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THE INSURANCE NEWSLETTER

Winter 2015-2016

Here's a year-end wrap up of some significant developments that all businesses and employers should be aware of.

Wacky Weather

Florida passed a milestone this year as the 2015 hurricane season ended...it was the tenth year in a row without a major hurricane striking the state. The rest of the country has not been so fortunate; 2015 has been a busy year for extreme weather events.

Insurance industry sources report that insured losses from natural disasters in the United States in just the first half of 2015 totaled \$12.6 billion, well above the average in the first halves of the years from 2000 to 2014. Through November 23, here's the 2015 scorecard:

- Hurricanes: Atlantic storms, 11 named storms, 4 hurricanes (none in Florida);
- Severe thunderstorms: 38 events, 66 reported fatalities;
- Hailstorms: 5,358 total hailstorm incidents, peaking in June with 1,324 reported;
- Tornadoes: 1,166 total reported, 414 in May alone, 101 fatalities;
- Floods; numerous regional and localized in events plus two major events, May in Oklahoma and Texas, October in the Carolinas, 71 killed;
- Snow/freeze events: 11 winter storms and cold waves, Massachusetts with 3 feet of snow in places, February the coldest month of the year; winter weather the third largest cause of catastrophe losses for the year.

While not a specific weather event, climate warming trends have made the U.S. considerably drier. Resulting wildfires have been severe this past year, with 55,636 total fires reported and 9.8 million total acres burned, equal to the entire states of Massachusetts, Connecticut,

Rhode Island and part of New Hampshire going up in flames. This means 2015 is closing in on the record as the worst wildfire season ever, since such statistics have been kept; three of the worst wildfire seasons ever recorded have occurred in the past five years. Some places usually prone to these events escaped them this year, with Arizona, New Mexico, Texas, Colorado and even southern California avoiding catastrophic fires. Northern California, Washington, Oregon and Idaho, all affected by record drought, were hit hard. Two big fires were still being fought in December in Kentucky.

On a positive note, earthquake activity was low, a welcome note in an otherwise gloomy year for natural disasters. No locusts were sighted, either.

What lessons to take from this? There is no state in the U.S. that has avoided catastrophic natural events like those described above. Wherever you are, you're at risk for what seem to be increasingly unpredictable and severe natural events. And most are insurable.

Winter and Spring are busy times for many of these types of events. Give us a call if you would like to sit down and review your insurance program to make sure it will respond if something like these were to happen to you.

Marijuana in the Workplace

What a can of worms this is.

Twenty three states and the District of Columbia currently have laws legalizing marijuana for "medicinal" use; four states and DC have completely legalized marijuana for recreational use. Some medical marijuana laws are broader than others, with the medical conditions that qualify for treatment varying from state to state. If all this is not already confusing enough, many cities and local governments have passed their own versions of laws or ordinances that decriminalize the possession

of small amounts of marijuana held for personal use, or treat it at minimum as a misdemeanor that will earn a violator nothing more than a ticket. The direction of this trend throughout the country is pretty clear; expect to see more easing of marijuana laws as time goes on. Yet marijuana is not legal according to federal law. Its classified as a Schedule I drug because it is considered to have no “accepted medical use”. No producer of marijuana medicines in the 23 states that legalized the drug for medical use has sought or received FDA approval of its products. Doctors cannot prescribe it and pharmacies cannot sell it.

This creates some big headaches for employers. Here’s a short list of some of the most troublesome issues raised by increasing acceptance of marijuana use.

First, consider that marijuana is not like alcohol. Alcohol metabolizes relatively rapidly; except for serious abusers, a day after consumption alcohol’s effects are mostly gone, except for a possible headache. Workers in safety sensitive jobs can party on Saturday night and show up Monday morning ready and able to work safely. Marijuana’s effects linger much longer. The science is not settled but what research has been done suggests that the active ingredients only dissipate from the system slowly, and build up over time in the systems of habitual users. There is not much research on what lingering effect it has on users, but there appears to be evidence that some degree of impairment can linger for a period of time, resulting in measurable impairment and raising real concerns about the safety of such workers, and coworkers and members of the public around them.

Because of the way marijuana lingers in the system testing for it creates other issues. While alcohol can be tested for easily and reliably and degrees of impairment determined with some credibility, marijuana poses different problems. Unlike alcohol, no scientific measure of marijuana impairment has been established. Tests available will readily detect it, but can’t tell how recently it was used or if the user is impaired, or to what degree. A current or prospective employee that tests positive for marijuana could claim they used it legally (whether medicinally or recreationally) on their own time, and claim discrimination if you enforce any policy prohibiting it’s use.

Consider another complication: as mentioned, many state laws allow for marijuana use with a doctor’s order. Federal law, however, prohibits doctors from prescribing marijuana. Doctors can only write a recommendation for medical marijuana, which is different than a prescription. What does this mean? How can, and must, employers

accommodate medical marijuana use? Do you have to make reasonable accommodation? Must employers pay for employee’s medical marijuana if they are injured on the job? How can an employee claim to be legally using a drug he doesn’t have a prescription for?

More questions: Can employers fire employees for engaging in legal activities off the clock? Can employees use legal marijuana off the clock even if they may be impaired the next day? What if courts hold that failing a pre-employment drug test is no longer a valid reason to deny employment to applicants? Must employers pay unemployment compensation to employees fired for failing a marijuana drug test? If drug testing only reveals use of the drug but not degree of impairment, how can employers whose businesses involve driving or other safety-sensitive positions protect their workers and the public from injuries and deaths cause by stoned drivers? How can employers in legalization states comply with federal law that maintains marijuana is illegal no matter what states say? These questions, and others, are all still unsettled, and answers can vary from state to state.

So, what will all this cost employers? There are two sets of problems for employers, increased marijuana use and all the costs this brings to employers in the form of accidents, absenteeism, poor job performance and lost productivity, and uncertainty and costs from litigation arising from the questions raised above and others issues yet to emerge.

For the first, in jurisdictions where marijuana use has been legalized, managers will need to be educated in safety, job performance and productivity issues to deal with the first set of problems. Even where legal, employees are still required to show up for work on time and be fit and ready to work.

In terms of the litigation exposure, a well written employment practices liability insurance policy will be more important than ever. So far there has been no noticeable movement in the insurance industry to add any exclusions in these policies for claims arising from marijuana use. If that’s going to happen it will likely happen first in those states that have legalized it for recreational use, but even there, so far, so good. Its something we are keeping an eye on.

These issues, and others arising out of legal use of marijuana are just now beginning to be considered. It will be many years before answers are known, and new questions not yet contemplated are sure to arise.

Wage & Hour Lawsuits Hit Record Levels

Continuing with employment practices liability risks, wage and hour litigation has been a persistent and worsening problem for employers all over the country, and the news is getting worse. According to data from the Federal Judicial Center, the research and education agency of the federal judicial system, workers filed a record number of wage and hour lawsuits under provisions of the Fair Labor Standards Act (FLSA) during the federal fiscal year that ended Sept 30. The data indicates that employers are more likely to face wage and hour claims in federal court than any other form of employment related litigation. During the past decade these claims have increased in eight out of ten years; since 2000, wage and hour federal court filings has gone up by more than 450%.

What's driving this increase? There are a number of separate factors all combining to drive this type of litigation, but the root of the problem goes to the FLSA itself. Originally passed in 1938, its an old Depression-era statute created for a time when smokestack industries were characterized by work shifts that started and ended with the sounding of a whistle. As written the law is antiquated and ill suited to the modern workplace which is characterized by independent contractor classifications, joint employer relationships, stay-at-home and telecommuting jobs and other modern innovations, where application of the Act's mandates, grounded in a different time and reality, is often confusing and difficult.

And wage & hour claims are expensive. Most often they are class actions or multiple plaintiff suits, which drives up the cost. Actual damages per employee may be modest; legal fees and defense costs are usually the most costly thing about these claims. In addition to your own legal costs you may also have to cover your employees' legal fees because of attorney-fee-shifting provisions in wage and hour laws. The FLSA and many state laws also require employers in violation to pay "liquidated" damages and interest as well as the unpaid wages. Under the FLSA, liquidated damages are an additional 100 percent of the unpaid wages.

A cottage industry of litigation has sprung up here, with many plaintiffs attorneys actively client shopping. Strong enforcement of federal wage and hour laws, the potential for class action status and large damage awards have made wage and hour violations an attractive target for litigation. This is not good news for employers because, unlike with marijuana related employment litigation, most employment practices liability insurance

policies either totally exclude wage and hour claims, or if they do cover them have only some very low sublimit, perhaps \$50,000 or \$100,000, and for defense costs only. Some limited niche products may be available, but when they can be found terms are restrictive and premiums are very expensive.

Bottom line, these types of claims are frequent, very expensive, and probably not covered by your EPL policy. This is an area where the best defense is to take a close look at your own policies and procedures to be sure you are in compliance with the law. If you're not, you could find yourself writing some big checks.

OSHA Fines to Increase in 2016

In another employment related development, OSHA fines are set to increase in 2016 for the first time in 25 years. A provision that allows OSHA to hike maximum penalties for violations by about 78 percent was added by Congress to the budget bill signed by President Obama on November 2. It also indexes fines to the rate of inflation, allowing for future growth. This change will be effective August, 2016.

Penalty money collected by OSHA goes to a general Treasury Department fund, not directly to OSHA, so they have no direct incentive to fine employers. Nevertheless, OSHA has long argued that fines have not been large enough to serve as an incentive for compliance and actually effect change in employer behavior, and that many employers just treated them as a cost of doing business.

OSHA publishes information on fines on their website. As of December 1, 2015, there had been 607 cases year to date nationwide that resulted in total initial penalties of \$40,000 or more, with total penalties adding up to more than \$55 million all together. For the mathematically inclined, that's an average penalty of over \$90,000, which would increase to over \$160,000 with the new legislation. Bear in mind, many of these are initial penalties, not all are final, and employers can choose to contest them.

That could well happen more frequently in the future. Some employment attorneys think businesses may be likely to view higher fines as a change by OSHA to an emphasis on penalizing, rather than cooperating with, employers to abate unsafe working conditions. In any event, with fines being increased so much employers may be more likely to fight a citation rather than go along with a reduced fine, and OSHA could find that it will be spending a lot more time in hearings.

And so could you. Word to the wise.

2015 Changes to Crime Policy Forms

As we have noted in the past the Insurance Services Office (ISO), the organization that drafts standard policy forms used by much of the property and liability insurance industry, revises its forms periodically. ISO introduced some changes to standard crime policy forms in November, 2015.

We talked last issue about social engineering fraud losses, where employees were induced to transfer funds to bad guys employing ruses or impersonating a person in authority. Insurance companies have been denying those claims since they did not fall within the scope of coverage in crime policies up to that point. ISO has now introduced

a new Fraudulent Impersonation Endorsement, which covers losses resulting from an employee being deceived by an imposter into transferring money, securities, or other property. It comes in two flavors, Fraudulent Impersonation of Employees and Fraudulent Impersonation of Customers and Vendors. In both cases, an option for verifying transfer instructions must be included on the endorsement. Verification can be required for all transfer instructions or only for transfer instructions in excess of the amount shown on the schedule. There is also an option that does not require verification of transfer instructions.

This is a worthwhile coverage enhancement, and cost for it should be modest. It does need to be tailored a bit; give us a call and we'll sit down and review this important coverage with you to make sure all your bases are covered.



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