DISCLAIMER

THE INFORMATION CONTAINED IN THIS PRESENTATION IS ONLY INTENDED TO PROVIDE YOU WITH A GENERAL UNDERSTANDING OF LABOR AND EMPLOYMENT LAW AND SOME OF THE CURRENT LEGAL CHALLENGES FACING EMPLOYERS IN AGRICULTURAL INDUSTRY. THE INFORMATION CONTAINED IN THIS PRESENTATION IS NOT TO BE CONSTRUED AS LEGAL ADVICE AND IS NOT MEANT TO BE A SUBSTITUTE FOR LEGAL ADVICE. YOU SHOULD CONSULT WITH QUALIFIED LEGAL COUNSEL FOR ADVICE FOR ANY PARTICULAR SITUATION.
## TOP 10 MOST COSTLY RISKS

According to the 2019 Liberty Mutual index, the 10 most costly causes of workplace injuries and illnesses are:

<table>
<thead>
<tr>
<th>Injury Cause:</th>
<th>Cost (billions):</th>
<th>Percentage:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overexertion involving outside sources</td>
<td>$13.11</td>
<td>23.65%</td>
</tr>
<tr>
<td>Falls on same level</td>
<td>$10.38</td>
<td>18.72%</td>
</tr>
<tr>
<td>Struck by object or equipment</td>
<td>$5.22</td>
<td>9.42%</td>
</tr>
<tr>
<td>Falls to lower level</td>
<td>$4.98</td>
<td>8.99%</td>
</tr>
<tr>
<td>Other exertions or bodily reactions</td>
<td>$3.69</td>
<td>6.65%</td>
</tr>
<tr>
<td>Roadway incidents involving motorized vehicle</td>
<td>$2.70</td>
<td>4.88%</td>
</tr>
<tr>
<td>Slip or trip without falling</td>
<td>$2.18</td>
<td>3.93%</td>
</tr>
<tr>
<td>Caught in or compressed by equipment or objects</td>
<td>$1.93</td>
<td>3.48%</td>
</tr>
<tr>
<td>Repetitive motions involving micro tasks</td>
<td>$1.59</td>
<td>2.87%</td>
</tr>
<tr>
<td>Struck against object or equipment</td>
<td>$1.15</td>
<td>2.07%</td>
</tr>
</tbody>
</table>
WORKERS’ COMPENSATION EXCLUSIVITY

- Labor Code Section 3602 states that when an injury or death occurs in the course and scope of employment, **workers compensation is the sole and exclusive remedy of the employee and his dependents against the employer, and neither the employee or his dependents can pursue a lawsuit against the employer.**

- There are limited and narrowly defined exceptions as follows:
  - Where the employee's injury or death is proximately caused by a willful physical assault by the employer.
  - Where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment. This exception is most often triggered in hazardous material exposure cases, and may come into play in pesticide exposure cases.
  - Where the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee's use by a third person.
  - In order for this exception to apply the, equipment that caused the injury must have been manufactured by the employer for sale to the public.
  - The employer fails to obtain workers compensation insurance or approved self-insurance.
  - The injury is not subject to workers compensation. It is most often used in cases of discrimination and harassment, which are considered to fall outside the scope of employment.
  - Failure to install power press guards. Even if an attorney tried to stretch reality to call the auger a “power press,” the claim will fail. A “power press” means any material-forming machine that utilizes a die which is designed for use in the manufacture of other products.
Why Avoid Tort?

- Workers’ compensation damages are limited.

- Workers’ compensation damages are fully insured.
  - Even penalties like Serious and Willful misconduct are manageable.
    - Do not forget your OSHA Appeal!
  - Comp attorneys often less aggressive, less discovery, less litigation cost.
    - Preferable venue for claims and defense.

- Tort damages are unlimited….and not always insured.
  - Policy exclusions – e.g., “willful” conduct.
  - Legal exclusions – Punitive damages.
  - Coverage litigation may arise out of tort litigation – declaratory relief actions.
Who is the employer?

- The right to *control the details* of the work performed is “most significant” factor in determining who the employer is.

- Examples of control (please note this list is not exhaustive)
  - Direct the activities of the employee or the manner and method in which the work is performed.
  - Supply machines, tools, and the place of work for the person doing the work.
  - The nature of the services, whether skilled or unskilled.
  - Whether the work is part of the employer's regular business.
  - The power to discharge a worker (end of season – no longer need employees).
  - The payment of wages is not determinative.
INSURANCE

- Workers’ compensation
  - Workplace injuries – employer is covered
  - No limits (set by law)
  - No retention
  - Required by Law
  - No exclusions for covered employee

- Liability
  - Torts (including negligence)
  - Punitive damages excluded – other exclusions by policy
  - Retention (deductible)
  - Policy limits apply

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COMMON RISK MANAGEMENT TOOLS

- Handbooks
  - Implement and bring it to life

- IIPP & Hazard Communication Program
  - Tailor and follow the program
  - If no one is reporting hazards, or periodic inspections do not reveal them, you have a problem

- Training
  - Is it interactive and effective?
  - Do you test the acquisition of knowledge?
  - Equipment-specific is critical
  - Documentation is critical
  - Repeat and refresh on an ongoing basis

- Insurance….make sure it is covered. And covered again.
COMPONENTS OF EFFECTIVE RISK MANAGEMENT

- Demonstrate management involvement
  - Management must lead by example
  - Visibly demonstrate that you embrace a safety culture
  - Provide essential time, budget and resources to create and support the safety program
  - Evaluate results and establish accountability. What is your accident/injury rate? Do you identify near misses?

- Communicate the safety program
  - Published and available
  - Timely and effective reminders and updates
  - Welcome and encourage employee suggestions on workplace safety

- Collective involvement
  - Involve employees at all levels
  - Policies must establish responsibility and accountability for all employees
  - Safety committees ensure communication and engagement
  - Positive reinforcement of safe behavior (not just discipline for unsafe behavior)
COMPONENTS OF EFFECTIVE RISK MANAGEMENT

- Train and train again
  - Training must begin at the moment of hire and be ongoing
  - Time encourages unsafe behavior (desensitization to risk)
  - Evaluate the effectiveness of training – get employee feedback.

- Self-critical analysis
  - Review, revise, and update all aspects of the safety program
  - Be flexible and adjust to change
  - Regularly review, evaluate, and identify risk
  - Make changes to enhance and increase safety
  - Collect and share safety data – accident and injury rates, etc.

- Establish job safety standards
  - Each department should engage in job safety analysis
  - Emphasize doing the job correctly, not just quickly or productively
  - Involve employees
  - Recognize safe conduct as a promotional factor
  - Enforce accountability for unsafe behavior – remember to discipline after accidents!
COMPONENTS OF EFFECTIVE RISK MANAGEMENT

- Investigate accidents and incidents
  - Every single time – even “minor” incidents and near misses
  - Document outcomes and make recommendations
  - Collect evidence as soon as possible after each incident and accident
  - Prompt claims reporting

- Manage injuries and claims
  - Immediate first aid
  - Instruct to seek medical treatment – don’t just ask
  - Ensure transportation to medical care – and communicate its availability
  - Engage with the carrier and employee regarding care and return to work
  - Use light duty work to control claims cost…and keep them working

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SAFETY COMMITTEE ADVANTAGES

- The people doing the job know best how to do it safely and identify risks
- Promotes collaboration and “buy in” of both rank and file and management
- Encourages and identifies employee leaders
- Demonstrates commitment to culture of safety
- Promotes teamwork and a breakdown of hierarchies
- Free exchange of information on safe work practices
- Should be a point of pride to have membership
- Make sure you recognize it – pay them for the time spent, give a “bump”
- Accountability – remove those who do not participate productively
- Consider elected “at large” position for rank and file – let employees choose one representative

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SAFETY COMMITTEE FUNCTIONS

- Develop safe work practices
- Evaluation of existing practices and procedures
- Creating and revising written safety programs
- Developing and leading safety training
- Designing and conducting workplace inspections and safety audits
- Review of incidents, near misses, accident investigation reports, claim summaries, and loss analysis to prevent recurrence and improve safety outcomes
- Establish dispute resolution procedures
- Proposing and creating safety checklists
- Promote employee interest and involvement in health and safety
- Provide a safe forum for management and labor to discuss and improve safety
SAFETY COMMITTEE PITFALLS

- Lack of authority
  - The committee MUST be able to bring about change
  - Empower the group or don’t bother.

- Too management top-heavy
  - No management domination
  - Dialogue is the key

- Undefined roles
  - Each member must know their role and responsibility
  - Written agreement (signed) and mission statement
  - The goal should be outcome focused – prevent accidents and injuries, not regulatory compliance or reducing claim dollars

- Lack of training
  - Each member must have a general understanding of health and safety issues
  - Invest in training for members on health and safety regulations, data gathering, and group dynamics (including rules for civil behavior in meetings)
  - People need to know what to do and how to do it
SAFETY COMMITTEE PITFALLS

- Inadequate size
  - Size of organization and hazard potential drive the size
  - Smaller is often better for effectiveness
  - Use subcommittees (departmental?) to control inefficiency and maintain control

- Lack of formal meeting agenda
  - Preparing an agenda in advance keeps it on track
  - Staying on task prevents meetings from becoming long slogs
  - Have a “parliamentarian” who can focus discussion

- Failure to communicate
  - Publish the schedule
  - Publish minutes and committee actions

- Lack of follow-through
  - Reputation depends on taking action
  - Results must be demonstrated for credibility

- Lackluster involvement
  - Members must be accountable for participation and contribution

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SAFETY COMMITTEE BUDGETING

- Insufficient budget
  - Biggest pitfall
  - Investment does not mean buying donuts

- Member compensation
  - Promotes responsibility and accountability
  - Creates incentive to perform
  - Communicates management commitment and priority

- Investment in training
  - Improve and promote member expertise
  - Improve self-critical analysis – trained members will spot issues
  - Promotes perspective and context
ACTIVE MANAGEMENT FOR RISK

- Supervisor evaluation
  - Accountability for safety on their watch

- Management priority
  - “Head on a swivel”
  - Alertness for safe and unsafe practices at all levels of management
  - Eyes and ears open…and immediate response to issues – praise AND punish

- Discipline for unsafe conduct
  - All to uncommon
  - Essential aspect of any safety program….and OSHA defense
  - Promotes accountability

- Best work practices must be lived every day in every moment.