

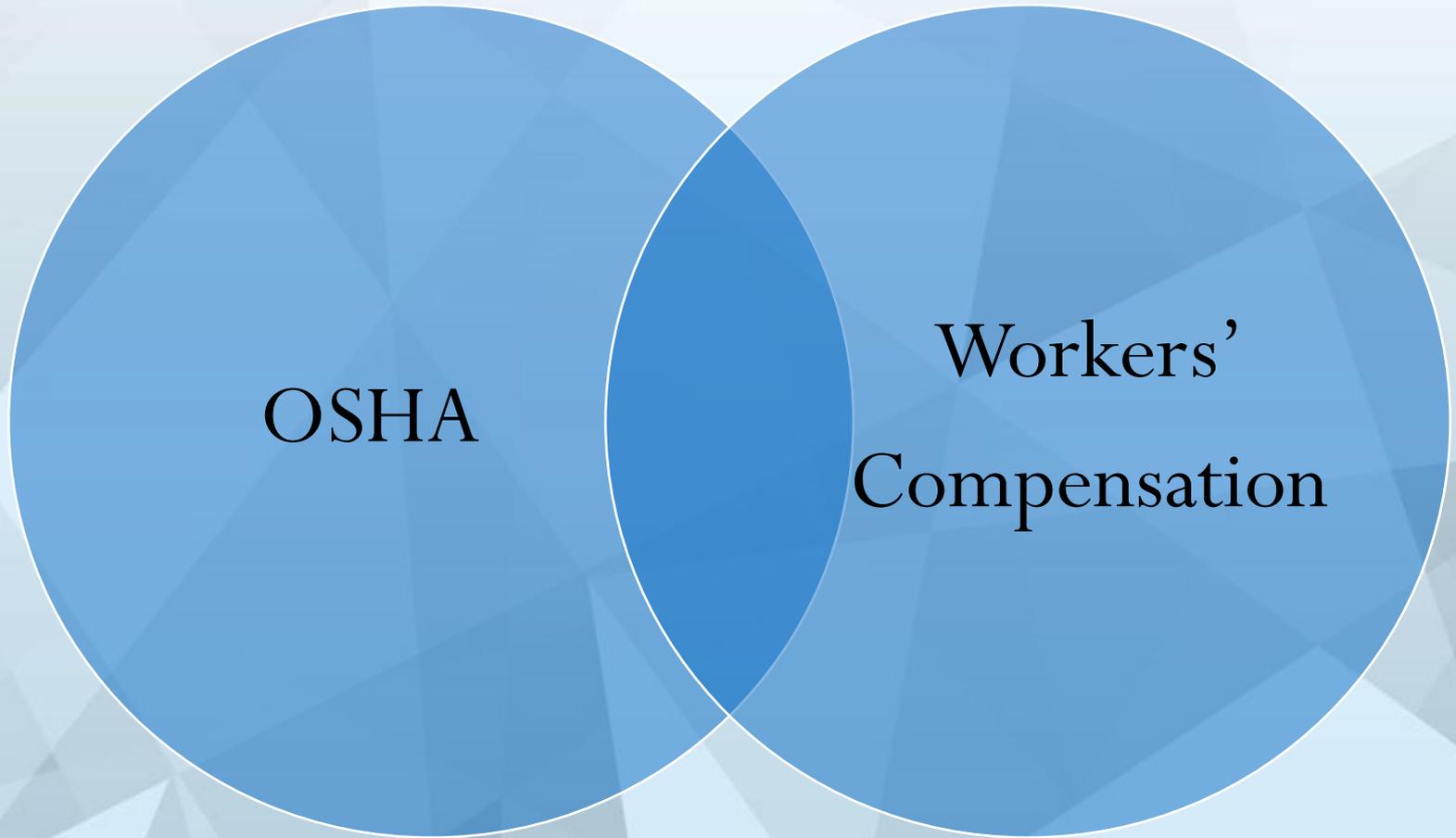
# OSHA v. Workers' Compensation: Improving Your Recordkeeping Process

Nicole Thompson, Program Manager  
Missouri Workers' Safety Program

# Agenda

- Recording and reporting changes at OSHA
- OSHA recordkeeping requirements
- Workers' Compensation case records
- Injuries and Illnesses: OSHA or Work Comp?
- Issues with medical treatment cost reporting

# Injury and Illness Recordkeeping



# OSHA Reporting Requirement Changes

- Call OSHA
  - Any hospitalization (instead of 3)
  - Amputations (New)
  - Eye loss (New)
  - Death



# OSHA's New Recordkeeping Rule

- Electronic reporting
  - OSHA believes that public disclosure of the data will "nudge" employers to improve workplace safety.
- Anti-Retaliation
  - Direct citations for policies that deter or discourage employee reporting injuries
    - Effective August 10, 2016
    - Incentive Programs
      - Employers must not create incentive programs that deter or discourage an employee from reporting an injury or illness.
      - Incentive programs should encourage safe work practices and promote worker participation in safety-related activities.

# Anti-Retaliation Drug Testing Policies



- OSHA's new Drug Testing policy
  - “drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use”
- Workers' Compensation: RSMo 287.120.6
  - An employee's workers' compensation benefit can be reduced if they used drugs or alcohol in violation of an employer's policy.
    - Under 6(1), employers only need to show that the drug or alcohol use is in conjunction to the injury to get a 50% reduction
- Do these policies conflict?

# Injury Reporting Requirements Workers' Compensation



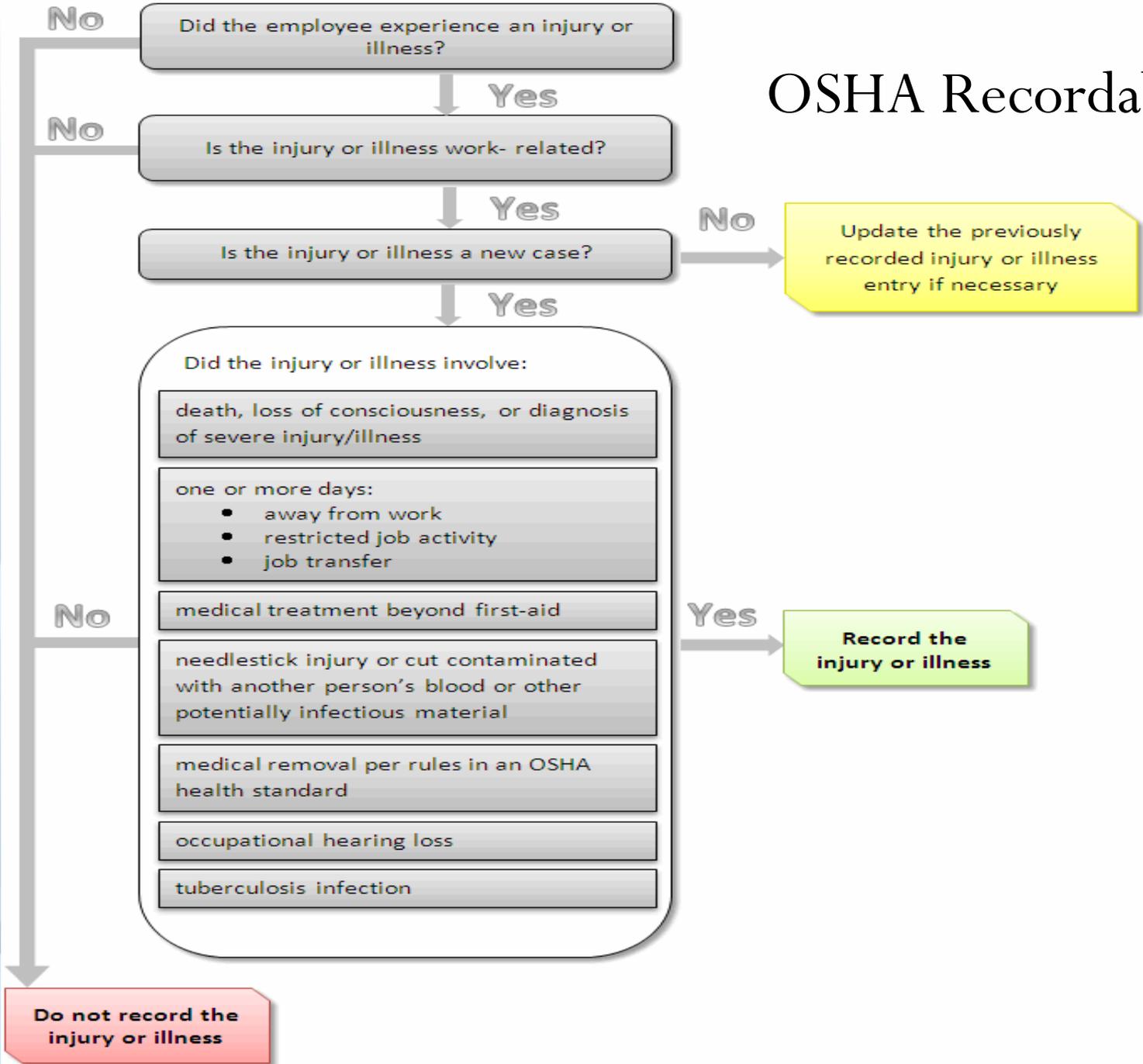
- Report injuries to carrier or TPA within 5 days
  - Report of every injury or death to any employee for which the employer would be liable to furnish medical aid, other than immediate first aid which does not result in further medical treatment or lost time from work, or compensation (287.380.1)
    - Carrier reports to the Division of Workers' Compensation within 30 days
- Complete the forms
  - First Report of Injury/Carrier or TPA reporting form
  - Accident investigation



# OSHA 300 and 300A

- Requirements to keep an OSHA 300 Log of Injuries and Illnesses
  - Required industries
  - 10 or more employees
- Record injuries on the 300 Log within 7 days
- Numbers from the 300A are reported to BLS annually, who compiles industry rates
- OSHA Data Initiative
  - Data collected and compared to industry rates for targeted enforcement
    - Over-recording can be a bad as under-recording
  - OSHA will receive more data with the new electronic reporting rule

# OSHA Recordable?



# OSHA Recordable

- Any work related injury that requires medical treatment beyond first aid
- If it is not listed as first aid, it is medical treatment
- PT recommends specific exercise plan to employee based on symptoms
  - Medical treatment

# First Aid

- OSHA
  - Anything that is listed
    - This includes diagnostic treatment
- Workers' Compensation
  - General interpretation
    - Immediately accessible
    - Can be self-administered



# Definition of Lost Time

- OSHA
  - 1 full day
    - Employee misses 1 full day of work, not counting the day of injury
    - All calendar days after the day of injury until employee returns to work are counted, even if the employee would not be scheduled to work
    - Any full days that an employee misses because of the injury or treatment are counted, even if they have returned to work
- Missouri Workers' Compensation Statute
  - More than 3 days
    - Indemnity paid after 3 day waiting period
    - Employee is compensated for lost wages

# Establishments

- OSHA recordkeeping
  - Must maintain a separate 300 log for each individual location
- Workers' Compensation
  - All employees are generally covered under the same policy
- Can your payroll system produce employment and work hours numbers by location?



# OSHA 301 or Work Comp Form?

- Allowed to complete an equivalent form in place of an OSHA 301
  - You can use a FROI/your carrier or TPA's work comp reporting form
  - If using a work comp form, you must allow an OSHA inspector access to this form
  - Some cases may be OSHA recordable but not covered under workers' compensation, so decide which forms you would like to use



# Accident Investigation

- Goes beyond the workers' compensation reporting process
- Needs to identify root cause or major contributing factors
- Necessary to help prevent reoccurrence of injuries



# Work Related?

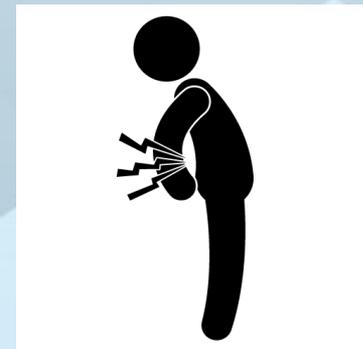
- What makes a case work related?
  - OSHA has specific regulation
    - Event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness
    - 29 CFR 1904.5
  - Workers' compensation depends on the details of the case and interpretation of statute
    - Arise out of and in the course of employment
    - RSMo 287.020
  - While there is overlap, some cases may be one but not the other

# OSHA

- You must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness. Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment, unless an exception specifically applies.

# Workers' Compensation

- The term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability.
- Missouri work comp law updated in 2005
  - The Prevailing Factor
    - Primary factor, in relation to any other factor, causing both the resulting medical condition and disability
    - RSMo 287.020.3



# Work Related: The Exceptions

- **OSHA**
  - **At the time of the injury or illness, the employee was present in the work environment as a member of the general public rather than as an employee**
- **Work comp is similar**
  - **If employee is picking up a check or in any way is required to be on the premises, compensation may be payable**

# OSHA v. Work Comp Exceptions

- OSHA: The injury or illness involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside the work environment
  - Solely?
- Work Comp: An injury resulting directly or indirectly from idiopathic causes is not compensable
  - Includes indirect injuries
  - This is different from OSHA's solely standard



# OSHA v. Work Comp Exceptions

- The injury or illness results solely from voluntary participation in a wellness program or in a medical, fitness, or recreational activity such as blood donation, physical examination, flu shot, exercise class, racquetball, or baseball
- Work Comp is very similar
  - focus on the voluntary nature of the program
- If instructed or expected to participate, compensation may be payable and it becomes OSHA recordable
  - Watch for wellness incentives that encourage participation, as they may make injuries recordable and compensable
    - Such programs may still be worth the risk for the expected wellness benefits

# OSHA v. Work Comp Exceptions



- The injury or illness is solely the result of an employee eating, drinking, or preparing food or drink for personal consumption (whether bought on the employer's premises or brought in). For example, if the employee is injured by choking on a sandwich while in the employer's establishment, the case would not be considered work-related
- Prior to 2005, eating and drinking injuries may have been considered compensable depending on the circumstances
  - The prevailing factor standard makes these injuries no longer compensable
- If the employee is made ill by ingesting food contaminated by workplace contaminants (such as lead), or gets food poisoning from food supplied by the employer, the case would be considered work-related (and compensation may be payable).



# OSHA v. Work Comp Exceptions

- OSHA: The injury or illness is solely the result of an employee doing personal tasks (unrelated to their employment) at the establishment outside of the employee's assigned working hours
- OSHA: The injury or illness is solely the result of personal grooming, self medication for a non-work-related condition, or is intentionally self-inflicted
- Work Comp: It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.
  - Greater hazard?



# Parking Lot Injuries

- The injury or illness is caused by a slip or fall in a parking lot that is part of the employer premises
  - OSHA recordable
  - Compensable?
- The injury or illness is caused by a motor vehicle accident and occurs on a company parking lot or company access road while the employee is commuting to or from work
  - Not OSHA recordable
  - Most likely compensable



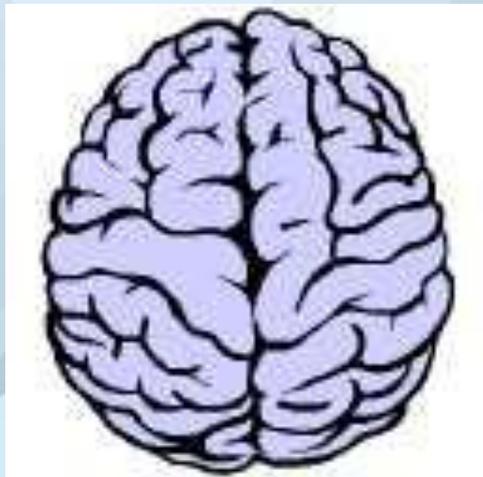
# OSHA vs. Workers' Compensation Exception

- OSHA: The illness is the common cold or flu (Note: contagious diseases such as tuberculosis, brucellosis, hepatitis A, or plague are considered work-related if the employee is infected at work).
- MO Workers' Comp: Same.



# Mental Illness: OSHA

- Mental illness will not be considered work-related unless the employee voluntarily provides the employer with an opinion from a physician or other licensed health care professional with appropriate training and experience (psychiatrist, psychologist, psychiatric nurse practitioner, etc.) stating that the employee has a mental illness that is work-related.



# Mental Illness: MO Workers Comp

- “§287.120.8: “Mental injury resulting from work-related stress does not arise out of and in the course of employment, unless it is demonstrated that the stress is work-related and was extraordinary and unusual. The amount of work stress shall be measured by objective standards and actual events.”
- §287.120.9, “A mental injury is not considered to arise out of and in the course of employment if it resulted from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or any similar action taken in good faith by the employer.”

# Questionable Cases

- Employee faking injury or injury was not work related
- Workers' compensation
  - All injuries must be reported
  - Compensability may be denied, employee may receive compensation on appeal, depending on evidence presented
- OSHA
  - Should be recorded until a determination of work relatedness can be made
  - If not recorded or removed from log, keep documentation for inspector review
    - Description of the decision
    - Reason for making that decision
    - Supporting evidence (medical opinions, witness statements, etc.)

# Restricted and Light Duty

- While workers' compensation costs can be greatly reduced by returning employees to work, OSHA requires that these cases still be recorded
- Develop a Return-to-Work Program so that you don't lose track of employees for recordkeeping purposes
- Research studies have shown that employees under Return-to-Work Programs recover quicker, return to their regular work sooner, and are released from medical care faster than employees without a Return-to-Work Program



# OSHA is different from Work Comp

- If the employee states they were injured on the job, the case will need to be recorded on the OSHA log if it meets the recording criteria.
- A delay in injury reporting by the employee may result in them not receiving compensation, but the case still needs to be recorded on the OSHA log.

# Hearing Loss



- OSHA
  - If an employee's hearing test (audiogram) reveals that the employee has experienced a work-related Standard Threshold Shift [ $\Delta$  10 dB] in hearing in one or both ears, and the employee's total hearing level is 25 dB or more above audiometric zero (averaged at 2000, 3000, and 4000 Hz) in the same ear(s) as the STS, you must record the case on the OSHA 300 Log.
- MO Work Comp
  - If the losses of hearing average 26 dB or less in the frequencies of 500, 1000, and 2000 cycles per second [Hz], such losses of hearing shall not then constitute any compensable hearing disability. If the losses of hearing average 92 dB or more in the 3 frequencies, then the same shall constitute and be total or 100% compensable hearing loss.



# Tinnitus

- Tinnitus is considered a separate disability from hearing loss for Workers' Compensation purposes.
  - Poehlein v. Trans World Airlines
- If an employee receives medical treatment for tinnitus, it would be recorded on the OSHA 300 Log as an injury.



# Other differences

- Any aggravation of a non workplace injury will be recordable on the OSHA log, even if it is not compensable
  - Know that your physician may not understand the difference between OSHA's definition of aggravation and Missouri's prevailing factor when you ask if a case is "work related"
- Over the counter medications at prescription strength are OSHA recordable, even if they are not compensable
- A second opinion does not necessarily remove the case from the OSHA log

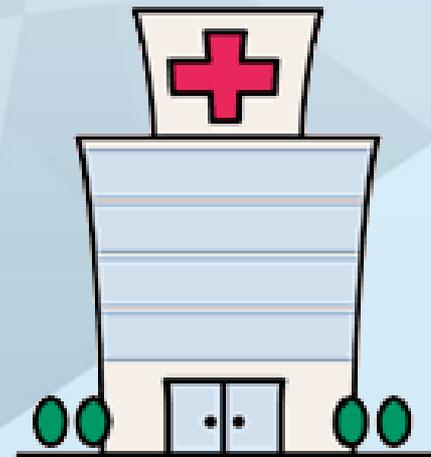
# Out-of-Pocket Medical

- If the injured employee misses no time from work, needs only medical care, and the cost of that care does not exceed \$1,000, the employer is allowed to pay that cost out-of-pocket
  - The cost of the injury will not be factored into the employer's experience modification factor
  - The employer is still required to report such injuries
    - RSMo 287.957



# Employer Provided Medical Care

- Three types of on-site medical facilities
  - Health care providers who treat their employees at their own facilities
  - Employers with a fully functional medical clinic
  - In-house first aid clinics/dispensaries
- Many also provide employee health and wellness services



# First Aid Clinic or Medical Treatment Facility?

- OSHA recently issued recordkeeping and other citations to an employer they found to have a deficient medical management program
- Clinical management directives at least 10 years old
- Delays in referral or non referral of cases that clearly merited referral for diagnosis
- Nurses acting outside the scope of their license
  - Missouri Board of Licensing and Registration
  - Collaborative practice agreement between LPN and physician

# In-House Medical Costs

- Costs must be billed internally to the workers' compensation account the same as any other client
  - These costs cannot be absorbed
- Failure to accurately capture medical costs affects:
  - EMR
  - Administrative tax payments
  - Second Injury Fund surcharge payments
  - Self-Insurance security
  - Individual Self-Insurers Guaranty Corporation assessment



# Reasonable Costs Assigned

- Follow NCCI Statistical Plan
  - If a carrier maintains a medical clinic, the cost of each treatment given must be charged against the individual risk according to a fixed schedule of charges per treatment. These costs must be assigned to the proper manual class codes. The schedule of charges, which may distinguish between types of treatment, must apply without exception to all risks with cases treated by the clinic. The schedule of charges must be frequently revised and adjusted if necessary so the total charges for a given period will be equivalent to the total cost of maintaining the clinic, including such costs as salaries, rent, light, heat, depreciation of equipment, and cost of supplies.

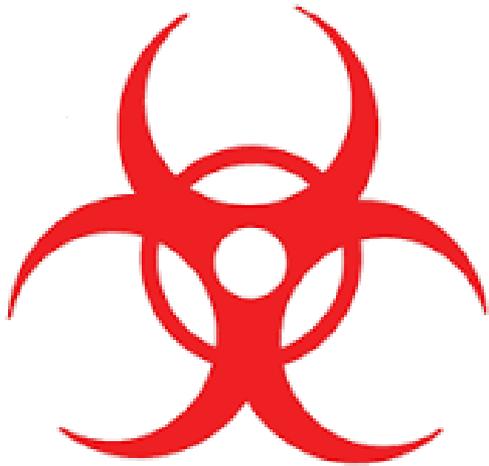
# Employer Directed Medical Care

- Consider using a designated clinic to reduce costs
- Do not use ER except for actual emergencies



# Bloodborne Pathogens

- OSHA required exposure logs
  - Record as a privacy case on 300
  - Keep separate sharps injury log
- Must also be reported for work comp
  - Assign appropriate costs
    - OSHA required medical evaluation



# OSHA v. Joint Commission and CDC

- Under OSHA's Bloodborne Pathogens standard, following an exposure incident the employer is required to make immediately available to the exposed employee a confidential medical evaluation and follow-up. This includes collection and testing of the exposed employee's blood. Post-exposure prophylaxis is then provided when indicated based on current guidelines from the USPHS and CDC.
- Testing only the source patient's blood as the sole indicator of exposure is not allowed under OSHA.
  - The employer could be cited for violating the standard for not providing a confidential medical evaluation and follow-up to the employee or for not recording the case properly.

# Injury and Illness Tracking and Analysis

- Total Recordable Case Rate
- Days Away Restricted Time Rate
- Total number of new claims
- Total cost, medical cost, indemnity payments
- Sort by department, shift, length of employment



# Final Thoughts

- Consider OSHA and Workers' Compensation separately
- Keep track of employees so that you can properly manage care and record the injuries correctly
- Make sure that you are tracking all medical costs
- Review your bloodborne pathogens program for OSHA and workers' compensation compliance
- Investigate all cases and review trends to help reduce injuries

# Questions

