectations for safety and behaviors. He or she needs to understand that yours is a culture where people care about and look out for each other.

Job training is about doing the job safely. Anticipate your new hire's questions. He may be hesitant to ask them. Or he may ask a co-worker later and not get the advice you'd want conveyed.

Getting new employees off to a good start on safety is among the most important steps you can take to control your organization's injury-related business costs both near and long term.

For topical safety training modules, see SFM's *5-Minute Solutions* series and *Video lending library* at www.sfmic.com > Employers > Resources > Resource catalog.

3. If using outside workers, be sure they are covered for workers' compensation.

As an alternative to permanent hires, some employers contract for temporary employees or use independent consultants.

If you are looking at temps or other outside help, you must be sure those outside agencies—*not you*—will be liable for payment of workers' compensation benefits in the event of a work injury.

Things to look for

Beware of scanty contracts. There are many of these out there, either deliberately or unwittingly silent on important legal considerations including coverage for workers' compensation. Have con-

tracts reviewed by your employment attorney before you sign.

Be sure an independent consultant or independent contractor is covered for work injuries. An independent consultant working alone may or may not carry workers' compensation insurance. If he does, you will need to get from him an insurance certificate showing workers' compensation coverage in force at the time you engage him. You can double-check his workers' compensation insurance through state agency online look-up databases, such as Minnesota's at www.inslookup.doli.state.mn.us. If he does not have workers' compensation insurance, then you will need to get from him an insurance certificate for general liability with adequate minimum limits of coverage, and you will need to verify that he meets your state's legal criteria to be considered an independent contractor (*see below, "Independent contractor requirements"*).

This is an important area. Many employers have learned the hard way that oversights in engaging outside firms or individuals can result in unexpected liability and expensive legal consequences. If you have questions, talk with your state labor department or insurance department, your employment attorney, your insurance agent, or SFM. For more, see SFM's "Hiring subcontractors" *CompTalk* and "Special liability of general contractors" *Legal Advisory* available at www.sfmic.com > Employers > Resources > Resource catalog.

Independent contractor requirements

In many states, specified criteria must be met to be considered an independent contractor for purposes of workers' compensation liability.

In Minnesota, for example, a person in the construction industry must meet nine statutory conditions. A person in trucking must meet seven conditions. A person in any other trade must meet five conditions relating to:

- Right to control the means and manner of performance.
- Mode of payment.
- Furnishing of tools and materials.
- Control over the premises where the work was done.
- Right of discharge.

4. Expanding business without adding to staff.

Longer work hours. Injuries rise with overuse. SFM's experience working with employers is that injuries increase when employees work longer shifts and extra jobs—unless steps are taken to mitigate that.

Have a plan in mind if you are going to be asking employees to work overtime doing repetitive tasks. The four basics are still good advice: task rotation, expanded duties to add variety, periodic rests, and stretch breaks.

Job changes. Will new processes or expanded operations result in job changes or new tasks for any staff? If so, you may also have created new risks for injuries. Training is at least part of the solution.

Equipment and facilities. If installing new equipment or making capital improvements, keep safety and ergonomics in mind in their design. SFM works with many large employers who design for safety when expanding facilities. They say it yields significant net financial benefits long term, including lower experience modifiers and stable or lowered workers' compensation premiums.

For workers' compensation legal advice relating to hiring practices or using outside workers, contact SFM's in-house law firm Lynn, Scharfenberg and Associates at (800) 937-1181 ext 4450 or (952) 838-4450. For advice on training new employees and planning production expansions, contact SFM's loss prevention professionals at (800) 937-1181 ext 4309 or (952) 838-4309.