Leaderschoice INSURANCE SERVICES

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NEWSALERT

Your Insurance Policies

Be Sure to Tell Your Broker of Any Material Changes

ONE MISTAKE that many policyholders make is failing to notify their insurance broker about material changes that could affect their coverages for a number of different types of insurance.

Various events should trigger you to inform your carriers. And depending on the type of change, it could cut across different lines of insurance, like workers' comp and employee benefits.

If you have had any material changes recently, you should read this.

Workers' comp

Hiring new employees – While you don't have to notify your insurer every time you are hiring someone, you may want to consider it if you are adding a number of new staff in a short period of time.

Insurers will often conduct policy audits to catch changes in personnel and may send a notice to collect additional premium for the new hires. But if you don't want any surprises and risk misclassification, it's a good idea to reach out to your insurer about these changes.

Ownership changes – If you and your partners are claiming an exemption for workers' comp coverage as owners of the company, and if there is a material change – like adjusting corporate structure or ownership – you must file the correct documentation with your workers' comp carrier. Contact us, we'll get the correct documents filed.

This is critical if there is an ownership change in the middle of the policy year. If you don't notify the insurer and assume a new owner will be exempt like the one they replace, you could be in for a surprise.

If the carrier doesn't know about the change, it could treat the new owner as an employee and demand collection of back premium to the date they entered the picture.

In California, this is especially important now in light of recent legislation.

Before AB 2883 and SB 189 were signed into law, if an insurer discovered during final audit or midterm that a policyholder's entity had changed to a corporation from a sole proprietorship and the owner had previously been exempt from coverage, the insurer would simply endorse the policy with the corrected entity type and legal name and then exclude the owner again.

As a sole proprietor, the individual was not covered on the policy and, as the only officer of a corporation, the owner would still be eligible for exclusion.

Under the new laws, this is no longer possible. In order to exclude qualifying individuals from workers' compensation coverage, the organization must file a signed waiver from each of the qualifying individuals requesting to be excluded.

Insurers cannot backdate waivers. So, if there are ownership changes or structural changes to the entity type, the owners who want to be exempt from coverage must file new waivers with the insurer.

See 'New Car' on page 2

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Employment Practices

Gender Wage Discrimination Lawsuits Heat Up

WHILE THE #MeToo movement has spurred a new wave of sexual harassment lawsuits in organizations throughout the country, there is a parallel trend that is also gaining a foothold: unequal pay lawsuits based on gender or race.

Corporate defense lawyers have expressed concern that pay discrimination cases also seem to be on the rise as more women in particular are feeling emboldened, perhaps in part by the traction of the #MeToo movement. There is even a hashtag trending in social media for it as well: #EqualPayNow.

While some high-profile cases have made the headlines, there are thousands of smaller ones that never make the news.

Some recent high-profile cases

- A female employee sued Vice Media in February, accusing Vice of systematically discriminating against female workers by paying them less than male colleagues with the same job and same experience.
- Four ex-Google employees filed a revised gender-pay lawsuit after a court dismissed their earlier lawsuit in December 2017. This new suit more clearly defines who was affected by Google's alleged unfair pay practices.
- Oracle was sued for gender discrimination by three female engineers who allege they were paid less than men in similar roles.

The federal Equal Pay Act prohibits gender-pay discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort and responsibility.

The bar for proving wage discrimination is high. In 2017, the Equal Employment Opportunity Commission received 996 equal-wage discrimination complaints, a number that's held steady since 1997. Last year, 64% of complaints received by the EEOC were found to have "no reasonable cause" for action.

California acts

A new pay-equity measure took effect on Jan. 1, 2018 in California. The new salary privacy law prohibits employers as well as agents of the employer (headhunters and recruiters) from inquiring into or relying on a candidate's past salary history (compensation and benefits) unless certain circumstances have been met.

Candidates, however, can voluntarily disclose their past compensation. Additionally, employers can review and consider salary history information that is publicly available pursuant to state law.

The new law also requires employers to provide applicants, upon reasonable request, with a pay scale for the positions they seek.

What you can do

Wage discrimination cases can be difficult to prove because there are four affirmative defenses built into the Equal Pay Act. If there's a disparity in pay, an employer must prove that it's justified by one of the following:

- A seniority system
- A merit system
- A pay system based on quantity or quality of output
- Any other factor other than sex

While the first three factors are pretty straightforward, that last category makes cases difficult to prove. An employer may say that the higher-paid employee has more experience or training, or that he was simply a better negotiator.

The problem is that even if you lose a wage discrimination case, you will face substantial legal costs if sued. That's why your organization should have an employee practices liability insurance policy. EPLI policies will pay for defense costs should you be sued for wage discrimination. ❖

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If You Buy a New Car, Contact Your Insurer Before Driving It

Employee benefits

For employee benefits, you need to notify us of new hires or recent terminations within 30 days. Health insurers have strict rules for retroactive changes. Follow the guidelines when adding new employees to your company health plan.

Employees may leave a company and new workers may take their places. Dependants may change from time to time. As such, you need to periodically review the group health insurance plan to make changes to the number of people covered in the plan. You can contact us or your insurer when you need to make these updates.

Personal lines

If you've had renovations or purchased any expensive items that you should list on your policy to ensure they are covered, contact your insurer.

And if you purchase a car, contact the insurer before driving it.

Also, if you are accumulating more assets you may want to consider revisiting your life insurance policy as well, to see if you need to increase the limits as your net worth increases. ❖

Citation Ruling

OSHA Can Go Back More Than Five Years for Repeats

OSHA CAN look beyond five years to assess "repeat violations" when considering the penalties against an employer for breaching workplace safety regulations, a U.S. appellate court has ruled.

Repeat violations can be assessed at 10 times the amount of a safety violation, which makes the ruling a game-changer for companies who have been cited more than once, even if that citation was issued more than five years ago. It increases the stakes for employers who until now chose not to contest more routine violations because of the cost of defending them.

Under OSHA regulations, the maximum penalty for a serious violation is $12,934, but if it's not the first time OSHA has cited the employer for the infraction, the maximum fine balloons to $129,336.

Up until 2015, the agency would typically not look back more than three years when deciding if a violation was a repeat. But in 2015, OSHA changed that period to five years in the field operations manuals for its inspectors.

Despite those changes, the U.S. Second Circuit Court of Appeals ruled in February this year that the field operations manuals are not legally binding and that OSHA is not restricted from going further back than five years to establish repeat violations.

The court made the ruling in the case of a company called Triumph Construction Corp. that had been cited in 2015 for a repeat violation, and which OSHA had fined based on Triumph receiving a prior citation for the same infraction more than three years earlier.

Triumph challenged OSHA's authority to go back more than three years to establish a repeat violation, saying that doing so was "arbitrary."

But the court stated that the earlier guidance of three years and the new guidance of five years were not actually binding on the agency because neither the Occupational Safety and Health Act nor OSHA regulations actually set time limits on issuing repeat citations.

What you can do

The best option for employers is to make sure they are in compliance with all OSHA regulations in the workplace in the first place, and have all the required safety precautions in place to reduce the chances of workplace incidents.

For employers that have been cited before, it's of utmost importance that they continually pay special attention to safety issues for which they've already been cited. Now that this ruling has set a precedent, it could open up all employers to repeat violations no matter how long ago they were cited for the original infraction.

The law firm of Fisher Phillips, in a blog on the lawsuit, recommends that employers who may have been reluctant in the past to challenge a citation, should consider doing so if they feel they have a good-faith defense. If they are successful in fighting the citation, it cannot be used as the basis for a repeat violation.

"The cost-benefit analysis for contesting non-repeat citations has changed. If an employer previously believed that contesting a $12,500 serious citation was not worth the legal cost, the risk of being hit with a repeat violation $125,000 several years down the road may tilt the balance toward contesting those lesser citations," Fisher Phillips wrote.

The law firm said that employers should be especially vigilant about contesting citations that involve "a routine activity, task, or equipment where a repeat [violation citation] is more likely to arise in the future."

It also emphasized the importance of maintaining comprehensive records from prior OSHA inspections and citations and documentation about actions taken to fix the problem, in order to avoid citations for the same hazards in the future.

"This will hopefully prevent the issuance of a repeat citation, no matter what the repeat time period OSHA may attempt to enforce," the firm wrote in its blog. ❖

Workers' Compensation

Seven Return-to-work Mistakes to Avoid

ONE OF the keys to reducing the cost of a workers' comp claim is to get the injured worker back on the job as soon as it is physically possible without endangering their recovery.

A solid, well-thought-out return-to-work (RTW) program can reduce workers' compensation, disability and medical insurance costs, as well as strengthen morale and productivity.

RTW programs can protect employers from lawsuits alleging breaches of the ADAAA (Americans with Disabilities Act Amendments Act).

But there is a right way and a wrong way to return an injured worker back to the job. Kevin Ring, director of community growth for the Institute of WorkComp Professionals, says employers should avoid these mistakes:

1. Forgetting the ADAAA

Properly structured, a RTW program can decrease ADA exposure. The expanded definition of disability under the ADAAA has significantly increased the number of employees who are entitled to accommodations.

The definition is so broad that some labor law attorneys advise not to fight whether the employee is disabled, but to engage in a dialogue to find out the limitations and discuss accommodation possibilities.

The ADA supercedes state workers' comp laws, and therefore its directives provide the floor-level protection for disabled individuals. State workers' comp laws can provide more protection, but not less.

2. Insisting on full duty only

Insisting on a return to full duty increases workers' compensation costs and heightens the possibility that the injured employee will fall prey to "disability syndrome" – the failure to return to work when it is medically possible.

An individual's sense of self-worth and motivation often comes from the ability to be productive. Instead, find modified work for the injured worker who has not healed properly.

3. Not committing resources

Without a planned transition back to full productivity, employees will not build up the tolerance to resume full job duties. Also, the plan needs to deal with potential failures; not every injured worker will return to the pre-injury occupation.

The cost of implementing a program will vary depending upon industry, company size and injury history.

4. No transitional work

Both employer and employee fear of re-injury often hampers RTW efforts. This of course is a risk, but an even greater one is having the employee stay at home and become disaffected, thereby extending absence and driving up costs.

The right timeline and transitional process for an employee to return to work is best decided on a case-by-case basis. Use guidance from the employee, the treating physician and the employee's supervisor.

5. Letting the doctor guide RTW

Physicians often don't have essential information about workplace policies, job demands and the availability of transitional work. Moreover, if a physician's training is not specifically in the treatment of occupational injuries, they may instead focus on home rest alone.

6. Not focusing on end goal

The ultimate goal of RTW is to transition workers back to their pre-injury job. Whether it's a result of a poorly managed program, lack of knowledge or fear of violating a law, some employees remain in a reduced-productivity position too long, or indefinitely.

7. Believing settlements resolve other liabilities

Obligations under the various laws are reconciled separately. During settlement negotiations, close coordination is necessary between the company's legal, risk management and HR departments to ensure that each office is able to accomplish its mandate without compromising the employee's rights. ❖

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