Insurance Buyers' News

Barker Phillips Jackson
Insurance and Other Financial Services
www.bpj.com

Springfield
PO Box 4207, Springfield, MO 65808
Phone: 800-422-5275
417-887-3550 • Fax: 417-887-3252

Rolla
PO Box 1258, Rolla, MO 65402-1258
Phone: 800-364-2212
573-364-8888 • Fax: 573-341-2257

West Plains
PO Box 964, West Plains, MO 65775
Phone: 800-400-3896
417-256-6162 • Fax: 417-256-6165

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Employee or Independent Contractor… and Why You Need to Know

Earlier this year, a court ruled that Federal Express drivers should have been classified as employees, when the company had classified them as independent contractors. And the U.S. Department of Labor announced that a five-year investigation in Utah and Arizona yielded $700,000 in back wages, damages, penalties and other guarantees for more than 1,000 construction industry workers.

In the case of the Southwestern construction employers, the employers required the construction workers to become "member/owners" of limited liability companies, stripping them of federal and state protections that come with employee status. These construction workers were building houses in Utah and Arizona as employees one day and then the next day were performing the same work on the same job sites for the same companies but without the protection of federal and state wage and safety laws. The companies, in turn, avoided paying hundreds of thousands of dollars in payroll taxes and other benefits.

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This Just In

A data breach now costs an average of $3.8 million, reports the Ponemon Institute. In a study of data breaches in 11 major countries, the average cost per record stolen had reached $154 in 2015, up from $145 last year.

The amount of time it takes to identify and respond to a data breach event directly affects the total bill. The sooner an organization responds, the lower its costs will be. Costs of a data breach include expert help to fix the problem, investigations and reparations, including setting up customer hotlines and providing credit monitoring services for victims.

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In recent years, employers have increasingly contracted out or otherwise shed activities to be performed by other entities through, for example, the use of subcontractors, temporary agencies, labor brokers, franchising, licensing and third-party management. The Labor Department supports the use of legitimate independent contractors — who play an important role in our economy — but when employers deliberately misclassify employees in an attempt to cut costs, everyone loses.

Employers often misclassify workers to reduce labor costs and avoid employment taxes. A misclassified employee — with independent contractor or other non-employee status — lacks minimum wage, overtime, workers compensation, unemployment insurance, and other workplace protections.

By not complying with the law, these employers have an unfair advantage over competitors who pay fair wages, taxes due, and ensure wage and other protections for their employees.

Whether a worker is an employee under the Fair Labor Standards Act is a legal question determined by the economic realities of the working relationship between the employer and the worker, not by job title or any agreement that the parties may make. To guide employers, the U.S. Department of Labor issued Administrator's Interpretation No. 2015-1 in July. You can find the entire document at dol.gov/whd/workers/Misclassification/AI-2015_1.pdf. In summary, the guidelines use an "economic realities" test to determine whether the worker is economically dependent on the employer or in business for him or herself.

Factors to consider include:

A) the extent to which the work performed is an integral part of the employer's business;
B) the worker's opportunity for profit or loss depending on his or her managerial skill;
C) the relative investments of the employer and the worker;
D) whether the work performed requires special skills and initiative;
E) the permanency of the relationship; and
F) the degree of control exercised or retained by the employer.

The Department of Labor says "…most workers are employees under the FLSA's broad definitions. The very broad definition of employment under the FLSA as 'to suffer or permit to work' and the Act's intended expansive coverage for workers must be considered when applying the economic realities factors to determine whether a worker is an employee or an independent contractor."

The Consequences of Misclassification

Employers caught misclassifying employees—whether deliberately or not—can be required to pay fines, penalties and back taxes. Please note that the commercial general liability and business owner's policy exclude coverage for employment-related claims. Specialized employment practices liability insurance (EPLI) often excludes coverage for violations of federal employment laws, such as the Fair Labor Standards Act, Americans with Disabilities Act, Occupational Safety and Health Act, COBRA, ERISA and state employment laws.

This Just In

The Ponemon study emphasizes the importance of having a business continuity management (BCM) program or team in place. Whether internal or external, the BCM team provides enterprise risk management, disaster recovery and crisis management.

The study found that responding to data breaches cost nearly 10 percent more if an organization did not use BCM as part of the incident response planning and execution. Perhaps more importantly, it found that organizations that did not use BCM in data breach planning were more likely than those that did to have a data breach in the next two years, 27.9 percent versus 21.1 percent.

For a review of what your EPLI covers, please contact us. And if you have questions on classifying your employees, please contact an employment attorney for advice to avoid potential claims.

Rented Premises: Why You Need Property Coverage

Generally, you buy property insurance to cover damage or loss to property. Your liability policy might provide some coverage…but probably not enough.

In the world of residential real estate, landlords buy property insurance to cover damage to buildings they own. If you rent a home or apartment, your renter's policy will cover your contents and other personal belongings. If the loss or damage isn't your fault, the landlord's policy will cover it. But let's say you accidentally cause a fire by leaving a pot unattended on a stove. The liability portion of your renter's policy would cover your liability for this negligent act.

It works the same way in commercial real estate. If you rent your business premises, you'll buy property insurance to cover your business personal property and inventory, if applicable. Your policy doesn't cover your premises, since you don't own them. But if you do accidentally cause fire damage to your landlord's premises, your liability coverage would apply.

Businesses obtain liability coverage either through a commercial general liability (CGL) policy or through a business owner's policy, which combines property and liability coverages. The CGL includes coverage for "damage to premises rented to you." Although this coverage is automatically included in the Coverage A section of your policy, it provides only limited coverage. Damage to Premises Rented to You covers only damage due to fire, and a separate, lower limit might apply. If your business premises are damaged by any other cause, the policy would not cover you.

Damage must also be caused by your negligence, otherwise the contractual liability exclusion would apply. For example, let's say your lease requires you to pay for any fire damage to your leased premises, even if you are not at fault. You have accepted contractual liability for fire damage. The policy's contractual liability exclusion states it won't pay for any loss you become obligated to pay by contract. Therefore, the Damage to Premises Rented to You coverage would not apply.

Buying tenant coverage will insure your on-premises property, but it won't cover the building itself. Check your policy to see whether it provides "building occupied by the insured" coverage. This section covers a building you regularly use but do not own—for example, a building you lease, rent or borrow.

You'll also want to check what "perils," or causes of loss, your policy covers.

- Basic form policies cover losses due to common perils, such as fire, lightning, explosion, windstorm or hail, smoke, "physical contact" of an aircraft or vehicle, riot or civil commotion, vandalism, sinkhole collapse or volcanic action.
- Broad form policies cover the basic perils, plus water damage, structural collapse, sprinkler leakage, and damage caused by ice, sleet, or weight of snow.
- Special form policies, formerly called "all risk" policies, cover all perils except those specifically excluded by the policy. Typical exclusions include damage due to flood, earth movement, war and terrorism, nuclear disaster and wear and tear.

Policies can vary from insurer to insurer. To make sure you have the coverage you need for your rented premises, please contact us for a policy review.

Alternative Dispute Resolution and Your Legal Rights

How many times have you signed a contract that requires mediation or mandatory arbitration of disputes? Do you know what you're signing?

In alternative dispute resolution (ADR), a neutral third party helps parties to a dispute reach a resolution outside of the court system. The most common types of ADR are mediation, arbitration and mini-trials.

Mediation lets two or more parties solve disputes through the use of a mediator, a trained neutral third party. The mediator opens the lines of communication and helps parties work out their own solutions in an informal, confidential and non-binding process.

You do not need an attorney for mediation, although you may choose to have your attorney present. The mediator will decide what role attorneys will play during mediation. The mediator does not decide who is right or wrong or issue a decision. Because it's voluntary, parties to mediation may exit at any time. A decision arrived at through mediation does not legally bind the parties, so any party may choose to file a lawsuit after mediation.

Arbitration is the most common form of alternative dispute resolution. Many contracts require the use of binding arbitration, so it pays to know what exactly arbitration is.

More formal than mediation, arbitration involves a trained arbitrator, who listens to both parties to a dispute and issues a decision. The arbitrator's decision is final, binding and enforceable in a court of law.

Many arbitrators have expertise in technical or specialized areas. The parties involved in arbitration can provide input into the selection of an arbitrator. If your dispute involves technical or specialized information, arbitration can save you time and money you'd otherwise spend educating a judge or jury.

Arbitration does not require formal discovery. However, most arbitrators follow the rules of the American Arbitration Association, which allow arbitrators to require parties to a dispute to produce relevant information and documents.

Mini trials involve a structured settlement process. The process begins with both parties (or their attorneys) presenting abbreviated summaries of their case to a panel. The panel consists of mediators, who advocate for their respective parties and work out a settlement. It may also include a neutral member, who serves as an expert or advisor on applicable law.

Summaries contain explicit information about the legal bases and the merits of the case.

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The process generally follows more relaxed rules for discovery and case presentation than might be found in a court, and the parties usually agree on specific limited periods of time for presentations and arguments.

Mediators will then advocate for their respective parties and work out a settlement. Your mediator will go into the process having authority to settle the matter according to criteria that you spell out—such as a specific dollar amount or other conditions.

If mediators cannot come to a suitable resolution, they might ask the neutral advisor to predict the outcome of the case if it goes to litigation. Since mini trials are often used after a lawsuit has been filed, we'll focus the rest of our discussion on techniques you can use to avoid litigation.

What You Need to Know about ADR

Advantages of mediation: Court cases become a matter of public record, while mediation remains private. As a non-adversarial process, mediation allows two parties to reach a mutually agreeable solution and preserve a working relationship. It also costs less than litigation or arbitration, is less adversarial and usually takes less time. Mediation is not binding, so parties unsatisfied with mediation can bring their dispute to court.

Disadvantages of mediation: A mediator might not have the expertise or discovery and evidentiary resources of the court system to come to a decision that's truly fair to both parties. In a personal dispute, a more aggressive party might also have an unfair advantage over a quieter, meeker one.

Advantages of arbitration: As with mediation, arbitration remains private and disputes do not become a matter of public record. However, decisions are enforceable by the courts.

Informal rules of evidence streamline the discovery process and allow the case to come to a decision faster. Arbitrators can have expertise in specialized areas, which could result in a fairer, more informed decision. That, and relaxed hearing procedure rules, can speed the process.

Finally, arbitration could limit your settlement costs. Most arbitrators do not award attorney fees to the prevailing party. Some states prohibit arbitrators from awarding punitive damages for certain types of claims. This could be an advantage or disadvantage, depending on which side of the dispute you're on.

Disadvantages of arbitration: When you have an agreement that disputes must be resolved through arbitration, you do not have access to summary judgment or other tactics to dismiss a claim without a trial. Even claims that could prove frivolous will likely be heard on their merits.

Decisions rendered by an arbitrator are binding. You don't have access to a court appeal, except in very rare, limited circumstances.

Arbitration agreements can limit your legal rights. Before signing a contract with an arbitration clause, or before including an arbitration clause in your employment and other agreements, please ask an attorney for advice. For more information on protecting your organization from the high cost of legal disputes, please contact us.

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Drones in the Workplace

Real estate agents use unmanned aircraft systems, or drones, to photograph properties. Amazon promises that it will soon be using drones to deliver packages from its warehouses to your doorstep. And drones could help employers manage risk.

In loss control: Drones can access areas out of reach of traditional video cameras, making them a valuable tool for security and loss control.

In safety: Drones can monitor work areas for safety violations and assist in accident investigations. Not only can they record an incident, they can follow an investigator to record any eye witness accounts and provide an overview of the accident area to off-site claims managers.

In workers' compensation claims: Workers' compensation investigators could use drones to observe employees suspected of malingering.

Things to Remember

The Federal Aviation Administration (FAA) permits the noncommercial use of unmanned aircraft systems with a few common sense restrictions. Those flying drones for commercial use must obtain FAA approval. Nongovernmental employers can receive FAA approval in one of three ways:

1. Obtain a "Special Airworthiness Certificate" to perform research and development, crew training and market surveys. You cannot carry persons or property for compensation.
2. Obtain a Restricted Category certificate for a special purpose.
3. Petition for an exemption to perform commercial operations in low-risk, controlled environments.

Some states have enacted laws regarding the use of drones. Most apply to police or other governmental agencies and generally prohibit their use without the appropriate warrants.

Most states have no specific restrictions against workplace drone use. The same privacy rules that apply to video cameras would apply to the use of drones. Anywhere a person has a reasonable expectation of privacy, such as a rest room or locker room, should be out of bounds of drones. And although you might not have a legal requirement to notify employees that they may be monitored by drones in the workplace, good employee relations and common courtesy makes notifying employees (and the public, if applicable) a sound practice.

For more information on how emerging technology could affect your risk management and insurance, please contact us. ■

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