Managing Risk

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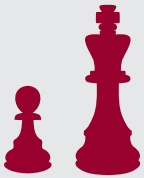

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Avoiding Pregnancy Discrimination Claims

The EEOC has had pregnancy discrimination on its radar screen for a while. A Supreme Court case, *Young v. UPS*, will likely bring more attention to the issue.

Many laws and regulations affect pregnancy and discrimination, disability, leave and accommodations. With women now comprising 47 percent of the U.S. labor force, at some point your HR department will likely have to determine how they apply to one of your employees.

The Pregnancy Discrimination Act (PDA) of 1978 extended protections under Title VII of the Civil Rights Act of 1964 to women who are pregnant or have related medical conditions. This makes employment discrimination based on pregnancy, childbirth or related medical conditions a prohibited form of sex discrimination. The PDA applies to all areas of employment: from hiring, to determining promotions, to qualifying for benefits and to allowing accommodations for pregnancy-related disability.

What Employers Need to Know

You probably already know that you cannot take "adverse employment actions" against an employee due to her pregnancy or possibility of becoming pregnant. That includes firing or failing to promote, and failure to hire someone on the

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Risk Tip

As this issue went to press, Congress hadn't reauthorized TRIA, the Terrorism Risk Insurance Act of 2002. Unless extended, the federal terrorism insurance backstop TRIA created will expire on December 31. What does this mean for your workers' compensation program?

By law, workers' compensation must cover all injuries your employees sustain at work—even if caused by terrorism. The terrorism events of September 11, 2001 caused workers' compensation claims costing at least $1.8 billion…and growing. Since 9/11, insurers have classified businesses with many employees in a single building in a major metropolitan area as high risk, along with businesses that have a concentration of employees in or near a "trophy building."

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basis of pregnancy (or the possibility of becoming pregnant).

But you might not know some of the other actions that the EEOC considers discriminatory. Here's a partial list from a recently issued EEOC guidance:

Light-Duty Work:

- An employer must provide light duty, alternative assignments, disability leave, or unpaid leave to pregnant workers if it does so for other employees with a similar ability or inability to work.
- An employer may not limit a pregnant worker's access to light duty based on the source of impairment (e.g., it cannot limit light duty to employees with on-the-job injuries).
- However, if an employer's light duty policy restricts the number of light duty positions or the duration of light duty assignments, the employer may lawfully apply those restrictions to pregnant workers, if it applies the same restrictions to other workers similar in their ability or inability to work.

Job Restrictions: an employer cannot restrict a pregnant woman from certain job duties, such as working with hazardous chemicals, unless it also restricts non-pregnant employees. This applies even if the employer is trying to avoid fetal injury and has the employee's best interests at heart.

Leave:

- Employers cannot compel an employee to take leave because she is pregnant, as long as she can perform her job. However, they must allow women with physical limitations resulting from pregnancy to take leave on the same terms and conditions as other similarly situated individuals.
- Employers cannot require employees disabled by pregnancy or related medical conditions to exhaust their sick leave before using other types of accrued leave, unless they impose the same requirements on employees seeking leave for other medical conditions.
- Employers cannot impose shorter maximum leave periods for pregnancy-related leave than for other types of medical or short-term disability leave.
- Title VII does not require or allow an employer to provide more favorable leave terms to pregnant employees than it does for other employees. For example, an employer cannot provide six months' paid parental time for mothers to bond with their new babies if it does not also provide similar benefits for fathers.

Disability/ADA Accommodations: Pregnancy on its own never creates a disability that triggers an employer's responsibilities under the Americans with Disabilities Act (ADA). However, if an employee develops a pregnancy-related disability, you must treat her the same way you would any other disabled worker. That means providing "reasonable accommodations" that allow her to continue to work. It also means allowing—but not requiring—pregnant employees to use leave available under the Family and Medical Leave Act (FMLA) and other leave laws.

TRIA provides reinsurance that will kick in once insurers pay $100 million in a year for losses due to a "certified terrorist act" (as determined by the U.S. State Department). In other words, private insurers would pay the first $100 million of terrorism losses, but after that point, the federal government and insurers would share in the cost of paying terrorism-related claims. Without TRIA's protection, insurers may have to increase premiums dramatically to cover terrorism-related claims. For information, please contact us.

Do You Have the Right Kind of Insurance?

Because employment law is always changing, it makes sense to protect your organization with employment practices liability insurance, or EPLI. Your commercial general liability or business owner's policy excludes coverage for employment-related actions. EPLI coverage fills this important gap. It covers your legal defense costs if an individual brings a discrimination or other employment practices claim against the firm, plus any legal settlements.

Buying EPLI coverage also gives you access to expertise that smaller firms usually lack. When you file a claim, your insurer will assign an attorney who has expertise in that type of claim to your case. This will help bring your case to resolution sooner, so you can get back to business.

For more information on EPLI, please contact us.

Covering the Forgotten Workers

In certain circumstances, the basic workers' compensation policy will not provide coverage for a worker's injuries. This could leave your company on the hook for a costly workers' compensation claim.

Out-of-State Coverage

Did you know that an employee injured in another state while on business may be able to elect to receive benefits in that state if…

- The injury takes place there
- The employee's principal place of work is located there
- The employee entered into a contract of employment there
- The employee lives there
- The employee is principally located there.

Although the typical workers' compensation policy provides out-of-state coverage, it provides only the level of benefits required by state law. If an injured employee opts to receive benefits in another state, you might have a coverage gap if that state provides more generous benefits.

Further, the typical policy limits out-of-state coverage to employees "who are hired in (state) and…temporarily working anywhere outside of (state) on a specific assignment." This disqualifies telecommuters who live outside the state or who are working outside the state on a more permanent basis.

Finally, failure to have coverage in the state of injury may void the "exclusive remedy" protections of the workers' compensation system. This risk increases if your employee is working out of state on a more permanent basis. With the "exclusive remedy," an employee foregoes the right to sue in exchange for receiving medical treatment and lost time benefits guaranteed by state workers' compensation law. If the exclusive remedy doesn't apply, an employee may file a civil lawsuit against you for his or her injuries.

Do You Need "Other States Coverage"?

Other states insurance will meet your workers' compensation obligations under the workers' compensation law of any state listed in your policy's declarations page. It does NOT apply to Ohio, North Dakota, Washington and Wyoming. These states have a state-controlled workers' compensation plan and prohibit private insurers from writing mandatory workers' compensation coverage in their borders. It also does not apply to Canadian provinces. To obtain coverage for these areas, you need an "extended protection endorsement."

Some workers' compensation insurers (particularly smaller ones) have licenses in only one or a few states. Your insurer cannot pay your employees directly for a claim if the injury occurs in a state for which your insurer lacks a license. To protect your business, you can ask the insurer to word your policy so that it will reimburse you for any benefit payments you have to make.

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Finally, consider the risks involved when an employee travels overseas for work. Courts have often ruled that an injury or illness that an employee suffers while on short-term assignment away from home—even if he or she is not working when it occurs—is work-related. But a basic workers' compensation policy will probably not cover this type of claim. A foreign workers' compensation policy will. Although no law requires employers to provide this coverage, you risk paying medical and lost-time costs out of pocket if you do not have coverage and a traveling employee becomes injured. Consider the fact that medical evacuation alone can cost more than $50,000, and a complicated case as much as $250,000. Buying coverage makes good financial sense!

Volunteer Coverage

Most states do not require nonprofit organizations or public agencies to provide workers' compensation coverage to unpaid volunteers. But some organizations opt to provide coverage, for several important reasons. Some feel a moral obligation to provide protection to their valued volunteers. This can affect morale: volunteers who have coverage know they will not have to pay medical expenses out of pocket for any injuries occurring from their volunteer work.

Covering volunteers as employees can protect your organization from litigation in ambiguous cases, as when a worker is sometimes paid and sometimes unpaid. Finally, without the "exclusive remedy" of workers' compensation, an injured volunteer can sue your organization in court, creating a much larger risk exposure.

If your nonprofit organization chooses to cover volunteers, your board of directors or other governing body must first adopt a resolution to provide this coverage. If your workers' comp carrier won't cover volunteers, you might want to provide volunteers with accident and medical insurance…and be sure to have adequate limits on your commercial general liability policy.

An analysis of your workers' compensation risk exposures could turn up other potential coverage gaps. Please contact us for more information. ■

Understanding Your Property Policy

Understanding the who, what, when, where and how of your coverage can ensure you have the coverage you need.

Who

Business property policies cover real estate and personal property owned by the "named insured." The policy lists this person or entity on the declarations page, located near the front of your policy packet. Be sure to review your policy to ensure your organization's name and address are listed correctly.

Tip: When a business is involved in an acquisition, merger or sale, the other entity's coverage does not automatically apply. Many business insurance policies have non-assignment clauses. These prevent a policy owner from transferring coverage to another person or entity without the insurer's written consent. Any sale, acquisition or merger creates new risk exposures, so please contact us for a policy review.

Tip: Your property policy also provides some coverage for the personal property of others on your premises. This could include property of others in your care, custody or control, such as for storage or repairs. It can also include leased personal property, such as equipment, that you have a contractual responsibility to insure. It also includes the personal effects

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and personal property of employees in or within 1,000 feet from your "described premises." Coverage for employees' personal property applies only after the employee's own insurance has paid for any loss or damage.

Older property policies usually provide only actual cash value coverage on the personal property of others. Actual cash value equals the current value of an item, or its value minus depreciation. Replacement cost coverage will pay the cost of replacing lost or damaged property with something of a comparable kind and quality, with no depreciation. Replacement cost coverage costs more, but your claims settlement will be higher.

What

The standard commercial property policy covers both real property (buildings and structures) and personal property. It limits coverage on structures to the building on "described premises" and any structures within 1,000 feet of the "described premises." This can include additions; permanently installed fixtures, machinery and equipment; and equipment and other personal property used to maintain or service the premises.

Tip: Standard policies exclude coverage for structures such as paved surfaces, retaining walls, foundations; underground pipes, flues or drains; fences and antennas. It also excludes certain types of personal property, including "valuable papers" (bills, currency and securities), electronic data; trees, shrubs and plants; fragile articles; and valuables such as jewelry, watches, furs and precious metals. You can buy specialized coverage for many of these items.

When

Your policy will cover any scheduled (listed) real and personal property from damage that occurs during the policy period.

Tip: Your policy will cover newly acquired or constructed property for a maximum of 180 days after acquisition or construction. To ensure coverage after that, you must notify your insurer to add (schedule) coverage. The 180-day coverage limit also applies to your personal property at newly acquired or constructed buildings.

Where

Your policy protects your covered personal property, no matter where it is located. It even covers personal property at "other locations," defined as more than 1,000 feet from the "described premises."

Tip: Your property policy will also cover personal property in transit. This coverage applies if your property is in vehicles owned, leased or operated by you, or in the custody of a common carrier, contract carrier or registered mail carrier. It does not apply if you are transporting cargo for a fee.

How (Much)

The most your policy will pay for loss or damage is the "limit of insurance" noted in the policy declarations. The limit applies "per occurrence," or covered incident. After a covered claim occurs, you'll pay the deductible amount out of pocket, then your insurer will pay the remainder of the claim amount, up to the policy's limit.

Tip: Property policies pay claims on either an actual cash value or a replacement cost value basis. You'll receive more at claim time if you have a replacement cost policy. As we discussed above, replacement cost policies give you better coverage. Even with a replacement-cost policy, policy limits still apply.

If you insure your property on a replacement cost basis, the insurer will penalize you if you underinsure it. Standard policies require insureds to insure their property to at least 80 percent of value. If your coverage doesn't meet that insuance-to-value ratio, the policy will pay any loss on an actual cash value basis instead.

For example, if you have a building and contents worth $1 million, you should have at least $800,000 in coverage. Although you meant to update your policy limits, you never did… and your policy has limits of only $600,000. A fire destroys everything. The insurer will penalize you by paying only the actual cash value of your lost building and personal property, up to the $600,000 limit. That oversight could cost you hundreds of thousands of dollars.

We can help you review your property coverage to ensure you have the coverage you need, when you need it. For more information, please contact us. ■

How to Handle a Fraud Investigation

If you suspect a workers' compensation claimant might be committing fraud or malingering, contact your claims adjuster with any evidence. He or she will likely contact the claimant's treating physician to get additional information on the claimant's condition and physical limitations. If those inquiries are inconclusive, he or she might bring in an insurance investigator.

If warranted, an investigator may covertly watch the claimant to see if he or she does activities that would be ruled out by the claimed injuries. Any investigation can create privacy concerns if not handled appropriately:

- Use an investigator with experience in handling workers' compensation cases. A licensed professional should know the applicable state and federal privacy laws, which will help you avoid claims you invaded your employee's privacy.
- Be clear what you want the investigation to determine. For a workers' compensation claim, you would probably want the private investigator to determine whether an employee is working for pay while supposedly disabled or doing activities that would be proscribed by his/her condition, such as playing golf while out of work with a slipped disk.
- Determine your budget. Surveillance can be time-consuming and costs can quickly add up. Weigh the cost of the claim with the likelihood of finding usable evidence of fraud in determining how much you want to spend.
- Know what an investigator can and cannot do. An investigator can generally make video recordings in a public location, but many states prohibit the "installation or use of any device for photographing, observing or overhearing events or sounds in a private place without the permission of the people photographed or observed." (New York, New Jersey and Pennsylvania are not among them.) (Source: *The Beacon Bulletin*, www.beaconbulletin.com) Of course, trespassing laws would apply to investigators. ■

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