



Importance of Immediate Injury Reporting for Workplace Injuries



Levi McCathern, recognized as one of the premier litigation lawyers in Texas, speaks out on the importance of immediate injury reporting. McCathern is Board Certified in both Civil Trial Law and Labor and Employment Law by the Texas Board of Legal Specialization – a double certification held by only 26 of the 87,000 attorneys in Texas. He is regularly called upon to provide legal consultation to companies across the United States.

ARAWC: Why have you decided to speak out on the topic of immediate injury reporting, the standard for injury benefit plans sponsored by employers outside the State Workers Compensation program?

LEVI McCATHERN: The topic has become subject of debate, and there's a lot of misinformation flying around. We have as much as or more experience in Texas working with companies providing what's known as "opt out" plans or as "nonsubscribing" companies, and we want to share that knowledge with other companies and with people who can influence policy like elected officials. Plus, we are a national firm so we have a track record and expertise in all 50 states, giving us an unusual basis of comparison.

ARAWC: Let's start with some background. What does it mean to require immediate reporting of an injury?

McCATHERN: Well, the whole idea of taking care of workers on the job means taking care of them when they have an accident or injury. Texas is the only state that allows employers to "opt out" of traditional Workers Comp programs and regulations, and the companies we work with are, as you might expect, the leaders in providing a safe, great working environment so they construct injury benefit plans that draw from the requirements laid out under the federal ERISA (Employee Retirement Income Security Act) rules. One of the keys to keeping employees healthy is reporting an injury quickly, usually within 24 hours.

ARAWC: Why is that now controversial?

McCATHERN: It shouldn't be. The results are very clear. Immediate injury reporting gets the worker to the doctor quickly, results in shorter periods of disability, fewer claims disputes and faster claims payouts. And, of course, for the employer, there are significantly lower costs plus the employer gets valued workers back. And, over time, workers who get back to work quickly tend to stay healthier and return to their earnings level more quickly.

ARAWC: So why are some regulators trying to undercut the 24 hour requirement?

McCATHERN: There have been occasional cases where employees waited longer than 24 hours and either were denied care or had to jump through hoops. Plus it's now recognized that there are different kinds of workplace injuries. That's why we strongly recommend three safeguards: first, there must be a

good cause exception in plans, and ERISA requires companies and all involved to act with what's called "fiduciary duty," which means, putting the employee first. And I can tell you that we, and our clients, take that very seriously. So, it's just the right moral stance, and you can also get in significant trouble if you don't adopt that standard. Second, the notice period should sensibly begin when the employee knows or should know about the accident or injury, and finally, we need to distinguish between an obvious injury caused by an accident and an occupational disease or what's called "cumulative trauma." These are the kinds of things caused by repetitive motion over time.

ARAWC: What does traditional workers compensation require?

McCATHERN: Here in Texas, there is a 30 day reporting requirement. But again, that's not necessarily a good thing. Traditional workers' compensation plans don't start replacing wages until seven days, whereas the opt out/ERISA-based plans replace wages from the first day, and they replace them at a higher level and without a cap. Now, the Department of Labor is pushing for a 30 day reporting requirement for all plans provided by nonsubscribers. And that's a terrible idea which would undercut all the benefits of the requirement for immediate reporting.

ARAWC: Why is that? Wouldn't some people think that's more worker friendly?

McCATHERN: It's just the opposite. It discourages and delays medical treatment, prolongs employee disability, increases the likelihood of injury aggravation or permanent injury and inhibits accident investigation. As you can imagine, it's harder to find witnesses after several weeks. Worse, it wipes out the effectiveness of drug and alcohol testing, and that's a hard topic to talk about but critical to maintaining a safe workplace. And there's more: delay increases claim and medical expense costs which increase premiums. Many people mistakenly think that the employer pays "all" the costs, but studies show that money paid for benefits reduces what employees get in cash or take home pay. A [2016 study](#) by the Texas Department of Insurance found that delayed treatment of work injuries beyond seven days increases medical expenses by 40 percent!

ARAWC: Have these negative impacts been documented?

McCATHERN: They have, and there are still more disadvantages to stringing out reporting. It increases fraudulent injury reporting, another unpleasant topic but an important one. Also, immediate injury reporting quickly identifies trouble spots in a work environment, allowing the employer to respond and remediate quickly. So a 30 day window actually jeopardizes the safety of other workers.

ARAWC: Surely employees who have accidents report them quickly.

McCATHERN: Not necessarily. We have seen many tragic cases. I'll give you a few, first names only: Sally is a 35-year-old food service employee. She ruptured a bicep tendon moving boxes and didn't report it for two weeks. The tendon couldn't be repaired. Bobby: a 29-year-old truck driver also had a tendon injury, just put a band aid on it, reported it four weeks later when it hadn't healed and the nerve was damaged. It took a lot more surgery and he suffered permanent loss of mobility. Then you have cases where an employee has an underlying condition like diabetes, gets an injury like a nail puncture, waits

three weeks and ends up with a foot amputated. This is a real case. I mentioned co-worker safety. One 43-year-old manufacturing company employee in a Dallas-based company was struck with a projectile from a defective binding machine. She waited a week to report it and during that time, a worker on another shift suffered the same injury. Immediate reporting prioritizes the importance of catching those dangerous conditions and fixing them.

ARAWC: You mentioned the Department of Labor and other regulatory bodies, what is the legal standard?

McCATHERN: That's one of the puzzling things. There is a solid body of case law supporting our contention that immediate injury is fair and beneficial. The Department of Labor itself approved an eight hour reporting requirement in a case involving U.S. Steel. OSHA, another important area of the Labor Department, requires 24 hour reporting for an employee who requires hospitalization and a fatality must be reported in eight hours! A federal district court found the 24 hour rule was reasonable and did not result in a substantial denial of claims. Again, we strongly recommend a good cause exemption and that companies administer these rules wearing their hat as a fiduciary agent on behalf of the employee.

ARAWC: We've supplied a list of the cases and links that McCathern noted at the conclusion of this interview. Where does industry stand on the reporting discussion?

McCATHERN: Missouri Employers Mutual, one of the country's leading companies and recognized advocates of employee safety has a [report](#), "Prompt injury reporting a benefit for all."

ARAWC: From your experience, what other advice do you have for employers?

McCATHERN: Take seriously the tradition and advice of companies with successful records of achieving better employee outcomes and reduced employer costs: over-communicate with employees, demand accountability from physicians and employees, innovate and develop proactive policies and procedures to avoid employee conflicts. Make sure your ERISA plans comply with current regulations and be active in the ongoing discussion about workers compensation regulations and the growing recognition that private sector solutions, such as nonsubscription, have an important role to play.

ARAWC: Thank you Levi McCathern.

McCATHERN: My pleasure, and there's more information on our website.

For further information please contact AJ Donelson, ARAWC Government Affairs, at adonelson@advocomgroup.com

LEGAL AUTHORITIES SUPPORTING IMMEDIATE INJURY REPORTING:

- [DOL Approves 8-Hour Injury Reporting in 2016 Settlement](#) – U.S. Steel, the union, and U.S. Department of Labor approved an 8-hour injury reporting requirement in this case.
- [OSHA Requires Injury Reporting in 24 Hours or Less](#) – Employers are required to notify OSHA within 24 hours of an employee: (1) being hospitalized for an on-the-job injury, or (2) having a limb or appendage amputated or eye removed. Further, OSHA requires that a fatality must be reported within 8 hours. A 30-day injury reporting timeframe can cause employers to violate OSHA reporting rules.
- [Federal District Court Finds 24-Hour Injury Reporting Reasonable in 2012](#) – A federal district court found that a 24-hour injury reporting rule was not unreasonable and did not result in denial of a substantial number of claims under the plan.

See also *Gonzalez v. Aztex Advantage*, 547 Fed. Appx. 424 (5th Cir. 2013) and *Garcia v. Best Buy*, 2009 WL 2982788 (S.D.Tex.2009) *aff'd* on other grounds, 416 Fed. Appx. 384 (5th Cir. 2011).

- [ERISA's Required Communication](#) – Immediate injury reporting requirements are problematic in workers' compensation systems because they require no pre-injury communication with employees. On the other hand, employers sponsoring a Texas injury benefit plan are under a legal obligation to fully disclose the requirement of immediate injury reporting when an employee begins work, should such requirement be imposed. 29 CFR 2520.104b-2. These employers also tend to "over-communicate" through highlight brochures, new hire orientation and other computer-based learning mechanisms, in person employee meetings and manager training, workplace posters, wallet cards, videos, etc. Communication supports employee understanding and compliance with the immediate injury reporting requirement. Enforcement of that requirement further cements the importance of timely injury reporting to all employees.
- [Texas Labor Code Defense for Controlled Substance](#) – Texas employers that do not provide Texas workers' compensation insurance coverage lose "exclusive remedy" protection and can be held liable for negligence in lawsuits by injured employees. Texas Labor Code section 406.033(c) provides a defense against these lawsuits if the employee was intoxicated at the time of the work incident. A 30-day injury reporting time frame can cause employers to lose that defense.

MEDICAL AUTHORITIES SUPPORTING IMMEDIATE INJURY REPORTING:

- [Journal of Occupational and Environmental Medicine](#) – "Lag Times in Reporting Injuries, Receiving Medical Care, and Missing Work: Associations with the Length of Work Disability in Occupational Back Injuries." This study explores how disability length relates to three lag times, the number of days from the date of injury until the day it is reported, the number of days from the date of injury until the day the injured receives medical care, and the number of days from the date of injury until the injured initiates work disability. The result of the study showed shorter lag times for each of the aforementioned lags were related to shorter lengths of disability.
- [Spine Health Services Research](#) – The sooner an injured worker starts therapy, the better the outcomes. This study shows that with early physical therapy, there is decreased advanced imaging and decreased overall medical costs for low back pain.

- [Sports Medicine and Arthroscopy Review](#) – Risk of complications increases with delay in surgical intervention after a ruptured bicep tendon.

- [Stanford University](#) – “Medical literature supports the idea that delayed provision of medical treatment can increase medical costs and delay employees’ return to work.” * Alison D. Morantz, Stanford University, 3/18/2016, “Rejecting the Grand Bargain: What Happens When Large Companies Opt Out of Workers’ Compensation?”

*See, e.g., Terry L. Blackwell, Stephen J. Leierer, Stephanie Haupt & Angeliki Kampitsis, “Predictors of Vocational Rehabilitation Return-to-Work Outcomes in Workers’ Compensation,” *Rehabilitation Counseling Bulletin* 46:2, pp. 108-114 (2003); Stephen J. Hunter et al., “Predicting Return to work: A Long-Term Follow-Up Study of Railroad Workers After Low Back Injuries,” *Spine* 23(21), November 1, 1998, pp. 2319-28; Kucera et al. (2009); Patricia Sinnott, “Administrative Delays and Chronic Disability in Patients with Acute Occupational Low Back Injury,” *Journal of Occupational Environmental Medicine*, June 2009; 51(6):690-9; Gerald F. Kominski, “Return to Work and Degree of Recovery Among Injured Workers in California’s Workers’ Compensation System,” *Journal of Occupational and Environmental Medicine* 2008; 50: 296-305.