



# Avoid improper mental health disclosures, avoid penalties in Washington

By Flynn Burke and Shawna Fruin ■ August 27, 2021

A recent change in Washington law aimed at protecting mental health records provides for the imposition of stiff penalties on employers that run afoul of confidentiality safeguards.

Washington has long required that workers' compensation claim files and records be kept confidential. See [RCW 51.28.070](#). Of course, employers or their authorized representatives (i.e., claims examiners, third-party administrators, etc.) are permitted to review claim files of their own injured workers in connection with the administration of pending claims. Substitute House Bill 1901, signed into law by Washington Governor Jay Inslee on April 17, 2021, added a notable civil penalty to this statute: \$1,000 for each occurrence of an employer (or its representative) improperly revealing information in a claim file "regarding a mental health condition or treatment" to any person other than a duly authorized representative.

So who is a "duly authorized representative"? The statute itself does not specify, but, [according to the Washington Department of Labor and Industries](#) (Department), employers may continue to communicate claim file information, including that which pertains to mental health, to:

- Workers or their representatives (i.e., attorneys);
- Medical providers treating or examining workers (i.e., independent medical examiners, nurse case managers, functional capacity evaluators);
- Vocational rehabilitation counselor(s) (so long as the counselor is providing services on the claim); and
- Authorized Department personnel (i.e., claims adjudicators).

In practice, most employers/examiners were likely in compliance with this new rule before it was drafted, but, in any event, a \$1,000 penalty is all the more reason for additional pause. If administration of a claim calls for sharing mental health information with a person or organization that does not clearly fall into one of the categories listed above, it may be best to obtain written authorization from the worker or consult with legal counsel. The Department intends to fully investigate all complaints lodged under this section, and penalty exposure could be exponential depending upon the extent of the improper disclosure.

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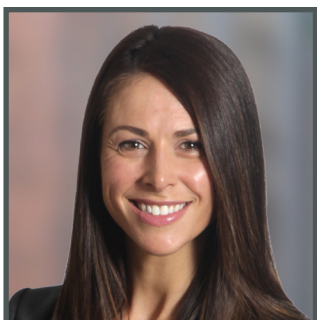


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## **Mental health disclosures (continued)**

To ensure that workers are aware of this increased right of privacy, the Department has also issued a revised Self Insurer Accident Form, or SIF-2, and is requiring that self-insured employers utilize it—or provide similar information in an addendum—no later than June 30, 2021 Order revised forms from the Department [here](#), whereas an addendum that can be used in conjunction with older SIF-2 forms can be found [here](#).)

If you have any questions on how best to avoid penalties, please feel free to contact the attorneys at Reinisch Wilson Weier PC. ■

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