Insurance Buyers' News

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How to Insure against Alleged Whistleblowers

Employees file lawsuits against their employers for many reasons.

A 62-year-old white male employee with a positive performance record and favorable bonuses was terminated by a foundation. He sued the foundation, alleging he was terminated from his job so that the employer could hide a pattern of discrimination against women and minorities. The employee further alleged violations of the Age Discrimination in Employment Act (ADEA) and Title VII of the 1964 Civil Rights Act.

Before we tell you the outcome of this "whistleblower" lawsuit, let's talk about what kind of insurance that employer should have been carrying to help with that claim.

The type of policy most likely to respond would be Employment Practices Liability Insurance (EPLI), which covers businesses against claims by

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This Just In…

The National Labor Relations Board may be prepared to revise some Obama-era policies that protect employees from disciplinary action when using profanity while engaged in union activity.

Attorneys representing employers are asking for the changes because they say that the language used in these matters can often be quite explicit, disrespectful and outright insubordinate.

Under the Obama administration, "the NLRB really went overboard in finding any type of complaint or criticism of an employer to be protected activity for which you cannot terminate an employee," said Christopher V. Bacon, counsel, labor and employment, with Vinson & Elkins LLP in Houston, who litigates employment matters on behalf of private employers, according to *Business Insurance.*

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workers that their legal rights as employees of the company have been violated.

According to the Insurance Information Institute (III), the number of lawsuits filed by employees against their employers has been rising. While most suits are filed against large corporations, no company is immune to such lawsuits. Recognizing that smaller companies now need this kind of protection, some insurers provide this coverage as an endorsement to their Businessowners Policy (BOP). An endorsement changes the terms and conditions of the policy. Other companies offer EPLI as a stand-alone coverage.

EPLI provides protection against many kinds of employee lawsuits, including claims of:

- Sexual harassment
- Discrimination
- Wrongful termination
- Breach of employment contract
- Negligent evaluation
- Failure to employ or promote
- Wrongful discipline
- Deprivation of career opportunity
- Wrongful infliction of emotional distress
- Mismanagement of employee benefit plans

The cost of EPLI coverage depends on your type of business, the number of employees you have and various risk factors such as whether your company has been sued over employment practices in the past. The policies will reimburse your company against the costs of defending a lawsuit in court and for judgments and settlements. The policy covers legal costs, whether your company wins or loses the suit. Policies also typically do not pay for punitive damages or civil or criminal fines. Liabilities covered by other insurance policies such as workers compensation are excluded from EPLI policies.

To prevent employee lawsuits, educate your managers and employees so that you minimize problems in the first place:

- Create effective hiring and screening programs to avoid discrimination in hiring.
- Post corporate policies throughout the workplace and place them in employee handbooks so policies are clear to everyone.
- Show employees what steps to take if they are the object of sexual harassment or discrimination by a supervisor. Make sure supervisors know where the company stands on what behaviors are not permissible.
- Document everything that occurs and the steps your company is taking to prevent and solve employee disputes.

This Just In

In the cases under review by the NLRB, much of the language is "pretty explicit, including using the 'f' word." according to Kenneth J. Yerkes, a partner with Baker & Thornburg LLP in Indianapolis. "It was not just low-level profanity. It was personal, and it was direct."

"There's really a commonsense border" beyond which an employee violates not only company policy but potentially other laws, he said. This kind of language can become blatant sexual or racial harassment in violation of Section VII of the 1964 Civil Right Act, which prohibits employers from discriminating against employees on the basis of sex, race, color, national origin and religion. This can place a company in a difficult position.

Labor attorneys disagree with any attempt to change NLRB policy in this regard. "A change will chill employees from working together to enforce their rights." New York-based solo practitioner Joshua Parkhurst, who represents workers, told *Business Insurance,* "I don't think the Obama administration went too far."

So, what was the verdict in the Whistleblower case? The jury awarded the employee $55,000 in compensatory damages and $325,000 in punitive damages.

If you don't currently carry EPLI insurance and would like more information, please give us a call.

Are Insurance Companies Prepared for Another 9/11?

The terrorist attacks on 9/11, in which terrorists hijacked and flew commercial airliners into the World Trade Center Towers and the Pentagon, demonstrated how such events are unpredictable, highly destructive and possibly uninsurable.

These attacks still count as the deadliest and most costly terrorist incidents in U.S. history, with insurance losses totaling approximately $47 billion, according to the Insurance Information Institute (III). Even though U.S. and international insurers were able to pay virtually all claims from the attacks, it was clear that insurance company reserves would not realistically be able to respond to similar losses in the future.

Terrorism Risk Insurance Act Set to Expire

In response to these concerns, the U.S. Congress enacted the Terrorism Risk Insurance Act of 2002 (TRIA), creating a federal backstop for catastrophic terrorism losses that is designed to keep terrorism risk insurance available and affordable. Renewed in 2005, 2007 and again in 2015, the act is set to expire on December 31, 2020.

With its expiration only a year away, how well prepared are U.S. commercial insurers for the possibility of another terrorist attack? And how would TRIA assist insurers if renewed?

According to estimates made by the Reinsurance Association of America (RAA) for the III, the government's net payout under TRIA would be less than zero, as it would recover more from mandatory surcharges to insurance policies than it would reimburse insurers for a portion of their losses.

Meanwhile, the net payout by insurance companies would be nearly $20 billion. Repeating the exercise in the future, the

insurer contribution would steadily grow, assuming the law was renewed with the same terms under which it is set to expire at the end of next year. The share borne by policyholders through the surcharge increases more dramatically.

A 9/11 Event in 2030 Would Cost the Government Nothing

III estimates that adjusted for inflation, 9/11 this year would generate insurance losses of $45.7 billion. According to the RAA model, the government would contribute $6.6 billion. It would front another $19.3 billion but recover $27.0 billion from a mandatory surcharge that would be placed on the insurance purchased in all lines of business that the program covers. Netting all that out means the government would pay less than

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zero. Insurers would be responsible for $19.7 billion, or 43 percent of the total insured loss.

By 2030 9/11 would be a $58 billion event. The government would contribute nothing. It would front $29.6 billion but recover $41.5 billion from policyholders due to the recoupment and surcharge. Insurers would be responsible for $28.4 billion, or 49 percent of the total insured loss.

Though 9/11 is used to illustrate the numbers, the RAA model can be adjusted to show how TRIA would handle other types of catastrophic events, such as 25-ton truck bombs, chemical or biological events, industrial sabotage and port bombs. It also can tailor results to individual cities; car bombs in New York and Baltimore, for example, will generate different levels of loss.

Proposed Changes to TRIA

The main drivers of the changes to TRIA when it's renewed would be:

- Beginning in 2020, the law makes the size of the industry marketplace retention a function of insurers' aggregate premiums, so the marketplace retention grows as the industry's premium does.
- Also, in 2020 the government's co-payment shrinks to 80 cents per dollar insurers pay above their deductible, down from 81 cents in 2019.
- The amount of losses subject to policyholder surcharges grows to $29.6 billion from $19.3 billion, shrinking the federal support.

The work "is a reminder under the current statute, policyholder and company retentions go up over time," said RAA President Frank Nutter. "In 2020 this becomes effective in a way that changes retentions of the private sector. It also shows a vanishing federal share." ■

Why You — not just "Dolly" and "Bruce" — Might Need Surplus Lines Insurance

A change in your business strategy can create a need to access the surplus lines market.

When Dolly Parton insured her breasts for $600,000 and Kiss's Gene Simmons insured his tongue for $1 million, you can be sure a standard insurer didn't cover those risks. Same for Bruce Springsteen's $19 million policy for his voice. These celebrities turned to the surplus lines market.

But the surplus lines market does far more than insure celebrity body parts.

According to the Wholesale & Specialty Insurance Association (WSIA), specialty and surplus lines companies are often called the "safety valve" of the insurance industry. They fill the need for coverage in the marketplace by insuring those risks that are declined by the standard underwriting and pricing processes of admitted insurance carriers. With the ability to accommodate a wide variety of risks, the wholesale, specialty and surplus lines market acts as an effective supplement to the admitted market.

According to A.M. Best, 2017 surplus lines premium volume was nearly $44.9 billion and represents a vast number of insureds who, without the surplus lines market, would have a difficult time obtaining insurance, if they were able to secure it at all.

The surplus lines market plays an important role in providing insurance for hard-to-place, unique or high capacity (i.e.,

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high limit) risks. Surplus lines insurers are able to cover unique and hard-to-place risks because, as non-admitted insurers, they can react to market changes and accommodate the unique needs of insureds who are unable to obtain coverage from admitted carriers.

This results in cost-effective solutions for consumers that are not "one size fits all," but are skillfully tailored to meet specific needs for non-standard risks.

Risks typically written in the surplus lines market fall into three basic categories:

1. non-standard risks, which have unusual underwriting characteristics;
2. unique risks for which admitted carriers do not offer a filed policy form or rate; and
3. capacity risks where an insured seeks a higher level of coverage than most insurers are willing to provide.

Although surplus lines insurers are "non-admitted," that does not mean they lack regulation. Each surplus lines insurer must be admitted (licensed) in one of the 50 states and must meet that state's financial solvency requirements. The state of domicile becomes that insurer's regulator.

Surplus lines companies are able to offer special coverages because they are largely free of rate and form restrictions that make it difficult for standard companies to write the risk. Their flexibility allows them to design policies that meet unique customer needs.

Talk to Us

Sometimes a small change in your business strategy creates a need to access the surplus lines market. For instance, if a contractor installs kitchen cabinets in rental apartment buildings, he probably buys liability coverage in the standard market. However, if he takes a similar job for condominiums, he may need surplus lines liability coverage. Why? Because his potential liability is greater. If there were a construction defect, the contractor could be sued by each condo owner, rather than just one building owner.

If your business activity has changed, give us a quick call, and we'll let you know if we need to make any adjustments in your insurance program.

What Does Surplus Lines Cover and How Do You Buy It?

Surplus lines insurers handle a broad range of business risks. These are some examples of the types of risk commonly insured by excess and surplus lines insurers:

- A developer re-building homes and businesses in a hurricane-prone area
- A new business, especially in an industry that has frequent claims, such as roofers and pawn shops
- A sports or media celebrity who wants to insure against an injury that could jeopardize their future earning capacity
- A school district building a new high school
- A nonprofit that seeks to provide food, medical care and education in Third World countries
- A research lab working on a promising, yet unproven new drug
- A law firm specializing in intellectual property work.

Accessing Specialty Markets

Surplus lines companies sell their products through special brokers — called surplus lines brokers or wholesalers — and through managing general agents (MGAs). MGAs (which can be individuals or business entities) hold "appointments" from insurance companies, which give them the authority to solicit insurance applications from agents and negotiate coverage. MGAs generally specialize in particular types of risks and know which insurers are most likely to accept your risk.

The end customer has no direct access to those agents or to the non-admitted market. The good news is you do not need access. When we learn that you have an unusual risk, we discuss it with you and then contact the appropriate wholesaler or MGA to obtain the coverage you need.

Regardless of your special risk exposures, the process of finding the right coverage is largely invisible to you. We place the coverage and you receive a policy, just as you do with your standard property/casualty insurance.

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