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## THE INSURANCE NEWSLETTER

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### Elements of a Good Cyber Insurance Policy

The rate at which businesses are buying Cyber policies continues to escalate. Two main reasons for this are the unending stream of reports of breaches as cybercriminals find ways to attack even the largest, most sophisticated organizations, and the fact that insurance policies have evolved to a point where they offer real value in the coverage they provide, at prices that still remain reasonable.

Such policies are still often commonly called “cyber liability” insurance, a very misleading term. The word “cyber” suggests a technological hacking event, while “liability” suggests these policies are primarily liability policies. The more appropriate name for these policies would be “privacy breach insurance,” because the scope of coverage includes the loss of private information from almost any means, not just technology breaches or failures. And while these policies almost always include a liability coverage component, it’s the first party coverage for out of pocket costs that result from a breach that’s really caught buyer’s attention. Suffer a breach and you’ll start writing checks right away, and it’s nice to have an insurance policy to pay those bills.

We don’t need to dwell on the severity of privacy breach risk, all you have to do is read the paper. These threats continue to grow at an exponential rate, and cybercriminals are becoming increasingly sophisticated in their methods of attack. The problem isn’t just technology breaches; in 2015, nearly 50% of total breaches were the result of employee error, improper disposal of documents, lost equipment and other non-technological failures.

With all this, what should a cyber policy do for you? Here are some key coverages to look for in any good policy:

1. Forensics and legal costs: The first checks you’ll write

after a breach is for forensic services to figure out what happened and how bad the situation is, and legal services for advice on what laws apply and what you need to do to comply with them. These costs are the most frequently exhausted limits in a policy, so it is important to assure that limits of liability offered by insurance carriers for such coverage are adequate.

2. Public relations: Another early cost after the breach. An old bromide says “It takes a lifetime to build a reputation and ten minutes to ruin it.” If a data breach occurs, a good public relations team to help mitigate reputational risk associated with the breach can be an important investment.

3. Cyber extortion: cyber criminals steal private information for many reasons, but top of the list is their desire to figure out how to make money from it. They are getting ever more creative in how they monetize a data breach and ransom and extortion are increasingly popular with the bad guys. Ransom or extortion payments might be demanded to allow you to regain control of your internal servers or data that had been taken hostage or demanded to return stolen data. These costs can be heavy, sudden and unexpected; a good privacy policy will cover them.

4. Business interruption coverage: Security failures often lead to unforeseen business disruptions while your systems are down to identify or recover from a breach. Interruptions also come in different forms: denial of service attacks, deletion of critical files or secret installation of malicious software that causes systems to malfunction or fail. These can lead to interruptions that wreak havoc on day-to-day operations and lead to substantial additional financial losses, which a good policy will pay for.

5. Notification costs and credit monitoring: After all the other early and immediate costs from a breach you’ll come to this. Currently 47 states have breach notification

requirements that force companies to inform affected individuals of a data breach in a prescribed way. It's also become standard to offer free credit-monitoring services for at least 12 months following an incident. You may also need to set up a phone line or even a new website to provide affected individuals with answers to frequently asked questions. All of these damage control strategies require capital up front; costs associated with informing customers of a data breach can be substantial and should not be overlooked.

6. Fines and Penalties: When all the other dust settles you'll still be left with these. Many state and federal laws about privacy breaches provide for fines and penalties; the Payment Card Industry (PCI) has its own set of penalties. Unlike most other insurance policies privacy breach policies can cover these costs, which can be substantial. You likely won't be dealing with these right away, it takes a while for these to shake out, but you'll want to buy high enough limits so that after all the other costs of a breach are paid for you have some limits left over to pay for these.

At the end of the day you need to take every reasonable step to secure information you may possess, even if only briefly. Even so, experts caution there are only three types of businesses, those who have been breached, those who will be breached, and, worst of all, those who have been breached but don't know it yet.

Even with everything going on with privacy breaches, good, well written policies with meaningful coverages can be found at reasonable prices. We can help you with them.

## WC Waiver of Subrogation

We wrote a few issues ago about some of the problems encountered with contracts containing abusive indemnification provisions, and some solutions. Here's another similar problem sometimes seen in contracts, a requirement for a worker's compensation waiver of subrogation.

Subrogation is what happens when an insurance company pays a claim caused by the negligence of a culpable third party, then turns to them and attempts to recover the claims money they paid. The policyholder whose claim was paid had the original right to pursue an action against the at fault party, but once the insurance company pays the claim that right passes to the insurance company; they are said to be subrogated to their policyholder's rights.

Subrogation is common in auto and property claims,

but it's also allowed in worker's compensation in many jurisdictions; an insurance company that pays benefits for an injured workers claim could seek recovery from a third party whose negligence led to the work injury. At first glance it would seem sensible that a project owner or general contractor might want to seek protection from subrogation claims from the injured workers of their subcontractors and require a workers compensation waiver of subrogation in their contracts. On closer look, though, it's not clear that there is any real value to these requirements.

A WC waiver of subrogation does indeed eliminate the ability of an insurance company to seek recovery from a culpable party for money paid for a work injury claim. Here's the catch: parties to contracts can't waive or eliminate the rights of injured employees themselves to bring liability claims on their own behalf if their work injuries can be shown to be caused by negligence on the part of others, even if they have already been paid by worker's compensation. In a liability claim the employee can seek damages for pain and suffering, loss of consortium and other damages in addition to the lost wage and medical benefits that they already received through the worker's compensation system, so there is an incentive for them to pursue such claims. A waiver only bars the subcontractor's worker's compensation insurer who pays the claim from initiating a subrogation action and/or from enforcing a lien it might otherwise have on the employee's claim.

So think about this for a minute. Injured employees can still sue, but when a WC waiver of subrogation is present in a contract, the insurance company can't recover anything it might have paid the employee. Who wins? It's possible the only winner is the injured employee who might actually receive a double recovery if a worker's compensation lien does not have to be repaid from any judgement or settlement.

Who loses? The contracting party loses or at least doesn't win since the waiver did not have the desired effect of preventing the employee's negligence claim. The worker's compensation insurer loses because it's right of recovery was forfeited. The biggest loser is probably the subcontractor policyholder who:

1. Pays an additional premium to add the waiver of subrogation to its worker's compensation policy.
2. Faces a premium increase because the lack of a recovery on its worker's compensation lien inflates its loss experience.

3. Takes a double hit when its own general liability coverage is used to resolve its employee's third-party claim due to a likely indemnification provision in its contract.

Here's another point: many jurisdictions do give insurers an independent right to pursue subrogation if the injured employee opts not to bring a suit. In theory, a waiver could eliminate a third-party exposure by eliminating the insurance company's independent right. But considering this as a practical matter, it's pretty rare for an insurer to independently initiate a third-party worker's compensation subrogation claim. There will always be legal costs involved in pursuing subrogation, and of course there is no guarantee of recovery. The risk with these types of actions is even greater if they are undertaken without the cooperation of the star witness...the injured employee. And of course if the injured employee becomes involved in subrogation litigation he'll pretty quickly figure out it's to his benefit to pursue his own independent action, for the reasons cited earlier.

With all the hungry plaintiff's attorneys out there, chances are an employee with a reasonable case will have no trouble finding an attorney to take his case on a contingency basis, no money up front. Workers compensation insurers figured out pretty quickly that it made more sense to lay back, let the employee bring suit where appropriate with the plaintiff's attorney working on contingency bearing all the risk of litigation, and just attach a lien on the action. They get roughly two thirds of what they paid back (the attorney has to get paid) with no risk.

Except, of course, if there is a waiver of subrogation. Then the only winner is the employee, with his double recovery.

So why do it? With such questionable value, why are worker's compensation subrogation waivers so often required in contracts? Some culprits: General liability insurers look favorably on companies that obtain waivers from their subcontractors. It's a fairly standard question on general liability applications and the right answer can affect the insurer's appetite for the risk and the premium charged (underwriters are not always as smart as they think). Requesting waivers has also become a "best practice" for brokers, insurance advisers, and risk managers, who may be unwilling to have their competence questioned because they failed to follow an industry norm—even if the norm is largely pointless.

To summarize, it's generally advisable to resist worker's

compensation waiver of subrogation requirements whenever possible. The problem is that lower tier contractors may lack the leverage necessary to force the general contractor to drop this requirement. Unless their bargaining position changes for the better, subcontractors will likely need help from state legislatures or will need to mount court challenges to rid themselves of the waiver of subrogation requirements that they now face.

## Reporting Employment Liability Claims

We routinely recommend Employment Practices Liability insurance for our clients. If you have employees you are subject to a myriad of employment related laws and regulations. The bigger you are, the more employees you have, the more onerous the regulations, and the bigger the chance of running afoul of one of them, or at least being accused of that. And that points to one of the key benefits of employment practices liability insurance. Even if you are blameless in the most mundane of complaints, the cost to defend yourself can be substantial. These policies pay not only for judgements or settlements, but for the cost of defense.

There is a catch (this is insurance, there is always a catch). These policies almost always have a provision requiring timely reporting of claims. What's a claim? That will be defined in the policy, but in general it's usually pretty broadly defined. Any written communication that makes a demand of almost any nature can be a "claim" for policy purposes. Any communication from a regulatory agency, like the EEOC or local equivalent, is a claim. Even verbal demands or threats of litigation can be considered a claim. Why is this important? Let's say you get an EEOC notice about an employee complaint. You know the case is bogus, the employee would have no chance of prevailing based on information you have, and you just handle the issue internally, without noticing the insurance company. A few months later the case blows up, and you have a major claim on your hands. You report it to the insurance company. A few days later you get a letter, saying in effect, thanks but no thanks, you failed to comply with policy provisions and report this claim timely, you're on your own.

Sometimes claim declinations based on late reporting stick, sometimes they don't. Either way, it's an avoidable headache. You need to have a procedure in place to identify potential claims and report them promptly to the insurance company. Claims reported on a "record only" basis comply with policy claim reporting provisions, avoiding that problem. At the same time if they never develop into anything real, or close out for nuisance value within your deductible or retention,

the insurance company makes no payment and there is no adverse effect on your loss experience.

Employment Practices Liability policies are all non-standard policies, with each insurance company writing their own form, and terms and conditions (including claim definitions and reporting requirements) can and do vary. You need to understand what yours says, It's not difficult to establish a procedure that avoids problems in this area. We'll be happy to help you with that.

### **Family Health Insurance Tops \$17,000**

A recent Wall Street Journal article noted that the average cost of employer health coverage for a family plan has

passed \$17,000. The percentage rate of growth was low, only 4%, but over time that adds up. Of course there are wide variations from the average depending on the part of the country, plan design, size of employer and many other variables.

This is a newsletter about property and casualty risk and insurance so why mention this? Don't forget, you are also buying workers compensation insurance, and two thirds of the cost of WC claims is medical expenses. All of the same factors that impact medical cost inflation also affect the cost of WC medical benefits.

If you ever wonder why WC premiums seem to defy gravity, this is one big reason.



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