Leaderschoice
INSURANCE SERVICES

Leaders News Alert

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Risk Management

Employees Responsible for 85% of Trade Secret Theft

TRADE SECRET theft by employees is a serious and growing problem in the U.S. According to an analysis of federal court cases, 85% of such theft is committed by employees or business partners.

There's been a significant escalation in the number of trade secret thefts over the years: cases doubled from 1988 to 1995 and again from 1995 to 2004, and they are on track to double yet again in the next few years.

Suits brought against former employees over restrictive covenant agreements jumped 60% in the 10 years ended 2013, according to a study by PricewaterhouseCoopers.

The law firm of Foley & Lardner LLP, which specializes in employer litigation, recommends the following to protect your company's secrets:

- **Identify your secrets** – Any confidential business information which provides an enterprise a competitive edge may be considered a trade secret. Trade secrets encompass manufacturing or industrial secrets and commercial secrets. Legally, you should know that different states define trade secrets differently, so you should familiarize yourself with your state's definition.
- **Limit access** – Restrict access to those who need to know. Have them sign a confidentiality agreement in which they:
  - Acknowledge receipt of material
  - Agree to keep material confidential

  - Agree to return the material when employment ends
  - Agree to advise you of the identity of their new employer and to make the new employer aware of the agreement
  - Agree to allow you to provide a copy of their agreement to a new employer
  - Acknowledge that forensic analysis may be done on their devices, such as computers and phones, when their employment ends
  - Acknowledge that irreparable harm would be done if they violate it
- **Use non-compete agreements** – Have employees who have access to your trade secrets and customer information sign non-compete and non-solicitation agreements.

You can customize the agreement to ensure it reflects the worker's role in the company, so you have a better chance of enforcing the agreement should it be breached. Do not use a "one-size-fits-all" form and don't have workers sign such agreements when there is no legitimate business reason.

- **Exit interviews** – Conduct interviews with staff who had access to trade secrets and:
  - Confirm in writing the obligations the employee has by contract, or otherwise by law, to keep confidential information confidential and, if applicable, not to compete or solicit
  - Confirm that all confidential material has been returned
  - Inquire about the person's next job
- **Forensic analysis** – Perform forensic analysis on computers and other devices of departed workers who had access to trade secrets to determine whether any thievery of trade secrets or other prohibited conduct occurred.

The takeaway

While the above steps are not foolproof, they can go a long way towards protecting your company's trade secrets.

Finally, in some cases, employee dishonesty insurance can help cover the costs of internal trade secrets theft. Call us for details. ❖

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Human Resources

Changes to California's New Paid Sick Leave Law

LESS THAN two weeks after it took effect, California's paid sick leave law has been changed with important amendments that affect most employers in the state.

The new changes took effect immediately upon Gov. Jerry Brown signing the fixer legislation to last year's Healthy Families Act of 2014. The new law gives employers some new flexibility in how they accrue paid sick leave.

To make sure that you stay on top of the new law and understand your responsibilities, the following are the main changes:

Employer standard

The old law: Under the original version of the law, if an employee worked in California for 30 or more days within a year from the start of employment they were entitled to paid sick days to be accrued at a rate of one hour for every 30 hours worked.

The new law: Now, an employee who works in California for 30 or more days within a year from the start of employment is entitled to paid sick days so long as the employee works for at least 30 days within the previous 12 months with the same employer.

Sick leave accrual method

The old law had one standard for calculating paid sick leave accrual, but the new law allows for other methods.

Under the amended law, employers may provide for employee sick leave on a basis other than one hour for each 30 hours worked, provided that the accrual is:

(1) On a regular basis, and

(2) The employee will have 24 hours of accrued sick leave available by the 120th calendar day of employment.

An employee is allowed to use accrued paid sick days beginning on the 90th day of employment.

Limiting sick day use

The old law: An employer could limit the employee's use of paid sick days to 24 hours or three days in each year of employment.

The new law: An employer may limit an employee's use of paid sick days to 24 hours or three days in:

(1) Each year of employment,

(2) A calendar year, or

(3) A 12-month period.

Grandfathered status

The new law gives employers more flexibility when accruing paid sick leave.

The law states that an employer may use a different accrual method, other than providing one hour per every 30 hours worked, provided that the accrual is on a regular basis so that an employee has no less than 24 hours of accrued sick leave or paid time off by the 120th calendar day of employment or each calendar year, or in each 12-month period.

But if employers changed their existing policy, the grandfathering provision does not apply. At that point, an employer has to comply with the accrual method above, or front load three days of paid sick leave at the beginning of each 12-month period.

This section does not prohibit the employer from increasing the accrual amount or rate.

'Pay' rates when sick

The new law prescribes options for employers to calculate the "pay" for sick leave under this law:

- Paid sick time for nonexempt employees shall be calculated in the same manner as the regular rate of pay for the work week in which the employee uses paid sick time, whether or not the employee actually works overtime in that work week.
- Paid sick time for nonexempt employees shall be calculated by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment.
- Paid sick time for exempt employees shall be calculated in the same manner as the employer calculates wages for other forms of paid leave time.

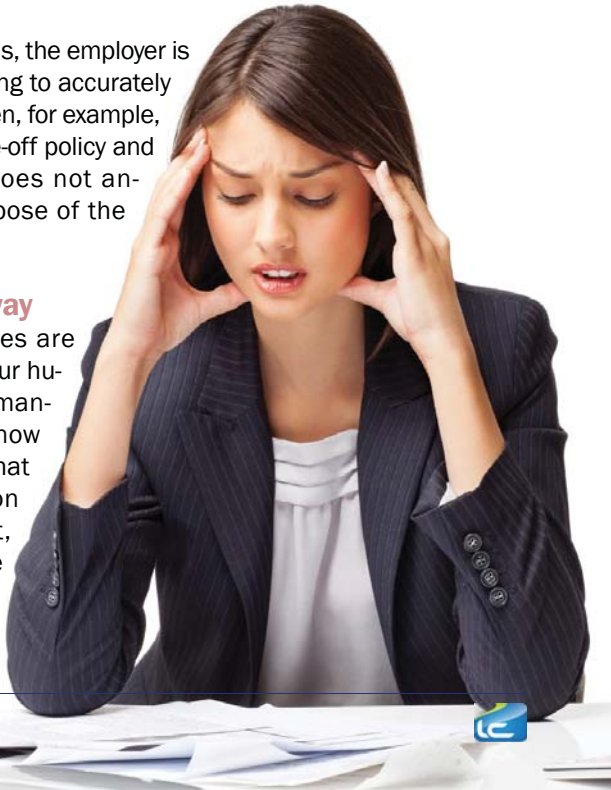
Reinstatement and sick time balances

Under the new law, employers are not required to reinstate accrued paid time off for an employee who is returning after less than a year of leaving their employer if they were paid for their accrued time off upon separation.

Record-keeping

The new law also clarifies that the employer does not have to inquire for record-keeping purposes why someone took paid time off.

Because of this, the employer is not liable for failing to accurately keep records when, for example, it has a paid-time-off policy and the employee does not announce the purpose of the paid time off.



The takeaway

These changes are important and your human resources manager needs to know about them so that your organization stays compliant, which reduces the chances of being sued by someone. ❖

Workers' Compensation

Many Small Businesses Can't Identify Claims Fraud

FRAUD EATS away at workers' comp costs for all businesses, but it hits small businesses the hardest as they may not have the resources to identify bogus claims.

According to a new study by workers' comp insurer Employers Holdings Inc., about 20% of small business owners are insufficiently prepared to identify workers' compensation fraud.

It's estimated that at least 10% of workers' comp claims are fraudulent and identifying those illicit claims would keep your workers' comp claims in check and reduce your workers' comp premiums.

Claims fraud happens when an employee tries to gain workers' comp benefits by falsely stating that an injury or illness occurred at work, or by exaggerating an existing injury or illness.

"Workers' compensation fraud ... can strain business operations, lead to higher insurance costs for businesses, and even undermine honest workers who are legitimately injured on the job," said Ranney Pageler, VP of fraud investigations at Employers.

The disconnect

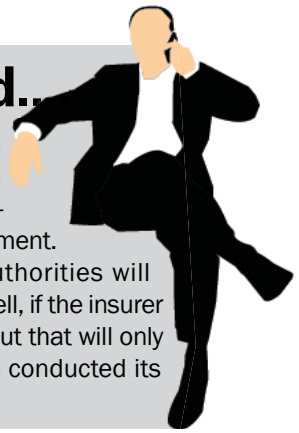
The study found that:

- 13% of small-business owners are concerned that one of their employees would commit workers' comp fraud by faking an injury or illness to collect benefits.
- 21% said they are unsure of their ability to identify workers' comp fraud.
- 24% of small-business owners have installed surveillance cameras to monitor employees on the job.

The strongest indicators of potential claims fraud noted by survey respondents include:

- The employee has a history of claims (58%).
- There were no witnesses to the incident (52%).
- The employee did not report the injury or illness in a timely manner (52%).
- The reported incident coincides with a change in employment status (51%). ❖

If You Suspect Fraud...



Employers who suspect a worker may be committing claims fraud should first alert the special investigations unit or fraud unit within their insurance company's claims department.

The appropriate law enforcement authorities will likely be brought into the investigation, as well, if the insurer deems that the claim may be fraudulent. But that will only happen after the insurance company has conducted its own investigation.

NIPPING FRAUD IN THE BUD

Investigator Pageler recommends that small business owners look for the following warning signs:

- Monday morning (or start of shift) injury reports. The alleged injury occurs first thing on Monday morning, or the injury occurs late on Friday afternoon but is not reported until Monday.
- Employment changes. The reported accident occurs immediately before or after a strike, job termination, layoff, end of a big project, or the conclusion of seasonal work.
- Suspicious providers. An employee's medical providers or legal consultants have a history of handling suspicious claims, or the same doctors and lawyers are used by groups of claimants.
- No witnesses. There are no witnesses to the accident and the employee's own description does not logically support the cause of the injury.
- Conflicting descriptions. The employee's description of the accident conflicts with the medical history or injury report.
- History of claims. The claimant has a history of suspicious or litigated claims.
- Refusal of treatment. The claimant refuses a diagnostic procedure to confirm the nature or extent of an injury.
- Late reporting. The employee delays reporting the claim without a reasonable explanation.
- Claimant is hard to reach. The allegedly disabled claimant is hard to reach at home and does not respond promptly to messages.
- Frequent changes. The claimant has a history of frequently changing physicians, addresses or jobs.

It should be noted that one of these indicators on its own may not be indicative of fraud, so don't jump to conclusions.

Human Resources Risk

Independent Contractor Classification Clarified

ON JULY 15, the U.S. Department of Labor (DOL) issued an administrator's interpretation regarding the application of the Fair Labor Standards Act with respect to the misclassification of workers as independent contractors.

The new interpretation is required reading for any business that uses independent contractors to any degree – often or seldom. It's also important as the government continues to crack down on companies that misclassify their employees as independent contractors, most recently evidenced by the decision that Uber drivers are employees, and not independent contractors.

The interpretation came after a ruling by the California Labor Commissioner's Office that a driver for the ride-hailing service should be classified as an employee, not an independent contractor. The ruling ordered Uber to reimburse a driver $4,152.20 in expenses and other costs for the roughly eight weeks she worked as an Uber driver last year.

The changes are not so dramatic, however, and the interpretation should give employers a good roadmap to use when designating employees.

Despite the last item on the list opposite, covering the degree of control the employer exerts over an independent contractor, the DOL actually de-emphasized it repeatedly in the interpretation. Up until this interpretation, degree of control had been a central part of assessing whether a contractor actually is an employee.

That said, because the agency is downplaying this now, it means that employers could be in for a few surprises and time will tell what factors are taking more precedence.

Ultimately, the goal of the "economic realities test" is to determine whether a worker is economically dependent on the employer (and is therefore an employee), or is really in business for him or herself (and is therefore an independent contractor). This new document should be your guidepost if you currently are using independent contractors or plan to classify someone as an independent contractor in the future. ❖

DOL's Interpretation

Some of the main points in the interpretation are:

- It is the DOL's unequivocal opinion that "most workers are employees," under the Fair Labor Standards Act.
- It fully embraces the "economic realities" test (explained below) as the DOL's preferred approach to determining whether a worker is an employee or a contractor.
- It downplays the significance of an employer's exertion of control over the tasks performed by the worker.
- It reinforces the DOL's pattern over the last several years of aggressively examining the classification of workers as contractors.

The "economic realities" test includes the following factors:

- The extent to which the work performed is an integral part of the employer's business;
- The worker's opportunity for profit or loss depending on his or her managerial skill;
- The extent of the relative investments of the employer and the worker;
- Whether the work performed requires special skills and initiative;
- The permanency of the relationship; and
- The degree of control exercised or retained by the employer.