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Five Ways to Protect Your Firm from Sexual Harassment Claims

Here are the steps to take to prevent harassment claims and what to do if allegations are made.

Accusations of sexual misconduct have been surfacing at an unprecedented rate. Some of the most recent high-profile figures to be accused of sexual harassment include actor James Franco, celebrity chef Mario Batali, public radio host Garrison Keillor, casino mogul Steve Wynn and dozens more. The list just keeps growing. And these are just public figures. The #metoo movement has many American businesses worrying that these people are only the tip of the iceberg and that someone in their firm may be next.

Sexual harassment in the workplace is hardly new or uncommon. A recent study by *Cosmopolitan* Magazine study found that "81 percent of the more than 2,200 women surveyed had been

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This Just In

Each year Allianz Global ranks the top 10 risks to businesses, according to a survey of U.S. risk managers. Here's how they ranked the risks for 2018:

1. **Cyber incidents (e.g. cyber-crime, IT failure, data breaches)**
2. **Business interruption (including supply chain disruption)**
3. **Natural catastrophes (e.g. storm, flood, earthquake)**
4. **Market developments (e.g. volatility, intensified competition/new entrants, mergers and acquisitions, market stagnation/fluctuation)**
5. **Fire, explosion**
6. **Legislative and regulatory changes**

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verbally sexually harassed at work, 44 percent said they encountered unwanted touching and sexual advances, and 25 percent have received lewd texts or emails," as reported by *Insurance Journal*. "Of those, only 29% reported it."

The Equal Employment Opportunity Commission (EEOC) defines harassment as conduct "severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile or abusive." In 2016, The EEOC says 12,860 charges of sexual harassment were filed by employees against employers.

The fact is that sexual harassment is not something only perpetrated by powerful public figures. It's pervasive and exists in businesses of all sizes — and it's often hard to control.

What Can You Do About It?

1 The most important first step is to develop a corporate policy on harassment and put in place HR procedures for addressing sexual harassment, including conduct guidelines in your employee handbook. Not doing at least this much can have grave consequences. "The absence of such a policy could be used as evidence that a harassing employee had apparent authority to engage in his or her misconduct, a finding that could trigger employer liability," said Loretta Worters, an insurance expert formerly with the Insurance Information Institute, to *Insurance Journal*.

2 Employee training also plays an important role, to create a culture of awareness about the problem. Committing to a safe workplace should include more than just protecting employees against bodily injury. According to risk manager and human resource consultant Steve Carter, as part of their mandatory sexual harassment education, companies should:

- Emphasize the organization's commitment to providing a harassment-free workplace.
- Familiarize employees with the organization's procedures for reporting incidents of sexual harassment.
- Apprise employees of the range of disciplinary consequences for legitimate complaints.
- Provide employees with coping strategies to handle minor incidents of harassment before they become serious issues.

[Source: The Rough Notes Company]

3 Audits can also help by assessing whether existing systems and procedures may engender situations where sexual harassment can easily take place. Start by reviewing your hiring process, says Worters. "The problem starts when human resources hires the wrong person," Worters says. "That's what plaintiff's lawyers are going to look at. Do you have a history of hiring these types of people?"

4 Employees should be encouraged to report incidents of sexual harassment promptly and, if necessary, anonymously. Supervisors and those who handle sexual harassment incidents, such as HR personnel, should receive training on identifying problems, learning to proactively intervene to prevent complaints and how to resolve them.

5 As always, it's best to manage allegations of sexual harassment internally and diffuse situations before they become serious. If any of the above steps fail, your fallback is to have a sound insurance program. Several types of insurance policies could help.

We'd be happy to give you quotations if you don't already have any of these coverages. Please contact us.

This Just In

7 Loss of reputation or brand value
8 Impact of new technologies (e.g. increasing connectivity, nanotechnology, artificial intelligence, 3-D printing, drones)
9 Climate change/increased weather volatility
10 Talent shortage

Since 2017, the importance of cyber incidents has increased from second to first place and concerns about climate change/weather volatility and talent shortages are new to the list.

Source: Allianz Global Corporate & Specialty Insurance Company

How a Business Income Worksheet Helps You Rebuild after Disaster

An estimated 70 percent of companies that undergo a major loss eventually go out of business because they failed to plan for the disaster. Proper planning includes completing a business income/extra expense worksheet. This worksheet can help you get all the funds you're entitled to after a disaster—here's how.

Business property policies usually include business income and extra expense coverage. This valuable coverage reimburses you when a property loss covered by your policy causes you to lose income due to a shutdown or slowdown. In other words, if a fire (an insured loss) gutted your building and you had to close for four months to rebuild, your business income coverage would reimburse you for lost income. The extra expense portion of the coverage will reimburse you for any unusual expenses you incur to get your business up and running again after an insured loss, such as renting space while your building is under repairs.

How Much Coverage?

Businesses typically buy insurance to replace six to 12 months of lost income and extra expenses. Ideally, you will want to buy coverage for the "period of restoration," or time it takes to repair or rebuild the property, or the date you resume business at a new location. While it is possible to overinsure, most businesses underestimate the time and expense they will incur. When calculating lost income, be sure to factor in compensation for your projected growth — not last year's income.

What Is a Business Income Worksheet?

Completing a worksheet may seem like a hassle, but it will help you estimate recovery costs and give you a blueprint to follow during the restoration period. It also documents your organization's pre-loss income and expenses when you submit a worksheet as part of your application for coverage. This is important if you want "agreed value" coverage.

To calculate your income, use the formula: Net sales minus costs of goods and services

This will give a figure that's accurate to within 3 to 4 percent of the actual claim if a loss should occur. Try not to fill out a generic worksheet, which will have cells that are not relevant to your industry. Your insurer should have worksheets specific to your industry sector available.

After a disaster occurs, the costs of re-

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building and replacing new equipment represent only a part of your costs to restore your business. You might have to incur unusual expenses to speed the restoration and avoid losing business to competitors. This could include the cost of renting temporary premises, expedited shipment of equipment or goods, hiring public relations counsel to do "damage control" and more. You will also have to pay the cost of moving to your temporary premises, advertising the new location, not to mention heating, lighting and insuring the new site. You will likely have to pay employees overtime, incentives and perhaps increased transportation costs. Consider all these factors when completing your business income/extra expense worksheet and your recovery plan.

Why Is the Worksheet So Important?

Typically, business income coverage has a coinsurance provision. Like the coinsurance provision in your health policy, it requires you to pay a certain percentage of covered losses out of pocket, which lowers your monthly premium and gives you incentive to control your healthcare costs. Unlike your health policy's coinsurance, the coinsurance provision of the business income policy acts as a penalty for not having enough insurance.

For example, let's say your business has annual net income and operating expenses of $5 million. Fortunately, you have business income coverage, with a coinsurance of 80 percent. Unfortunately, you haven't updated your policy in a few years, and your business has grown. You have only $2.5 million in coverage, where you should have $4 million in coverage (80 percent of $5 million).

If you have a business income claim, your insurer will reduce your claim payment by the amount by which you are uninsured. In this example, that would be $2.5 million/$4 million = .625. Let's say a fire closes your facility for six months and you lose $1.7 million in income. At claim time, then, you'd recover 62.5 percent of the covered loss, or $1.06 million (your $1.7 million loss times .625, less any deductible).

Unfortunately, underinsurance occurs fairly often. You can avoid this problem by making sure your policy has an "agreed value provision," which your agent can add by endorsement. This provision eliminates the coinsurance penalty, so the insurer will use your worksheet as the basis of your claim payment.

After a disaster is the worst time to discover you don't have enough insurance. Business income and extra expense are fairly complex products—if you need assistance in estimating your business income/extra expense needs, please contact us.

The Future of Insuring against Disaster

Most companies aren't insured for natural disaster and federal disaster relief is often too little and too late.

Even though the cost of natural disasters in 2017 was approximately $300 billion in the U.S., less than half — $130 billion — was insured, according to research by Swiss Re. The other $170 billion will be borne by taxpayers. What's more, the cost of natural disasters has been increasing dramatically, quadrupling in the past decade, according to the U.S. Department of Commerce's National Oceanic and Atmospheric Administration (NOAA).

The frequency, severity, and burden of bearing these losses are factors insurance leaders considered recently at the Insurance Information Institute's 2018 Joint Insurance Forum in New York City. As reported by *Inurance Journal*, industry executives identified several trends that could change the risk landscape in the next few years.

Better Forecasting Is Needed

The insurance industry needs to do more to take advantage of new technologies for assessing risk probabilities. Referring to Hurricane Harvey, Bill Churney, president of AIR Worldwide, said, "One of the things that I think the industry will have to come to grips with is this whole idea of the one-in-100-year flood zone FEMA (Federal Emergency Management Agency) map. It's not a very good proxy for the risk, given that 40-50 percent of the loss in Harvey was outside of those areas."

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Churney pointed out that data collection and the technical expertise to use it for forecasting have become much more sophisticated. More insurers and risk managers need to incorporate these highly sophisticated resources into their risk modeling.

The Cost of Federal Aid Is Becoming Unsustainable

Presidentially declared disasters during the Reagan administration averaged 28 per year; during Clinton's it was 90 per year; in the first year of the Trump administration it was 137; and in 2011, during the Obama administration, it was 242.

"If there's any clear policy that's coming out of Washington holistically, I would call it a reallocation of burden," said Alex Kaplan, head of North America at Swiss Re Global Partnerships. "We are finally beginning to come to a point where the federal government is going to say, 'You know what? This is not financially sustainable. We are not going to continue to provide bailouts to communities that are otherwise making bad decisions about land use, planning or building codes. You have to own your risk."

Federal Disaster Relief Is Often Too late, Too Little

The other problem with federal disaster relief is that it's slow, and its payouts are relatively small. It took Congress three months to pass supplemental relief for Hurricane Sandy and even one year after the disaster, only 25 percent of the funds had been dispersed. Most people don't know that the largest check FEMA will write is $33,000.

If federal disaster relief is often too little too late, most people don't realize it. Even businesses and public entities expect to get bailed out by the government. "I've known risk managers of public entities across the United States that always say, 'Why would I pay for something I know I'm going to get for free?' So, there's this perception that the federal government is going to come and save the day," said Kaplan.

The Public Needs to Be Better Informed

Attendees noted that the political climate is changing. More government entities are focusing on "the cost of risk and how to engage the private sector to shift more of the burden off of the back of taxpayers onto the balance sheet of the private market."

Greater reliance on private insurance is part of the solution. But there is also more focus on mitigation. For example, federal subsidies should be reduced or eliminated for insuring properties in flood zones or where the lack of loss mitigation features make damage from flooding, wildfire, tornadoes, hurricanes and earthquakes more severe. The private market can price these risks more accurately.

Leaders Foresee an Increased Emphasis on Mitigation

"Hopefully, 2018 will be the year when the switch flips, and people start seeing that mitigation is an investment; it's not an expense. Because that's how we will change the culture of this country so that it is one of preparedness instead of just continued response and recovery," said Julie Rochman, president and CEO at the Insurance Institute for Business & Home Safety (IBHS).

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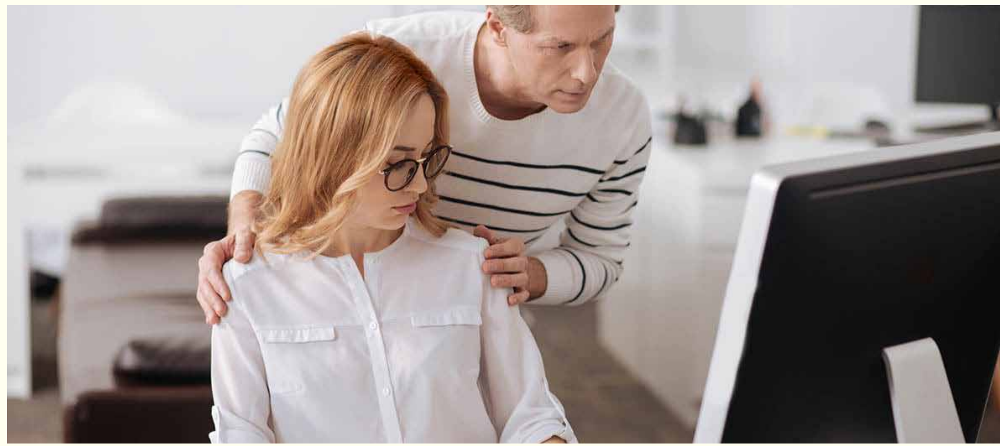
Four Insurance Policies That May Protect against a Sexual Harassment Claim

Depending on the circumstances, there are four different types of insurance policies you need to consider:



Employment Practices Liability Insurance (EPLI): This is the most likely policy to respond to a sexual harassment claim. It covers your company against employees' claims of sexual misconduct that occur in the course of their employment. Most policies explicitly say they cover sexual harassment, wrongful termination, discrimination and retaliation. The main limitation of an EPLI policy where sexual harassment is concerned is that it does not cover allegations of bodily injury.

General Liability (GL): Most GL policies cover "personal injury," which is defined to include defamation. They will also cover claims for bodily injury (which EPLI excludes). Coverage might be limited by a common GL policy exclusion against claims that are "expected or intended." However, many courts have ruled that this exclusion doesn't apply when the claim involves negligent hiring or sexual assault. Another problem is the standard exclusion against claims made by employees, though some courts have ruled in favor of coverage when the misconduct was off premises or not related to employment.

Directors & Officers (D&O): D&O indemnifies the business for "wrongful acts" of a company's directors and officers and commonly, by endorsement, of its employees. As with EPLI, bodily injury —including mental anguish, humiliation and emotional distress as well as "willful or intentional" misconduct — is excluded.

Crisis Management or Reputation Risk: These new coverages seek to address the bottom-line impact of negative publicity to a firm. They cover the cost of hiring a public relations firm. Coverage is triggered by an actual loss sustained that is directly attributable to negative publicity. These policies vary widely and may include specific language excluding claims by employees against the company.

For help deciding which policies may be helpful for in your firm, please contact us.

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