

Workers Compensation and ADA Issues: Costs or Opportunities to Maximize Profitability? The Choice Is Yours!

By Mitch Miller, J.D., M.B.A and Kindon Olsen

Managing lodging properties using “best business practices” will optimize profitability and asset value. Often, the “best business practice” derives from an understanding and management of pertinent legal issues as embodied in contracts and exposure to risks imposed under the law. This is particularly true in the areas of workers’ safety and compensation insurance as well as liability coverage for protection and programs to avoid ADA claims. A few key strategies are a helpful beginning to an exhaustive topic.

Workers’ Compensation Insurance

Workers’ compensation insurance premiums are determined by the lodging property’s history of worker-related injuries and the resulting amount of insurance that the insurer has had to expend for injuries and the legal fees incurred in defending those claims. Management’s ever present, sincere and total commitment to worker safety programs will decrease work-related injuries which, in turn, will decrease the insurer’s payout for all related claims. Reducing work-related injuries would not only decrease premiums, but also absenteeism, which will have the effect of minimizing overtime and increasing productivity. Inevitably, increased profitability will result.

Every additional dollar of net operating income increases the value of your lodging property between seven to twelve dollars.

The best way to maximize profitability is to minimize the number of claims and the severity of each claim. In addition to implementing worker safety programs, it is essential to understand the insurance company’s contractual obligations under a policy. It’s also important to understand the claims adjustment and enforcement process. Know your rights and diligently pursue a collaborative relationship with your insurer (especially the adjuster) to minimize the insurer’s payouts.

Premiums can also increase from inaccurate worker classifications and claims reporting, both of which determine the experience modification used to calculate the annual premium. Use your broker to audit these. Not all brokers are created

equal. If your broker is not adding value in this process, find one who will. The savings can be substantial, and can carry forward for up to four years.

When a claim results in legal action by an employee, it often includes allegations of serious and willful misconduct by the employer. Serious and willful misconduct is conduct that the employer knows—or ought to know—that is likely to jeopardize the safety of an employee. Failure to maintain a safe work place or to remediate a known hazard, while requiring employees to work there, is the typical situation that prompts such a claim.

Workers’ compensation insurance does not cover serious and willful misconduct, which, if found, increases the compensation fees recoverable by an injured employee 50 percent. An insurer that provides a legal defense under a “reservation of rights” may seek reimbursement related to the uncovered claim. More typically, however, a settlement is negotiated wherein no liability is admitted and the insurer foregoes reimbursement for the legal fees; but as a consequence, the insurer does consider those expenditures when determining premiums for the ensuing years.

Americans with Disabilities Act (“ADA”) Claims

Avoiding ADA claims is an obvious objective in implementing best business practices and optimizing profitability. These claims are costly. If a claim occurs, invoking contractual protection under one’s liability coverage is critical to minimizing the out-of-pocket loss.

Lodging property owners must remove barriers that impede access to a disabled individual when doing so is deemed “readily achievable.” The ambiguity of the term “readily achievable” has spurred a flood of litigation. Much of the litigation is intended solely to achieve a monetary settlement for the claimant and the attorney. The ADA provides for recovery of attorney’s fees, and the California’s Unruh Civil Rights Act provides for statutory damages. Since usually some violation can be found, a hotelier’s best option is to minimize the expense through a

quick settlement, or risk incurring his own legal fees and the claimant’s lawyers as well, an amount that will only increase.

Most general liability insurance policies will provide coverage for discrimination and legal fees stemming from ADA claims, although the coverage is found in provisions that have seemingly nothing to do with ADA issues. This can be a substantial cost savings to the hotelier. To invoke coverage, consult an attorney with knowledge of the issues. The physical remediation of the property will not be covered.

The best means of avoiding claims is by complying with the regulations. Using professionals, audit one’s hotel to determine violations. This will serve as evidence of a good-faith effort to comply with the ADA. Remediate barriers conclusively deemed “readily achievable,” including:

- Accessible shelves, tables, chairs, and other furniture
- Raised markings on elevator control buttons
- Flashing alarm lights
- Accessible door hardware
- Required bathrooms with grab bars and raised toilet seats, insulated lavatory pipes and faucet lever handles, a full-length bathroom mirror, and repositioned paper towel dispensers
- Designated accessible parking spaces
- Accessible paper cup dispensers at existing inaccessible water fountains

Complying with the ADA is an ongoing duty. The foregoing list is merely a starting point. Know the law. Understand your contracts. Consult with professionals. If you comply, tell the marketplace, so you can generate revenue from your efforts.

Author’s note: Special thanks to Lynne Wallace, President of Matsen Insurance, Santa Rosa, California, hospitality insurance specialists, for her technical input and review.

Mitch Miller is Managing Partner and Kindon Olsen is a Research Assistant at Miller & Fanwick, LLP, a CLIA Associate Member Company. For more information about the firm, visit www.mflaw.com or contact them at (650) 566-2290.