



## *Workers' Comp In The Hospitality Industry*

### **"E-MOD" – WHAT IS IT AND HOW CAN IT BE CONTROLLED?**

*By Christine H. Long, Esq.*

If you are an employer in California, you must have worker's compensation coverage. However, while you may think you have little control or choice in this type of insurance coverage, the opposite is true.

Employers can control the areas of risk that influence their "experience modification factor," also known as your "experience mod" or "e-mod." An e-mod is used to adjust your premium based on your actual claims and expense experience. The calculations relating to an e-mod can be confusing, and are seldom discussed. It is important for employers to know about the factors that can affect their rating, and to know whether their losses are comparatively better or worse than expected for their industry.

#### **How E-Mod is Calculated**

If your losses are lower than anticipated, your e-mod rating should be less than 1.00. Simply put, this lower rating, also known as a "credit modifier," will lower your premium (most employers enjoy an experience rating modification credit).

If your losses are higher than anticipated, your e-mod should be greater than 1.00. This higher rating, also known as a "debit modifier," will raise your premium.

The e-mod calculation is the comparison of your actual losses during an experience period with the expected losses for your actual payrolls and classification code(s). The experience period usually includes three years of data, excluding the most recent year. Company size and unpredicted large losses are also considered in determining the rating.

#### **How to Improve Your E-Mod Rating**

The key to having a good e-mod rating is prevention. Short of preventing incidents, there are other factors that affect an employer's rating:

1. Employers should have a "Return to Work" program. If an employee can return to work within a set time, the rating formula may not be impacted or minimally impacted. Each insurance carrier has a different window, so it is important to inquire about when your rating will be affected. For example, some carriers provide that if the injured worker returns to work during the waiting time period for lost wages, then the e-mod rating is minimally affected or not affected at all.

Providing a transitional duty program for injured employees helps ensure that they return to work sooner, which will help the employer's rating. For example, if your airport shuttle driver is unable to drive, can he work at the front desk answering phones? Can he work as a concierge? Or are there other activities he can perform? Of course, each situation will need to be evaluated individually.

2. Review your policy class codes and payroll. Understanding the definitions of the classification codes assigned to your policy will help to insure that you have the best coverage, at the best rate. Incorrect coding can lead to errors in the calculation. For example, certain jobs may be considered a higher risk. *The hospitality industry ranks as one of the top five high-risk industries.* This is due in part to these factors:
  - Manual handling
  - Slips, trips and falls
  - Fire and emergency
  - Drugs and alcohol in the workplace
  - Violence in the workplace
  - Hazardous substances
  - Contractors
  - Injury reporting and management
  - Noise in the workplace

For this reason it is important to understand the classification codes and which employees are assigned or covered under which codes.

3. Nature of claims history. Losses are categorized as primary or excess. A primary loss is the first \$5,000 of any loss. This loss carries the heaviest weight in determining the e-mod factor because claim frequency is more predictable than claim severity. An excess loss is an amount over \$5,000. An excess loss carries an increased weight in determining the e-mod factor for larger employers, and is capped at maximum values.

Some insurers believe that if there are fewer claims, there is a less likelihood of a large loss, which can result in a lower e-mod rating.

### **Employer Responsibilities in Handling a Claim**

As discussed above, the first priority is to prevent claims from happening. Claims should still be reported. However, situations in which claims may arise need to be addressed and prevented.

If an employee is injured, employers are responsible for making sure that a "First Report of Injury," or other similar document, is completed and forwarded to the workers' compensation carrier.

Employers are responsible for making sure that they do not violate any laws or rights of the injured employee. If an injured employee needs medical attention for a serious injury, allow them to see the company doctor or leave work to see their own doctor. Prepare detailed reports of the incident. Obtain witness statements early. Document everything.

Employers are responsible for cooperating with their workers' compensation carrier and its attorneys when the matter is being investigated. The insurance carrier may request a copy of the injured employee's personnel file, so it is important to make sure the employee's file is current with all documentation, including performance reviews, before it is provided to the insurance carrier.

If the attorney representing the employee contacts the employer, the employer should not respond directly to the employee's attorney. The employer should forward the communication to the insurance carrier. Oftentimes, employers think that they can mitigate the damage (save money or exposure) by handling the matter themselves. In almost every instance, this has backfired against the employer.

The employer must welcome an injured employee back into the workplace once that employee is physically ready to resume employment. At no time should the employee be penalized or terminated for the fact that they filed a claim. If the claim is the result of misconduct, it is important to consult legal counsel in order to differentiate between a disciplinary action for the misconduct as opposed to the claim. Employers can face civil and even criminal penalties if it is found they discriminated or retaliated against the employee making the claim.

Employers can also be subject to a fraud investigation. Many employers mistakenly believe only the employee can be subject to a fraud claim. However, employers who fail to report claims in a timely manner or try to have employees visit company doctors in lieu of a claim, can be subjected to a fraud investigation as well as fines and penalties.

### **Layoffs, Terminations and Seasonal Employment Can Affect E-Mod**

With a rise in downsizing in this current economy, employees are looking for ways to ensure economic security. One way is to file a workers' compensation claim prior to, or in conjunction with, a layoff, a reduction in hours or an end to seasonal employment.

In most instances, when a company decides to downsize, a problem employee is terminated first. The question needs to be asked: why is the employee a problem? If the employee is considered a problem because a workers' compensation claim was filed, or the employee is out on a disability leave, the employer is in violation of the law. There certainly will be times when an entire department or group of employees are laid off or downsized and the department or group may include an employee who is not working due to a claim or disability. In this case, the employer must first ensure that the employment is ended for a legally sound, nondiscriminatory, well-documented and consistently applied reason.

It is always the best practice to consult legal counsel when laying off or downsizing employees, especially when there are employees who are on leave. It can be less costly for the employer to obtain legal advice as opposed to a significant cost for a state or federal investigation or a potential litigation.

### **Ways to Protect Your E-Mod When Terminating Employees**

1. Choose a carrier that suits your business. The workers' compensation carrier is not the enemy. They have to protect the rights of the workers', but they also want to prevent having to pay fraudulent or false claims. Close attention makes it more difficult for abusive or fraudulent claims to slip through the cracks. By opening the lines of communication with the insurance carrier, employers can learn and develop strategies to prevent any abusive claims.
2. Utilize existing accident reporting procedures. Having a "Reporting Policy" that requires all employees to report accidents immediately, no matter how minor, should be consistently enforced. If a policy does not exist, create one. Even if an employee does not report the accident in what you consider to be a timely manner, it must be reported immediately upon the employer learning of it. It is also important to investigate each claim, ascertain if the accident needs to be reported to CalOSHA and determine any corrective action that needs to be taken.

The employer's job to investigate does not end when the report is submitted to the workers' compensation carrier. Employers need to insure that the same type of injury does not occur again. Repeated injuries of the same nature may result in a "Serious and Willful Charge" being filed, in which the State of California can subject the employer to independent liability and punitive damages.

3. Conduct exit interviews. When there are large layoffs, companies often are overwhelmed by the amount of time and paperwork involved, and they tend to skip exit interviews. However, by conducting this simple step, employers can have employees sign a form verifying if they have had any injuries (or other employment claims) that have not been reported. This document becomes a valuable tool if a claim is later filed.
4. Keep accurate and detailed records. Be sure industrial hygiene record keeping is accurate and well-documented, including baseline levels of noise, airborne particles and chemicals, as well as equipment condition or housekeeping inspection reports. Do not destroy employee payroll, work schedule and accident records after the employment has ended – these may become evidence. If there is video surveillance available, and a claim is reported, immediately preserve the video footage.
5. Conduct a thorough accident investigation. Investigate every claim. While a minor incident may not require as detailed an investigation, a report should be completed and reviewed by a second person. Obtain witness statements from not only the injured employees, but any other employees in the work area or those who work in the same area on a different shift, to discover any similar incidents. Also, when equipment or other physical evidence is involved, remove it from further use until it can be examined. Address any other hazards which may have caused the accident.

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**Christine H. Long**, a partner at Berliner Cohen, represents and counsels hospitality clients on all matters related to their operation. She provides advice and counsel on employment matters and represents clients in litigation in matters relating to employment, contracts, partnerships, and real estate.

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