WATER. REST. SHADE.

Insights
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Heat is Creating More Legal Problems this Summer.

It has been close to 100° in many southern states and even worse in the West. The *Union of Concerned Scientists* has warned of a "dangerous heat wave and steps to take. Perhaps I should not be surprised that we have heard of an unusual number of employee deaths where heat was probably not a factor, but the circumstances required determining whether workplace heat contributed to the event. Similarly, was an employee's illness after work related to the heat and was the hospitalization for treatment or for "observation." We have also seen a large number of OSHA inspections examining heat outside on construction sites or in manufacturers and foundries. Regardless of these legal issues, one fact is clear … we have to purposefully protect employees during this season.

OSHA and other organizations have done a good job of reminding employers to protect employees from risk associated with heat. In particular, OSHA maintains a site on protecting employees from heat, entitled *"Water. Rest. Shade.* as shown above. California OSHA maintains a similar site and, unlike Federal - OSHA, has a heat - related safety standard. Rather than solely focusing on the temperature, weather and setting of the day, these guidelines emphasize the importance of training employees to recognize the signs of heat illness, and for supervisors to recognize the signs in their employees. The guidelines emphasize the need for frequent hydration and when working in the sun, a shady area to periodically retreat. Supervision should thoughtfully consider when work schedules need to be changed and breaks enforced.

Sadly, employees will experience heart attacks this summer, and many people will jump to the conclusion that the heart attacks were caused by working in the heat. In my 32 years of experience, heart attacks are rarely caused by work. In recognition of this fact, for years, Federal - OSHA largely left it to employers to determine if a heart attack at work should be reported to OSHA as a workplace fatality. The current OSHA recordkeeping and reporting requirements require employees to report heart attacks to OSHA and to allow OSHA to determine if the heart attack may be work related. Employers may initially be unsure whether the heart attack was caused by the heat and working conditions. On some occasions, emergency responders and medical examiners will immediately determine that body core temperature and other factors establish that the heart attack was not caused by the heat. In other cases, the employer may be almost certain that the heart attack is not work-related, but is unable to document the fact until a medical examiner completes their reports. OSHA is cognizant of this fact and even when they go on-site to investigate a heart attack, generally recognize that the attack was not work-related.

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This is not to say that the hot environment does not present a workplace hazard. While I worry more about construction, agriculture and other outdoor work, heat can be hazardous in warehouse and trailer settings or in many manufacturers' workplaces. Rarely have I seen the bulb test and other testing procedures demonstrate that a temperature that is hazardous, but that does not mean that the employer may not need to rotate employees, increase the frequency of breaks, provide cool areas, etc. Good guidance exists, such as the result of the American Foundry Society (AFS)/OSHA effort. Employers should consider whether they are taking all possible steps, and many are doing so. Employers should also scrutinize OSHA efforts to test a workplace because they may fail to consider schedules and the amount of actual exposure, shielding and cover and changes in daily processes.

Healthy Workers

A related problem is our increasingly older and less healthy work population. The median age of many construction craft workers is in the 50s. Similarly, the median age of many workers i primary metals and similar industries is again in the 50s. I am in my 50s and certainly a 50 - something worker can be fit and effective. However, statistics show that employees, like the general population, are increasingly experiencing more weight, health, and other problems. Employers may be concerned that an employee presents a health risk, but the Americans with Disabilities Act (ADA) is non-paternalistic. In other words, the ADA does not encourage or permit employers to easily confront and address employees who may be at risk because of their health, but do not yet present documentable evidence. An employer may be reluctant to confront a possibly unhealthy employee for fear that any adverse action taken after the confrontation will appear to be based upon the employee's disability condition under the ADA. Cases narrowly construe the requirements that employees be able to perform the essential functions or constitute a direct threat to safety. It is especially difficult to prove that a visibly sweating, overweight employee with health issues is at a point where he or she presents a direct threat to safety. Because of this challenge, advocacy groups and many unions fight employers who want to implement clear fitness for duty standards because they are fearful that these standards will be unfairly enforced. Frankly, one suspects that some groups simply recognize that many individuals may be unfit for work based upon life decisions or the creeping health problems of age. Employers may be in the position of weighing the need to do the "right thing" versus legal exposure.

Importance of Wellness Efforts

Employers would be well served to develop defensible job descriptions and fitness for duty standards, as well as defensible means of evaluating an employee's ability to perform the essential functions of the job. Because employers are limited in their ability to intervene on behalf of an employee's possible health issues, it is more important than ever that employers provide health fairs and take other steps to encourage employees to get health for their blood pressure or other issues.

Similarly, employers should invest effort and money in developing truly effective wellness programs. Frustratingly, the *Wall Street Journal* just posted that employer wellness efforts are declining. Once again, well-meaning laws have harmed the ability of employers to most effectively utilize wellness

programs and any sort of accountability to improve employees health. The EEOC has not taken a very pro-- wellness approach to wellness efforts and raises many concerns under the ADA and the GINA. But with care, tools remain. Both business and moral reasons require creative strategies, and it is counsel's job to guide well-meaning employers around the obstacles.

Howard

Related People

Howard A. Mavity
Partner
404.240.4204
Email