

Risk Monitor



Workers' Comp Alone May Not Fully Protect Your Business from Workplace Liability

Workers' compensation is designed as a trade off between the interests of employers and injured employees. In most circumstances, employers receive immunity from lawsuits by workers who are injured on the job or the survivors of those who are killed in work related events. In return, injured workers are not forced into an unpredictable system of lawsuits with long waiting periods for damages and no guarantee of compensation. They receive medical expenses and compensation for lost wages, or when work-related injuries or disease lead to death. Benefits are guaranteed to the worker's survivors.



For the most part, the system works just as it was designed. There are a few exceptions, however, when courts allow workers who have on-the-job injuries or occupational disease, or their survivors, to pierce the employer's immunity and file a personal injury lawsuit. As workers' compensation is a matter of state

law, the rules as to when courts permit these lawsuits will vary somewhat from state to state. Most importantly, they will be based on the unique facts of each case. Nevertheless, there are general circumstances that make courts more likely to find in favor of an injured worker, or his or her survivors.

The key issue the courts usually consider is whether the employer intentionally created a situation that would be, in the words of one court, "substantially certain" to lead to a worker's injury or death. On this basis, an Oregon court held that an employer could lose its workers' comp immunity by ordering an employee to perform a task that the employer knows is unreasonably dangerous, such as doing work without safety equipment, and thus is substantially certain to cause injury.

If evidence exists verifying the employer knew it was substantially certain employees could be seriously injured or killed, and then deliberately concealed the information from them, the courts are even more likely to permit an injured employee to sue. This is what happened with companies that manufactured or installed asbestos. Ordinarily, workers' compensation would have been the employees' exclusive remedy for lung disease and cancer caused by working with asbestos. But in some instances, workers were able to show that the employers had known about the diseases and nevertheless told them there was little risk or need for safety precautions.

In another example, a Florida employer occasionally and deliberately shut off a workplace ventilation system and misrepresented the potential harm of toxic fumes and the need for safety equipment. The court ruled that due to the employer's deliberate misrepresentation, injured employees were not limited to workers' compensation as their exclusive remedy, but could

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Welcome to the Corcoran Havlin Insurance Group Risk Monitor Newsletter.

This edition of the newsletter is primarily focused on Workers' Compensation issues. There is also an article on Disaster Recovery planning that may be timely based on the upcoming hurricane season. As always, do not hesitate to contact us if you have questions or if we can be of any assistance.



The Corcoran Havlin Sales Team; from left Jack Keefe, President; George Doherty, Executive VP; Mark Sawyer, Vice President; Rick Weden, Vice President; Ronald Long, Account Executive.

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Do You Have a Disaster Recovery Plan?

Hurricanes. Tornadoes. Floods. Natural disasters can shut the doors of a business for days, weeks or even months. For some small business owners, the inability to recover quickly can spell a death knell. Having a disaster recovery plan in place can make the difference between going forward and going under. It can help to bring organization to an otherwise chaotic situation.

Assess your needs

A disaster plan begins with assessing your needs. Your insurance agent can review your business and determine what you need to cover loss of net income, any continuing operating expenses that would have to be paid while the business was closed, and extra expenses incurred after a disaster.

Organize important documents

Having all the information you need in one place will save you precious time in the face of a disaster. The documents and information you should safeguard will depend on the type and size of your business. You need to assess what information is critical. The nature of your business may make off-site backup of computer files imperative, for example.

The standard business owners' insurance package includes business income insurance, which covers loss of business income should operations be interrupted. In the face of a loss, you will need, among other things, to provide financial information to your insurance company. These records enable an adjuster to estimate what your profits might have been if your business had not been closed.

Generally, copies of documents you should have ready include items such as:

- Insurance policies
- Bank account numbers
- Historical sales records
- Most recent income tax forms
- Inventory
- Leases

Also, make a list of contact names and numbers of the people you would have to contact. These would include, for example:

- Insurance agent
- Landlord
- Banker
- Accountant
- Creditors
- Suppliers
- Employees
- Customers
- Utilities
- Cleaning service

Prepare an evacuation plan

An evacuation plan ensures that you and your employees know beforehand how to proceed in the face of an emergency. This would include preparations to safeguard equipment and files, and/or shut down facility operations. Discuss your

emergency plan with your employees and have assignments in place so that they know what is expected of each of them. Post a copy of your evacuation plan where employees can easily refer to it. Also prepare a step-by-step list of procedures required to resume operations.

Safeguard your documents

Off-site storage of important information is essential. Put copies of your documents, evacuation procedure and contact list together in a safe location, with a duplicate set in another location in case one file is destroyed.

When disaster strikes

Should you fall victim to a disaster, call your insurance agent immediately to report the loss. Provide your policy number and a description of the damages. Your agent can explain your coverage and provide guidance on how to proceed with your claim.

Remember that you are responsible for the safety of employees, customers and anyone else who enters your business whether or not you own or lease the property. If you own the building in which your business is located and it has been severely damaged, you may need to have it inspected to ensure it is safe for occupancy. If you lease the property, work with the owner to get the building inspected.

Photo or videotape damage to property, equipment, inventory, etc. to document the loss. Also, make temporary repairs necessary to prevent further damage – covering holes in a roof or boarding up broken windows, for example. Cleanup should begin once you get authorization from local authorities and your adjuster.

Provide your adjuster with the financial information needed to determine your net business income loss and continuing operating expenses – historical sales records, income and expense information (which you should have in your disaster recovery file). If you have extra expense coverage, document the extra expenses you incur in the process of resuming operations. These would include, for example, temporarily leasing another location, renting equipment until yours is repaired or replaced, and moving expenses.

An extended period of indemnity clause can protect you from losses for a period of time after your business reopens. As often happens in a disaster, returning to previous income levels can take longer than expected even if a business is able to reopen relatively soon.

Start today

Don't wait until disaster strikes. Find out what your business income insurance needs are now and put a plan in place to



Understanding OSHA Illness & Injury Recordkeeping Requirements

In 2003, the most current statistics available, occupational injury and illness rates declined once more to 5.0 cases per 100 workers, thanks in great part to continuing efforts by OSHA to identify and correct hazards in the workplace. OSHA is able to recognize workplace hazards by thoroughly tracking workplace injuries, illnesses and deaths. Stringent requirements have been in place for record keeping of work-related illnesses and injuries since 1971. To remain compliant and help OSHA continue to reduce workplace accidents and illnesses, it is crucial that employers understand their record keeping responsibilities.

First, a company must know whether they are required to keep records of work-related accidents, injuries, and illnesses. Small businesses with 10 or fewer employees are exempt unless they are selected by OSHA or the Bureau of Labor Statistics to be involved in a mandatory data collection. Some low-hazard classified industries in the retail, service, finance, insurance and real estate sectors, are also exempt. A full list is available at www.osha.gov. However, when a worker is killed on the job, and/or three or more workers are hospitalized, all employers covered by OSHA, including those who are exempt for the above reasons, must report to the agency within eight hours.

Secondly, it is crucial to know that work-related is defined as an event or exposure in the work environment that caused or contributed to the condition. Injuries and illnesses are reportable even if an employee has a pre-existing condition that was significantly aggravated by a situation that occurred in the work environment.

To accurately follow OSHA's record keeping guidelines, companies must know how to identify which work-related illnesses or injuries are reportable. Those that result in death, loss of consciousness, days away from work, restricted work

activity, job transfer or medical treatment, beyond first aid, must be reported. Furthermore, employers must report any significant work-related injury or illness that is diagnosed by a licensed health care professional including work-related cases involving cancer, chronic irreversible disease, a fractured bone or a punctured eardrum. Visit www.osha.gov for a full list of criteria that also includes any needle stick injury or tuberculosis infection.

Though companies are not required to routinely submit their incident reports, they are expected to vigilantly record them as OSHA conducts random site visits and could otherwise request them at anytime. There are three key required forms:

- 1. Injury and Illness Report (Form 301)** This form details the incident and must be filled out within seven calendar days of learning that a recordable work-related injury or illness has occurred. It must be kept on file for five years following the year to which it pertains.
- 2. Log of Work-Related Injuries and Illnesses (Form 300)** This form is a running list of all work-related injuries and illnesses. Employers must keep a log for each worksite.
- 3. Summary of Work-Related Injuries and Illnesses (Form 300A)** This form totals the injuries and illnesses for the year and must be visibly posted at the worksite February 1 through April 30 of the year following the year indicated in the form.

Employers must know that their employees have the right to review their injury and illness records and that listing a case on the log does not mean the employer violated an OSHA standard or was at fault. All the appropriate forms and instructions for completing them are available at www.osha.gov.

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also sue. Similarly, a New Jersey court held that an employer lost the exclusive remedy protection of workers' comp when it removed the warning labels and safety devices from machinery.

Liability for concealment of risks can even be based on an employee's inability to read or understand warning labels or safety instructions, according to a South Dakota court. The court's ruling held that if the employer does not clearly explain the hazards and safety precautions so that the employees understand them, it might lose workers' comp immunity.

In certain cases, the employer can protect itself if it can show the worker fully understood the risks and decided to do the job anyway. In one case, a widow sued the employer after her spouse fell to his death on a construction job, arguing that the numerous citations the employer had received for failure to provide guard rails showed that the employer should be liable for her husband's death. But a Florida appeals court rejected

her claim, finding that the danger of working on an elevated construction site without a guardrail was, or should have been, obvious to an employee. Therefore, the deceased had chosen to accept the risk and the widow's exclusive remedy was workers' compensation benefits.

However, not all risks are obvious, and where they are not, courts are likely to find that the employer has a better understanding of the risks than the employee.

There is one other situation that almost always exposes the employer to potential lawsuits by injured employees: failure to maintain workers' compensation insurance. If the employer doesn't have insurance, injured workers or the survivors of those who die from job-related injuries have no barrier to filing a lawsuit, which can be a very costly proposition.

We can help you identify and manage potential risks, which may not be covered by your workers' comp policy. Give us a call today for more information.

Safety Incentive Programs – Do They Really Work?

The practice of rewarding or paying employees for not having workplace accidents is controversial. With hopes of reducing costly workers' compensation claims and improving the safety culture of their organization, companies are increasingly implementing safety incentive programs.

Professionals who support safety incentives believe they can be a healthy component of an existing safety program, to build interest in working safely, and thus reduce workplace accidents. They find it a valuable tool to show employees that they care about their workers' safety and believe that it can have lasting effects and improve morale. They also see that it dissuades exaggerated or false injury claims.

Those who discourage companies from implementing safety incentive programs often believe they are no more than a form of bribery. Because incentive programs do not involve a core change in existing procedures or conditions, this group fears they can actually create a negative safety culture that promotes underreporting of accidents. They feel they reward the wrong behavior because accidents are usually not intentional acts and do not only involve improper actions. Usually it is unsafe conditions and inadequate procedures that contribute to causes of accidents.

Even proponents see that a safety incentive program by itself does not constitute a corporate safety program. Employees cannot improve their safety record if they do not already have the training to know how to manage hazards and work safely.

When a company's safety program is not already functioning and effective, adding a safety incentive program could promote the underreporting of accidents as employees pursue rewards and, in group incentive scenarios, avoid being the reason why their fellow employees don't receive their rewards.

To be effective, a corporation's safety incentive program must be thoughtfully developed, launched and maintained. Generally these programs fail because of inadequate commitment from management

level staff or poor program administration. What is most important when considering an incentive program is that the company's existing program is strong and effective, that upper management is active in all stages of the program in a way that is visible to employees, that the program is well structured with goals and rewards tailored to the workforce and that communication about the program to employees is ongoing.



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