

BASIC RISK MANAGEMENT FOR LOCAL GOVERNMENT OFFICIALS

(Draft dated January 12, 2012)



Slide 1 – Workers’ Compensation and Liability Claims are one of the four largest items in a municipal or local authority budget, often costing \$50 per resident or more. This seminar will focus on the basic principles of risk management that can be implemented to control this line item.

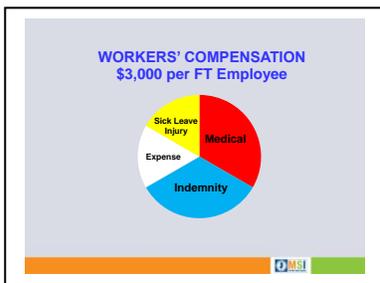


Slide 2 – Risk management is a coordinated strategy that:

- Finances Risks with the most efficient mechanism to reduce non-claim costs;
- Controls Risks to prevent claims; and
- Manages Claims to reduce settlement costs.



Slide 3 – Local governmental work is dangerous. In every state including New Jersey, local government has the highest accident rate of any employer classification. It is sobering to realize that the typical police officer, fire fighter or DPW worker has a higher accident frequency than either construction or underground mining.



Slide 4 – Over the last five years, the cost of a Workers’ Compensation claim in New Jersey has increased an average of 7% a year. Workers’ Compensation now costs local government approximately \$3,000 per full time employee equivalent.

- Medical Costs represent one third, or approximately \$1,000 per full time employee equivalent. Workers’ Compensation related medical costs have increased an average of 9% a year over the last five years to approximately \$1,000 per full time equivalent.
- Indemnity Costs also represent approximately \$1,000 per full time employee equivalent and are increasing at an average of 7% per year

because workers' compensation judges have significantly increased the awards, especially for relatively minor injuries.

- Sick Leave Injury programs add another \$500 per employee to the cost. Under most union contracts, municipalities pay workers a supplemental benefit beyond workers' compensation to make up the difference between the weekly benefit under workers' compensation and the employee's regular earnings. However, because workers' compensation is not taxed, an employee earning \$2000/week has an after tax income of about \$1,400 while on the job and \$1,800 while on workers' compensation and SLI. As a result, some employees have become adept at playing the system by filing repeated claims.
- Administration and all other non claim expenses represent the final one-sixth of the cost.

Most Plaintiff Friendly Court Systems



1. New Jersey
2. New York
3. Florida
4. Illinois
5. Pennsylvania
6. Missouri
7. Montana
8. Michigan
9. Connecticut
10. California



Slide 5 – The cost of liability accidents has also increased faster than the rate of inflation. A recent national survey concluded that New Jersey has the most plaintiff friendly court system in the nation.

NJ Local Government Risk Finance

	1984	2011
Commercial Insurance	90%	5%
Self Insurance	10%	10%
Joint Insurance Funds	0%	85%



Slide 6 - Risk Finance is the first part of an overall risk management strategy to control property/casualty insurance costs. Twenty five years ago, 90% of New Jersey municipalities financed their risks by buying commercial insurance policies, and the other 10% self-insured. However, since the advent of joint insurance funds or “JIFs”, there has been a dramatic change. Today, over 85% of New Jersey municipalities belong to JIFs.

Cost per \$100 in Claims

	Comm. Insurance	JIF/Self Ins.
Claims	\$100.00	\$100.00
Administration	31.60	15.50
Acquisition	22.70	7.70
Assessments	12.50	0.00
Taxes	9.00	0.00
Total	\$175.80	\$125.20

Slide 7 – A self insurance plan or a joint insurance fund is about 40% less expensive than a commercial insurance company. This chart compares the cost of financing \$100 in claims. JIFs and self insurers have considerably lower administrative costs and pay much lower fees to insurance agents. Further, they are exempt from second injury fund and other state assessments and taxes. The bottom line is that a JIF or a self insurance program can finance \$100 in claims for about \$50 less than an insurance company.

Self Insurance/JIF Comparison

	Self Insurance	JIF
Insured Retains Cash Flow	★	
Insured Retains Control	★	
Minimum Size		★
Budget Stability		★
Administrative Simplicity		★
Focus on Safety		★
Focus on Claims Management		★

Slide 8 – Individual self insurance plans have two significant advantages: the town or authority retains the cash flow until the claims are paid and also retains control over administration. This means it chooses its own attorneys, third party administrator, managed care organization, safety engineer and so on. For large organizations with strong administrative staffs, this can be a significant plus. However, except in unusual situations, individual self insurance is only feasible for municipalities with more than 20,000 in population.

The advantage of a joint insurance fund is that it provides the cost savings of an individual self insurance plan to local units that are not large enough to bear the risk on their own. The budgets for JIFs are more stable than individual self insurance and the JIF itself administers the program for the members. In fact, many local units that are large enough to individually self insure still join JIFs to avoid the administrative burden associated with individual self insurance. JIFs also tend to have stronger safety and claims control programs. This is critical because the most effective way to reduce insurance costs long term is to prevent the accidents from happening and to effectively control the claims process.

Best Practices



Risk Finance

- Make effective use of your risk manager
- Check values, payrolls and FEMA maps
- Become involved in the governance of your JIF

Slide 9 – There are three best practices in risk finance that every local unit should implement.

Make effective use of your risk manager: Risk Management is a complicated discipline and a professional advisor can be invaluable. Look for one with experience and a strong track record in achieving results for local government. You should

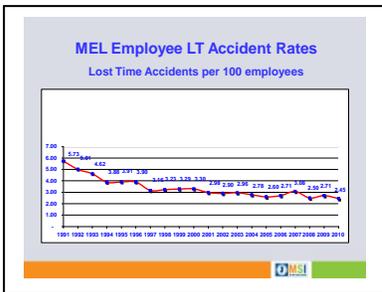
also require your risk manager to report to the governing body at least once a year.

Check values, payrolls and FEMA maps: No matter what type of program you adopt, exposure data will have at least some influence on your cost.

Become involved in the governance of your JIF: A JIF is a governmental entity that is controlled by its members, not the professionals and service organizations. JIF members that are active in their JIFs generally have better experience and hence lower costs because they are aware of what is happening.



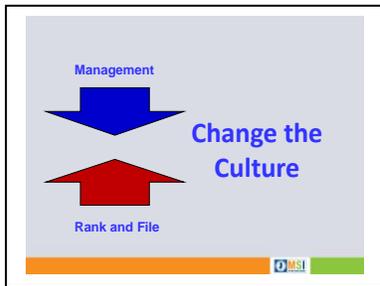
Slide 10 – Risk Control is the second prong in the risk management strategy. In fact, safety records can be substantially improved.



Slide 11 – In 1991, the average lost time accident frequency for MEL members was 5.7 lost-time accidents per 100 employees. At that time, this equaled the national average for local government. Today, the MEL accident rate is over 50% lower – 2.5 lost time accidents per 100 employees. Consistent safety effort over time achieves results.



Side 12 – In today’s legal environment, it is also important to take a hard look for previously unnoticed hazards throughout the community. Everything you see in this slide caused a major general liability lawsuit.



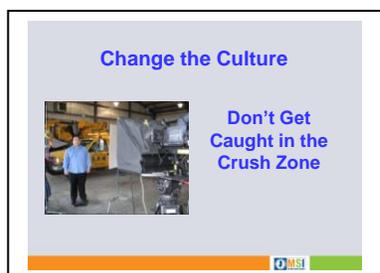
Slide 13 – To be successful, local officials must foster a safety culture within their organizations. This means that a safety program must include the rank and file...it can not be solely top down. Empower the workforce so that everyone feels free to question something that appears unsafe. Every employee must have the right to stop an operation if something doesn't seem right. That often involves a profound change in management/employee relations. That is what we mean by "changing the culture."



Slide 14 - The grass roots approach begins with the safety committee. Unfortunately, safety committees too frequently become stale because the same people are on the committee year after year. Encourage everyone to serve on the committee during their career. Further, provide leadership training to the chair. This training is usually offered by JIFs.



Slide 15 – Another way to reduce the accident rate is to keep reminding everyone of the basic precautions. A recent study concluded that departments where supervisors discuss safety with their crews at the start of each shift have 54% fewer accidents. The MEL has a series of these short reminders on its web site. Supervisors should talk about one of these issues each day.



Slide 16 – This is especially important in public works where a momentary distraction can result in a very serious accident. Working with heavy equipment is inherently dangerous and it is critical that managers and supervisors talk about these hazards daily. The MEL launched a special program called "Don't Get Caught in the Crush Zone" to address this type of accident.



Slide 17 – The same study concluded that departments that are current on their training have 46% fewer accidents. Each year, require that training records be audited to make sure all employees are up to date. The MEL conducts over 1750 training courses annually including the courses required by the NJ Department or Labor under PEOSHA. To ease the time burdens, the MEL has installed a new on-line training management system.



Slide 18 - In 2007, the National Institute for Occupational Safety and Health (NIOSH) issued an alert that sudden cardiac death represents the most common cause of on-duty firefighter fatalities. The report concluded that 39% of fatalities involving career firefighters and 50% of fatalities involving volunteers are due to sudden cardiac death. The higher incidence among volunteers is due to the fact that volunteers tend to be older. 43% of the heart attacks involved firefighters over 55 and one-sixth involved firefighters over age 65.

The MEL recommends that towns require an annual reexamination consistent with NFPA Standard 1582, Chapter 7.4-7.7. Costs vary from \$125 to \$900, depending upon the tests required for the particular individual. Specifically, any firefighter with a cardiac risk score above 10% should pass a stress test at 12 METS to establish that signs of the lack of oxygen to the heart do not occur at the work level common to firefighting.

Firefighters should also be encouraged to monitor and control their blood pressure, cholesterol and weight, and stop smoking to ensure that their risk of heart attack is within reasonable limits. Because of the high stress associated with all aspects of firefighting, it may not be sufficient to limit high risk individuals from interior firefighting. Experience suggests that passive or “life” firefighters can also experience heart attacks while performing light duties such as directing traffic or operating a pump.

A complete discussion of this recommendation is on the MEL’s web site.



Slide 19 - Another strategy to reduce accidents is to seek police agency accreditation. Accreditation is the process where an agency updates its policies and procedures as well as its training records – in other words improves its management. As a result, accredited law enforcement agencies have substantially fewer accidents. To make it easier to achieve accreditation, the MEL and the Chief’s Association now make available to MEL members special software to organize and manage the accreditation

process. Further, the Association recently completed a comprehensive model manual with all of the policies and procedures needed for accreditation. This model is now available on disc and is free to any NJ law enforcement agency.



Slide 20 – Another serious issue in police agencies is accidents involving school crossing guards. The position of school crossing guard is now one of the most dangerous jobs in local government.

In 2006, the MEL and the Chief’s Association collaborated in a new program that successfully reduced these accidents. The program is on the web site:

- Physical Examinations: with particular emphasis on annual eyesight and hearing examinations
- Training: including a new video. As you know, State law specifies minimum training requirements for both new and returning crossing guards.
- Public Education: For example model press releases are available on the web site and last year the MEL released a new video that police agencies can use with parent groups, and
- Traffic Calming: Town’s need to slow traffic in residential areas. Research has shown that a pedestrian’s odds of surviving an accident varies considerably depending upon the speed of the vehicle. At 20 mph, a pedestrian’s chances exceed 90%, but fall to less than 10% at 40 mph.

There are many approaches to traffic calming and each situation should be evaluated.



Slide 21 – Some additional Best Practices in Risk Control are:

- Elected officials training: Each year, risk management training for elected officials is available at the League convention and at sessions throughout the state. Some JIFs offer a discount for each elected official who attends.

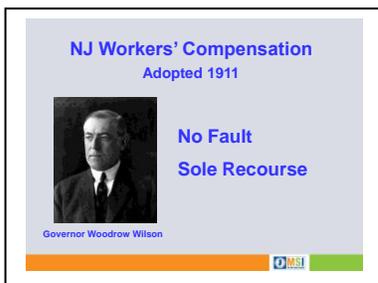
- Monthly report to the governing body: For the risk control program to become successful, it must have the continued support of management. Management communicates its priorities by what it chooses to monitor. Place safety and risk management on at least one workshop agenda monthly and request your risk management professional to provide the governing body with a monthly report tracking relative safety performance compared to other similar organizations. Many JIFs compute these figures. It is also important to review safety committee minutes, claim status and accident investigations.
- Audit contract files: Another basic risk control technique is to make sure your contracts have proper indemnification and hold harmless language. Also request the assistance of your risk manager to verify that contractors have the required insurance.



Slide 22 – To finish this section, consistent effort over time by management significantly reduces accidents, especially if management empowers the rank and file to participate as an equal partner. To help you implement this program, the MEL provides a complete risk management resource center at NJMEL.ORG. Take a few minutes to review this site.



Slide 23 – The third part of Risk Management concerns claims.



Slide 24 – New Jersey’s workers’ compensation law is one of the two oldest in the country and dates back 100 years to the administration of then Governor Woodrow Wilson. New Jersey is generally considered to have one of the most balanced laws of any major state. While the New Jersey Workers’ Compensation Court is one of the

more employee-oriented, the law also gives employers important controls to reduce fraud and abuse.

Workers' compensation is a no fault program that provides benefits to employees for occupational injuries and illnesses. The question of who caused the accident that injured the employee is not even considered when determining workers' compensation benefits. The only relevant issues are: (1) was this injury due to a job related accident or exposure; and (2) how seriously was the employee injured.

Normally, the employees "sole" recourse against the employer is workers' compensation unless the employer intentionally caused the accident. However, recent court decisions have held that if the employer deliberately violates a safety standard, this will be considered as an "intentional wrong" opening the door to tort litigation.



Slide 25 - Under the law, employees injured on the job are entitled to:

- Necessary Medical Care. The law allows the employer (or the employer's insurer) to contract with a managed care organization (MCO) to provide medical treatment. This is a critical control to prevent abuse;
- Temporary Disability Payments in the amount of 70% of the employee's earnings up to the state-average weekly wage. However, as was indicated earlier, many municipalities continue the employee's full wage during the temporary disability period. Temporary benefits stop when the doctor certifies that the employee has reached "maximum medical improvement" (MMI) even if the employee still cannot return to work; and,
- Indemnity Awards based on the extent of permanent disability. In recent years workers' compensation costs have dramatically increased because these awards have become very substantial.

The New Jersey Department of Labor, Division of Workers' Compensation enforces the law and workers' compensation judges make binding rulings regarding monetary awards, medical services and attorney fees.



Slide 26 – As a general principle, the cost of a claim is proportional to the amount of time the employee loses from work. Therefore, an effective claims control strategy includes four elements:

- Use the most skilled physician. New Jersey is one of the few states that allow the employer (or the employer's insurer) to contract with a managed care organization (MCO). The municipal or authority manager should personally interview the treating physician along with the managed care coordinator and the claims adjuster to discuss the claims procedures. In particular, review the job descriptions and requirements of critical positions and the physician's willingness to coordinate with the local unit to release employees back to work as soon as reasonable
- Maintain contact with the injured employee. The worst thing that can happen is for an injured employee to sit at home without periodically hearing from his or her supervisor. Numerous studies have shown that an injured person's attitude will have a direct impact on the speed of recovery. It is management's responsibility to periodically contact the injured worker and express support.
- Work with adjusters to reduce fraud. The adjuster should be informed of any suspicions so that an investigator can be placed on the case.
- Return the employee back to work as quickly as possible. Almost all local governments have personnel policies that include a transitional duty program, but too many do not fully implement the program. Studies have also shown that many injured employees will be capable of assuming their full responsibilities at

an earlier date if they start a transitional plan even before they reach Maximum Medical Improvement (MMI). Depending upon the circumstances, a transitional plan includes both specialized rehabilitation and transitional duty on the job. Other injured employees are not capable of immediately assuming full duties even after they reach MMI and may need time to build up to their full responsibilities. Management should work with the treating physician and the MCO to identify what the employee is capable of doing on the job while recovering. Additional rehabilitation may be required to get the employee back into shape after the relative inactivity during the employee's disability period.



Slide 27 – Include the municipal or authority attorney in the discussion. Some workers who have experienced multiple injuries or especially severe injuries may not be able to continue in their regular jobs without substantial risk of reoccurrence. In some of these cases, it may be in everyone's best long-term interest to assist the employee in obtaining a state disability pension.



Slide 28 - In recent years there has been a significant increase in law suits alleging violations of Americans with Disabilities Act. Under the ADA, an employer is required to enter into an interactive dialogue with any injured or disabled employee to implement reasonable accommodations that will enable the employee to continue work. Violation of the ADA can result in the employee receiving a substantial court award in addition to workers' compensation benefits

Accommodations include modifications to facilities, equipment and work procedures, auxiliary aides, services and permanent reassignment to vacant positions. Employees who are reassigned to a different position receive the salary of their new position.

Accommodations Not Required



- Unduly expensive
- Extensive
- Fundamentally change operation
- Permanent "light duty"

Slide 29 - Accommodations are not required if unduly expensive, extensive and disruptive or if they fundamentally alter the nature of the operation. The Act does not require the employer to offer permanent "light duty", relocate essential functions or provide personal use items such as eyeglasses, hearing aids, wheelchairs, etc. Decisions concerning ADA matters are complicated and should include your employment attorney.

Liability Claims



Tort Claims (Title 59)	60%
Civil Rights	30%
Environmental	10%

Slide 30 – Liability Claims Management also requires advanced planning. .

At one time under the legal doctrine known as "sovereign immunity", governmental entities could not be sued. In 1972, New Jersey replaced sovereign immunity with "modified governmental immunity" where governmental entities can be sued subject to certain special immunities. It would be impossible for government to operate without these special immunities.

Approximately 60% of the liability claims against local government are common accidents such as slips and falls. In New Jersey, these lawsuits are filed in state court under Title 59, known as the "Tort Claims Act." Another 30% of the lawsuits are civil rights matters filed under various federal laws such as Section 1983, or state laws such as the New Jersey Law Against Discrimination known as "LAD". The remaining 10% of cost involves environmental issues brought under federal or state "super fund" laws.

Title 59 Provisions



- Actual or Constructive Notice
- Permanent Injury
- Action or Inaction must be **Palpably Unreasonable**

Slide 31 – The key to controlling liability claims is to make maximum use of Title 59's immunities. In order to sue for most common accidents under Title 59, a claimant needs to establish the following:

- The local government or a governmental employee knew or should have known of the hazard that caused the accident;
- The claimant suffered a permanent injury; and
- The actions or inactions of the local government or its employees were palpably unreasonable.

The courts have defined palpably unreasonable to mean, “Actions or inactions that no reasonable person would condone.”



Slide 32 - There are several other important provisions: Specifically:

- Approved Design Immunity: A governmental entity cannot be held liable for an accident caused by a defect in an approved design. Therefore, the governing body should approve the plans for any project and the approval should be memorialized by resolution. A model resolution is on the MEL web site.
- Scarce Resources Immunity: The governing body can decide to defer a project if it lacks the funds so long as the decision is not “palpably” unreasonable. For example, most communities have miles of sidewalks, and it is simply impossible to repair every defect. If you do nothing, and do not have an orderly program to repair sidewalks over time, you will be held liable for sidewalk trips and falls. But if you enact an orderly program, you may have immunity during implementation period.



Slide 33 – Therefore, your attorney can be invaluable in preventing and controlling lawsuits. Management should periodically meet with the attorney to review procedures to identify and correct exposures as well as the status of ongoing litigation.

Specifically, each local unit should have:

- A system of regular inspections
- Training for employees to identify hazards
- Procedures for employees and citizens to report hazards, and
- Procedures to log all reports and record corrective action.



Slide 34 – Employment practices is the area of the largest increase in liability claims against local government. Just the portion of these claims covered by insurance now cost \$485 per full time employee equivalent. The total cost is double that. Through 2007, local units were successfully addressing these issues. Unfortunately, a series of court decisions made it far more difficult to defend these suits and the cost almost tripled over the last four years.

The “Lehman/Gaines” Test

Policies Prohibiting Discrimination and Harassment
 Complaint Structures (Formal & Informal)
 Training: (mandatory for management & provided to all employees)
 Monitoring Mechanisms
 Unequivocal Management Commitment

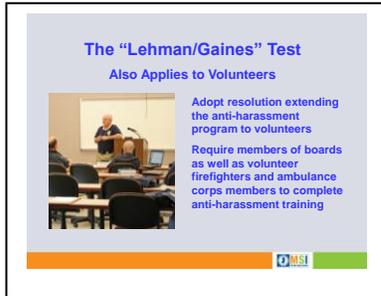
Chief Justice Rabner

Slide 35 – As in Title 59 claims, controlling employment practices liability requires knowledge of the law and advanced planning before a claim occurs. One of the reasons for the increase in claims is a series of court decisions that held employers liable for “aiding and abetting” harassment by failing to adopt and enforce an effective anti harassment program. In the landmark decision in Lehman v. Toys R Us, the court established specific guidelines for what an employer must put in place. These standards were reaffirmed in Gaines v Bellino. Specifically:

- a. Written policies and procedures prohibiting discrimination and harassment in the workplace – The MEL developed a model employment policies and procedures manual that is available on the web site. This manual is updated every two years.
- b. Both formal and informal employee complaint procedures – This is included in the model manual;
- c. Training, which must be mandatory for management personnel and optional for all other employees – Every two years the MEL develops a training program specifically for managers and supervisors and a special training program for Police Chiefs. Your local JIF will contact you about the arrangements for these programs in your area. The MEL has also developed a training program for non-managerial personnel that includes a new video. This is also available on the web site.
- d. A system to monitor compliance - It is good practice to ask employees if they have experienced harassment or discrimination at the end of the

training program or whenever difficulties come to your attention, and

- e. An unequivocal commitment from senior management - That is why we conduct these seminars for elected officials.



Slide 36 – These principles also apply to town sponsored volunteer organizations, especially the Fire Department. Every community needs to:

- Adopt a resolution extending the anti-harassment program to volunteers and the public. The model resolution is on the MEL's web site.
- Require all members of boards as well as volunteer Firefighters and similar public safety volunteers to view the training video produced by the MEL. This program is also recommended for other town sponsored volunteers.



Slide 37 – Advanced planning is also critical in controlling environmental liability claims. "Super Fund" laws are based on the principle that "the polluter pays." There are no immunities and public entities are subject to the same laws as private entities. Therefore, how quickly an environment event is remediated will often determine how expensive the claim will ultimately prove.

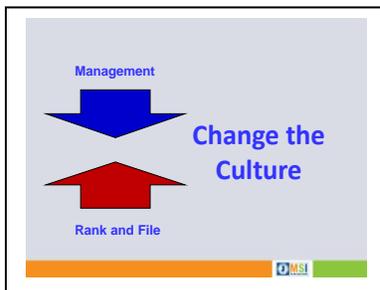
- Have an environmental engineer on call 24/7 to assist in the response to an environmental event. The first few hours are critical. This is one of the services offered by the New Jersey Municipal Environmental Liability Risk Management Fund, known as the E-JIF. If your entity is not a member of the E-JIF, you need to establish a similar on call engineering capability.
- Provide environmental training for all operations staff. This training is now mandated by the DEP and is being provided by the E-JIF in an online program. Again, if you are not a

member of the E-JIF, you need to make other arrangements to fulfill this regulation.

Slide 38 – Some other Best Practices in Claims Control are:

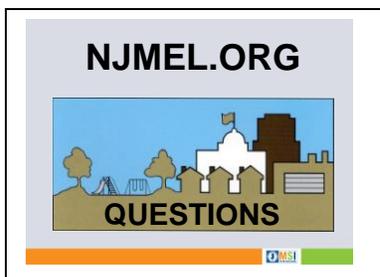


- Select an effective team of professionals and service providers: Claims control is all about advanced preparation and a strong working relationship between the town and a team of professionals. The devil is in the details. These are very complicated programs and do not assume these costs can be controlled without professional expertise.
- Eliminate SLI benefits - Recently the state eliminated this program for state workers and there is nothing to prevent a local unit from negotiating this program out of its bargaining agreements. SLI alone costs local government an average of \$500 per full time employee equivalent per year.



Slide 39 - To summarize, unless a local unit implements an effective risk management program, it can expect property/casualty insurance costs to increase at a rate of 5% to 7% per year because of higher medical costs and court decisions. Select a strong professional team and work closely with them.

Over the next decade there will be a generational shift in local government. The baby boomers are retiring in large numbers and the next generation is taking over leadership. It is especially critical that a constructive attitude is conveyed to this new generation. What is taught now will have a profound influence on your operations for decades to come. This has to start at the top.



Risk management must also include the rank and file. Empower the workforce so that everyone feels free to question something that appears improper or unsafe, and everyone looks out for each other.

Slide 40 – Questions?