

Risk Monitor



Private Companies Increasing Risk as Their Scope Widens

Competition is the name of the game in American business, and staying competitive means taking some calculated risks. Everyday, more privately held companies are choosing to take those risks by entering areas that were once considered the exclusive turf of large corporations. Of course, as these smaller players enter the arena of the big leagues, they find themselves part of another once exclusive domain of the large corporation – the liability lawsuit. Add workplace fraud and extortion to the mix, and you can't tell the players apart without a scorecard.

The existence of this brave, new world of small business is revealed in data presented by the 2005 Chubb Private Company Risk Survey. The data showed that 67% of the private companies surveyed are planning to enlarge the scope of their product offerings, while 20% plan to reduce employee benefits, 21% plan to eliminate workers, 18% plan to take on an outside board member, 27% plan a significant acquisition, and 31% plan to outsource some part of their operations.

Despite their newfound need to push the envelope, amazingly enough, 33% of private companies questioned do not plan to purchase any type of management liability insurance such as directors' and officers' liability, employment practices liability, fiduciary liability, errors and omissions, crime, kidnap/ ransom and extortion, and/or workplace violence. The two major reasons given for not obtaining coverage were that they didn't see a need, or they felt there was an extremely low risk of the company encountering a problem. High hopes aside, about two-thirds of the private companies responding to the survey had experienced some management liability situation within the past five years, primarily in the areas of employment practices liability, directors' and officers' liability and workplace crime. The 161 companies that admitted to having been a defendant in an employment practices liability lawsuit or Equal Employment

Opportunity Commission charge faced an average cost of \$1.1 million. Companies that were victims of stolen company funds, equipment, inventory or merchandise saw an average loss of \$348,000.

Most of the private companies polled indicated that they had tried to implement business practices that would mitigate risk from a liability lawsuit or crime:

- 9 out of 10 companies have a written policy regarding employment discrimination and sexual harassment;
- 73% have policies, procedures and training programs regarding loss prevention;
- 64% provide employment discrimination and/or sexual harassment training to their employees;
- Approximately three out of four companies use contracts in dealings with third-party clients;
- 71% use employee background checks;
- 44% have a written corporate governance program;
- 24% have implemented corporate governance rules under the Sarbanes-Oxley Act.

Despite their previously utopian outlook, many executives of these surveyed companies realize that they are entering into much more turbulent waters: 43% indicated concern about a possible lawsuit over termination, discrimination or sexual harassment in the year ahead. However, only 33% of these companies protected themselves by purchasing employment practices liability insurance. The unfortunate conclusions drawn from this data seem to show that companies most vulnerable to a liability lawsuit or crime are the least likely to purchase any type of liability coverage.

Several articles in this issue discuss the need for Directors & Officers liability coverage and Employment Practices Liability Insurance, if you haven't already purchased these coverages, we really encourage you to revisit your decision. We find the # offering coverage increasing and the scope of coverage less restrictive. Please feel free to contact your Agent or Customer Service Representative at 317-844-7759 for further discussion.

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Employers Paying the Price for Off-The-Job Injuries

Employers have spent the last few years putting more emphasis on workplace safety, to meet with the ever-increasing demands of safety-based regulations. According to the National Safety Council, their combined efforts have lowered workplace death rates 17% since 1992. However, while businesses have been working to keep their employees safer and healthier while on the job, their efforts have been thwarted by the rate of fatalities occurring off-the-job, which has risen 14% in that same period. Companies find themselves spending a great deal of money to cover injuries from accidents unrelated to the workplace.

Statistics gathered for 2004 indicate that twice as many workers (which translates to 6.8 million people) were seriously injured while they were away from work than were injured while working. There were 49,000 injury-related deaths in 2004 that involved workers, and approximately 90% of these happened during non-working hours.

During that same period, the cost of employee injuries, both on- and off-the-job, was over \$330 billion. Almost 60% of this figure went towards medical costs for injuries that occurred while employees were not at work. This translates to a \$200 billion loss by the companies in payouts to employees who didn't even qualify for worker's compensation. In addition, non-work related injuries caused employees to lose 165 million days of work time.

Compare that number with the 80 million lost workdays that resulted from actual workplace injuries.

The impact on business is even more significant than may appear on the surface. The Agency for Healthcare Research and Quality discovered that more money is spent on medical care to treat trauma and poisoning for people of working age than for any other health condition including cancer, heart conditions, mental disorders, upper respiratory conditions and asthma. In fact, the fallout from non-work related injuries on businesses is becoming so important that the country's first "Off-the-Job Safety Symposium" was held at Disney's Contemporary Resort in Orlando, Florida in early 2006. Businesses are beginning to understand the economic value of keeping their employees safe both on and off the job.

A survey of 1,300 companies conducted by the National Safety Council verified that businesses implementing off-the-job safety training programs are already realizing the benefit: 58% reported a drop in the number of employee injuries that occurred outside of work. Compare this to research presented at the 17th World Congress on Safety and Health at Work in the fall of 2005, which showed that every dollar businesses spent on safety instruction yielded \$3 to \$6 in savings in future health care costs, proving once again that prevention is the key.

EEOC Casting a Bigger Net to Catch Systemic Discrimination

Commissioner Stuart Ishimaru of the U.S. Equal Employment Opportunity Commission issued a stern warning to American businesses when he spoke at the Employment Practices and Fiduciary Liability Symposium sponsored by the Professional Liability Underwriting Society. He cautioned that the EEOC is shifting its focus from small individual cases to larger systemic issues, even some that will cut across entire industries. He added that the change in emphasis was the result of limited resources that were stretched too thin to fight all potential employment discrimination cases.

Commissioner Ishimaru also noted that the agency needed to choose its targets more carefully, especially in litigation. In order for the EEOC to change attitudes and deter bad behavior in employment practices, targets must be bigger than they've been in the past. To that end, the agency has adopted recommendations from an internal task force report that focuses on strengthening its nationwide approach to investigating and litigating systemic cases.

The task force was established in 2005 to examine the EEOC's systemic program and recommend new strategies for handling this type of employment discrimination. The task

force worked for nearly a year, conducting interviews, holding focus groups, and polling EEOC staff. One of the outcomes of their work was a specific definition of systemic cases as a "pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location."

Another outcome was a plan to revitalize the agency's systemic program by having district offices analyze data to spot problems within their regions' industries. Most employers are required to file an EEO-1 report that breaks down race, gender and ethnic composition of employees. These EEO-1 statistics will be used to uncover problem employers and industries. In addition, members of the EEOC Commission and employees involved in outreach will be encouraged to educate employers and other members of the public about systemic discrimination, including trends and issues the agency has identified and cases the agency has handled.

Commissioner Ishimaru also hinted at the possibility of the EEOC using testers either directly or indirectly in enforcement. Testers are job applicants with similar resumes but different races or ethnic backgrounds that apply for the same jobs.

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Proper Treatment, Proper Place: The Key to a Smooth Workers' Compensation Procedure



The longer an injured employee is out of work, the harder it is to return to their job, according to U.S. Department of Labor statistics. Employers are also generally unaware that the time that lapses between an injury and the filing of a claim significantly increases the resulting costs. The Hartford Research Study in 2004 found that claims filed over a month after the injury cost an average of 48% more to settle than those reported in a timely fashion. The study also found that even a delay of a week results in 10% more costs. The delay in a claim could also delay the treatment, which could add to the cost of medical care and wage replacement. The best strategy is to implement a 24-hour injury response process.

However, the duty of the employer does not end with the filing of the claim. It is the employer's responsibility to ensure that their employee receives appropriate care, for the benefit of both parties. Proper medical care that can still keep the employee in the normal routine of coming to work is the key to maintaining an injured employee. However, even if a physician or provider is credentialed through a network, it doesn't necessarily mean they are familiar with injury management, or are aimed at returning the employee to work as soon as possible.

Factors to evaluate the appropriateness of a provider are:

- Availability of case management
- Use of standardized work restriction forms
- Ability to identify ergonomic job risks
- Treatment guidelines in the care of the injured worker
- Willingness to coordinate and manage treatment and rehabilitation to facilitate a speedy recovery and return to work.

This is also an important step in establishing effective employer-employee relations, because when employers take on this responsibility, they will be able to:

- Improve access to care that results in early treatment and speedier recovery
- Establish origin of injury: is it really a workers' comp claim?
- Improve effectiveness of treatment
- Reduce claim costs
- Show your employees that you value them and are committed to their return.

Lower claims costs and a quick, effective recovery benefit all parties involved, and will maintain both your worker satisfaction as well as the productivity of your company.

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is taking to prevent an oil spill. The plan should cover facility operations and staffing, and list all areas of oil storage and transfer. It also should include an itemization of procedures that must be followed to stop, contain and clean up a spill. The EPA is also requiring that the plan include a history and all documentation of past spills and employee training drills.

Specific information about each storage container, such as its secondary containment system and the direction of flow, also should be included. A professional engineer must certify all plans.

To get additional information about the SPCC Rule and the EPA's Oil Program, visit <http://www.epa.gov/oilspill/>.

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In addition to those changes described above, the Commission also approved some other significant operational changes:

- Systemic investigations and litigation will be conducted in the field, and the systemic investigation and litigation units in headquarters will no longer exist.
- Each district in the field must develop a plan that will ensure the Commission is identifying and investigating systemic discrimination in a coordinated and effective manner throughout the agency.

- The Office of General Counsel should staff systemic cases using a national law firm model, meaning that cases will be staffed with employees who have the expertise suited to each particular case.

The most significant change in this overall shift in focus is the decentralization of the agency. Field offices are expected to handle all systemic investigations and litigation. They will be partnering to share expertise, in order to maximize resources. Headquarters will now assume a secondary role as a provider of assistance and support for the field offices' systemic program.

Mark Your Calendar: The New Spill Prevention Control and Countermeasure Rule Becomes Effective October 2007

In July 2002, EPA amended the Oil Pollution Prevention regulation at Title 40 of the Code of Federal Regulations, Part 112. The amendment, which pertained to Subparts A through C, has become known as the "Spill Prevention Control and Countermeasure (SPCC) Rule" because it describes the requirements for certain facilities to prepare, amend and implement spill prevention control plans.

The origin of the SPCC rule actually dates back to 1974, although it didn't become a formalized amendment to the Oil Pollution Prevention regulation until 2002. It will go into full affect in October 2007. The rule is designed to prevent oil spills from reaching the nation's waters. The focus is different from the current contingency plans facilities are required to have. Contingency plans spell out cleanup measures after a spill has occurred, while the new SPCC plans must outline a facility's strategy to prevent spills from happening in the first place. The plans must also contain a methodology for containing and cleaning up oil spills.

Only those facilities that meet certain criteria are subject to SPCC regulations. The first of these are facilities that are non-



transportation-related. Non-transportation related facilities are defined as not having moveable railroad cars, tank trucks, etc. The second type of facility subject to this rule is one that has either an aboveground storage capacity greater than 660 gallons in a single container, an aggregate storage capacity greater than 1,320 gallons, or a total underground storage capacity greater than 42,000 gallons. The third type of facility affected by the rule is one that has a reasonable potential for a discharge that could reach navigable waters or adjoining shorelines of the United States. Keep in mind, however, that EPA Regional Administrators may require otherwise exempt facilities to prepare an SPCC Plan if they feel it is necessary to carry out the purposes of the Clean Water Act.

All facilities subject to these regulations are required to develop spill prevention plans for the storage of any product that can be generically described as "oil." The definition of the term "oil" includes synthetic oils, vegetable oils, non-vegetable oils as well as standard petroleum products.

The SPCC plans must describe all the measures a facility

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