

Managing Risk



www.zinn.com

Myerstown Office:
16 East Main Avenue
Myerstown, PA 17067
717-866-5717

Lebanon Office:
761 Poplar Street
Lebanon, PA 17042
717-272-6693



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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.



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

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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 bil-

lion 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 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.

to *Business Insurance*.

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."

- ✳ 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." ■

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 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.

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. ■

6 Workers Compensation Regulation Trends to Watch in 2020

The expansion of presumption laws is just one of the predictions made by speakers at a recent workers' compensation conference.

Medical billing fraud, presumption laws, drug formularies, medical marijuana, magic mushrooms and opioids are expected to command the attention of various state and federal legislators in 2020, according to speakers at the recent National Workers' Compensation and Disability Conference in November 2019 in Las Vegas, Nev.

1 Medical Billing Fraud

The medical billing coding error rate in 2018 was 8.1%. While not all errors are related to fraud, many have a fraud element to them, including miscoding for lack of proper documentation and invalid diagnoses, up-coding to increase payouts, making up codes and mismatching services.

2 Presumption Laws

In many states, presumption laws, such as cancer presumption laws, exist to benefit first responders, such as firefighters, police officers and EMTs. They shift the burden of proof of medical causation so that the disease is "presumed" to be work-related in absence of compelling evidence to the contrary. These laws, thought by some to be more the creation of politics than science, are typically the largest cost drivers of workers compensation for public employees.

Now presumption laws are starting to expand into other industries and professions, such as fire truck mechanics, school teachers and jail guards.

One new trend, implemented in Georgia and Colorado, for dealing with public employees is to offer a lump-sum payout to offset medical costs rather than treating their occupational cancer or PTSD through the comp system.

3 Drug Formularies

More states are creating, refining and updating their drug formularies. Comp-Pharma estimates \$1.1 billion has been saved using drug formularies over the

past eight years, as a result of (1) specifying that only certain drugs should be prescribed, (2) using set time frames, (3) enforcing dosage limitations and (4) restricting dangerous interaction with other drugs.

4 Marijuana

There are several issues facing legislators throughout the country:

- * States continue to expand legal access, including looking to allow marijuana for all medical uses.
- * Research continues on medical uses and side effects.
- * States are reviewing the legality of home cultivation and deciding on open container laws.
- * Marijuana is still illegal at the federal level.

5 Magic Mushrooms

Petitioners and some legislators in several states, including California, Colorado, Iowa and Oregon, are trying to legalize magic mushrooms, psilocybin and ibogaine and ecstasy. While unclear about its use for treating anxiety and depression, research has

shown that magic mushrooms can be used successfully in smoking cessation programs.

6 Opioids

Prescribing rates for opioids have dropped, according to the CDC and the Workers Compensation Research Institute. The number of prescriptions per 100 patients fell from 81.3 in 2012 to 28.7 in 2018 while the cost of opioids decreased from 22% to 13% from 2015 to 2018.

Several state legislatures have bills pending relating to minimizing opioid prescriptions.

At the federal level, in the Senate's Judiciary Committee, the pending John McCain Opioid Addiction Prevention Act will "establish registration requirements for practitioners who are licensed to prescribe controlled substances.... Specifically, a practitioner must agree to limit the supply of opioids prescribed for the initial treatment of acute pain, as a condition of obtaining or renewing a registration through the Drug Enforcement Administration. An opioid that is approved and prescribed for the treatment of addiction is not subject to the limit." ■



How Does WC Coordinate with Social Security and FMLA?

Social Security. When a worker becomes eligible for both workers' compensation and Social Security disability insurance benefits, one or both of the programs will limit benefits to avoid making excessive payments relative to the worker's past earnings. According to the Social Security amendments of 1965, Social Security disability benefits must be reduced (or "offset") so that the combined totals of workers' compensation and Social Security disability benefits do not exceed 80 percent of the workers' prior earnings.

Reverse Offset Laws. Fifteen states, however, established reverse offset laws prior to the 1965 legislation to specify that they would reduce workers' compensation payments if the worker receives Social Security disability benefits. Legislation in 1981 eliminated the option for other states to adopt reverse offset laws, but exempted the existing 15 states that already had such laws in place:

Alaska, California, Colorado, Florida, Louisiana, Minnesota, Montana, Nevada, New Jersey, New York, North Dakota, Ohio, Oregon, Washington and Wisconsin.

FMLA.

The Family and Medical Leave Act of 1993 (FMLA) is a federal law that provides workers time off to attend to serious health conditions that make them unable to perform their jobs. The time off can also be used to allow employees to attend serious medical needs of immediate family members. Although employees on FMLA leave receive no pay during their time off, they have the security of knowing they cannot be fired while they are on leave.

In situations where both the FMLA and workers' compensation laws apply, employers must provide leave under whichever law pro-



vides the greater rights and benefits to employees. If an injured worker is eligible for workers compensation, an employer cannot require the worker to take time off under FMLA.

When FMLA and Workers' Comp Both Apply.

In addition, workers' compensation leave cannot be counted against a worker's FMLA leave entitlement. FMLA leave and workers' compensation leave can run concurrently if the reason for the employee's absence is due to a qualifying serious illness or injury and the employer properly notifies the employee in writing that the leave will be counted as FMLA leave. ■

