

# Risk Monitor



## Liability Insurance Is a Must-Have Protection for ERISA Fiduciaries

Fiduciary liability under ERISA is an exposure individuals or organizations may have as a result of their position in relation to an employee benefits plan. ERISA fiduciaries can be personally liable for breaches, and can be held responsible for the breaches of co-fiduciaries. Either of these situations can impact a fiduciary financially; for individual fiduciaries, this can mean their personal assets may be at risk. Fiduciary liability insurance can offer some protection against this exposure.

Under ERISA, a fiduciary is any person (or organization) who the plan names as such, or who exercises discretionary authority or control with respect to the management or administration of a plan or its assets. This broad definition encompasses the plan sponsor, plan administrator, trustees, investment managers, consultants and actuaries, to name a few. On an individual level, it can snare the small business owner and employees who are involved in plan administration or management.

Legal liability can arise for plan fiduciaries when they are alleged to have failed in the obligations that ERISA establishes (prudence, acting in the best interests of plan beneficiaries, etc.). You don't need a high-profile situation like Enron to trigger allegations of a fiduciary breach. Claims that a fiduciary duty has been breached can involve situations such as benefit claim denials; a reduction in benefits; inadequate plan funding; plan terminations; or questionable choice of an outside service provider, insurance company, or investment management firm. These claims can be filed by plan participants or beneficiaries, by a government agency (such as the Department of Labor), or by another fiduciary.

Fiduciary liability insurance can protect an insured fiduciary against the legal liability arising from alleged breaches

of the duty, including the cost of the fiduciary's defense. Fiduciary liability insurance should not be confused with a fidelity bond or with employee benefits liability insurance. A fidelity bond (also known as an ERISA bond) is for situations involving dishonesty, and its protections are for the plan and its beneficiaries. Employee benefits liability insurance protects against claims of administrative errors, and thus is quite narrow in its scope. Neither of these affords protection to a fiduciary that, for example, is alleged to have been imprudent in selecting an investment management firm for the company's 401(k) plan.

Like any type of insurance, fiduciary liability insurance policies can vary, and finding the policy that is the best fit for you and your business requires research and understanding of the available options. The International Foundation of Employee Benefit Plans posts on its Web site a "Short List" of questions to ask when investigating these policies. For example, whom does the policy cover? Does the policy cover multiple plans and, if so, to what limits, and what would be the cost of covering each plan separately? Are defense costs counted against the plan's indemnity limit? Is there coverage for penalties, fines or taxes assessed against fiduciaries?

These and other questions should form the basis for your conversation with your insurance broker when assessing the type of fiduciary liability insurance that is best for you and your business.

Thorough plan oversight, use of qualified benefit plan professionals, and proper training of employees who handle benefit plan functions are the key elements to ERISA compliance. However, an appropriate fiduciary liability insurance policy is a must for those situations when, for whatever reason, a fiduciary breach is alleged to have occurred.

Starting in early 2007, the Indiana Department of Transportation (INDOT) will require that all contractors exclusively submit bid bonds in an electronic form. In preparation for this time, INDOT is presently requesting bid bonds to be filed in duplicate, both paper and electronically. Our bonding staff has been providing input to INDOT as well as compiling forms and instructions for our participating contractors so they may register with the several software & identity validating firms that facilitate this process. Please feel free to contact our Bond Department at 317-844-7759 for further discussion.

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# US Chamber of Commerce Study Reveals Trends in Product Liability Exposures

The American tort system is still the most expensive justice system for remedying a civil wrong, costing \$260 billion in 2004; this according to a recently published paper authored by experts from the legal and insurance sectors and produced in collaboration with the US Chamber of Commerce. One area proving to be extremely sensitive to tort suits is product liability. The paper notes that product liability exposures present serious and unforeseeable problems for American manufacturers and negatively impact their ability to compete in a global market.

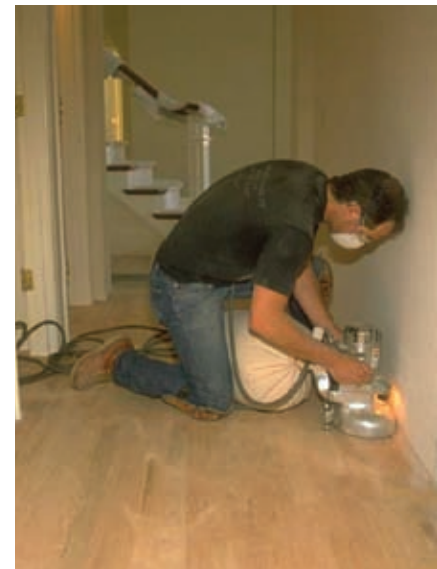
The problems resulting from product liability are caused by a number of sources, including new theories of liability, unexpected liability exposures or commonly used substances that are now alleged to be harmful even in trace amounts opening the floodgates to new litigation.

The paper goes on to discuss five emergent areas of products liability exposure:

- **Lead paint** – Suits are once again being brought against lead pigment and paint manufacturers on a large scale. In the earlier cases, these manufacturers were successful in obtaining favorable rulings by arguing that plaintiffs couldn't prove it was individual manufacturers that caused the alleged illnesses.

Until recently, lead paint and pigment manufacturers have also been successful in stopping actions filed by federal and state government. However, since mid-2005, two new liability theories have been used to argue cases that will prove to be a problem for manufacturers. State and municipal governments have successfully used the concept of public nuisance, as the basis of their cause of action, saying that the lead paint manufacturers' failure to abate existing lead paint conditions in homes constitutes a nuisance. The other theory is that of market share liability, which spreads liability to manufacturers in proportion to their market share when a product cannot be traced to any specific maker.

- **Benzene** – Benzene exposure has been associated with numerous illnesses, including blood disorders, central nervous system damage, immune system damage, lung and bladder cancer, and female fertility disorders. Millions of American workers are exposed to benzene on the job daily.
- **Pharmaceuticals** – Product liability claims are a constant in the pharmaceutical industry. Anyone who reads a newspaper or watches television is aware of the suits involving Vioxx, Fen-Phen, and Rezulin. Plaintiffs in pharmaceutical cases may seek damages for actual or anticipated bodily injuries as well as any related economic loss associated with the use of a drug.
- **Welding rods** – Welding rods are a major focus of litigation, with more than 10,000 current plaintiffs nationwide. The basis for this litigation is whether welding rod fumes containing manganese cause neurological damage.
- **Diacetyl** – This is a butter-flavored ketone. The Centers for Disease Control (CDC) believes that exposure to this chemical may result in bronchiolitis obliterans, also known as "popcorn packers lung." The National Institute for Occupational Safety and Health and the United States Environmental Protection Agency have also been studying diacetyl and its negative affects on pulmonary functions.




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transportation should be available so that attendees have a safe way to travel should they be too inebriated to drive.

Employees also have to be mindful of spouses and co-workers' guests who are attending the party. Making an inappropriate advance to a guest may not be harassment, but you don't need the fallout from this action. Make sure your employees are clear that any improper behavior towards invited guests will be grounds for disciplinary action.

Of course, when it comes to fallout, the next workday after the event is critical because it's when everything that occurred will be dissected and examined. This is also when a little innocent flirting can take on a new meaning that was never intended. To prevent this from occurring, have staff members talk openly and honestly about what happened at the party and if any misconceptions may be forming, eliminate them immediately.

# Minimizing Lawsuit Risk When Terminating Employees



Terminating an employee is a complicated issue no matter what reasons may exist. If handled properly, however, the employee can leave feeling little ill will toward the company, and, further, the employee may develop a plan for finding a suitable job replacement. When a termination is handled poorly, though, countless negative consequences can arise, the worst of which is a lawsuit filed against the organization by the ex-employee.

It's critical for businesses to be fully familiar with the concept and details of "Termination-at-Will," because even when a company employs workers in "at-will" states, they must still be on guard.

"Termination-at-Will" means that either the employee or the employer may, with or without notice, terminate the employment relationship at any time and for any reason, unless the reason is illegal. Although the termination-at-will statute is an important defense against an employee's lawsuit, in jurisdictions where it applies, employers should remain careful to avoid any action that might jeopardize an employee's at-will status. For example, if an employee was given verbal assurances that his/her job was secure, such declarations may be used later to contradict the employee's at-will standing.

An employee's at-will status could also be challenged when termination is based on poor performance. If an employee is having difficulty meeting performance standards, an employer's first priority and action must include holding a well-prepared evaluation meeting with the employee to address two specific issues: 1. what is lacking in his/her performance; and 2. what specific changes or improvements the employee is required to make before his/her performance could be considered satisfactory. It's important to keep the level of improvement required of the employee attainable; it's also critical for the employee to be provided with a reasonable time frame for making the changes and/or improvements discussed in this first evaluation meeting.

The employer must be sure that the employee understands that his/her failure to comply with these objectives within the time allowed will result in termination. The specific objectives for improvement and any help the employer intends to provide the employee in his/her effort to achieve these objectives must be documented in an action plan prior to the meeting so the employee can sign it, serving as a formal agreement between employer and employee. A copy of the action plan, signed by both parties, should be given to the employee, and a copy should be placed in his/her personnel file.

The employer must continually monitor the employee's progress in meeting the action plan objectives: a critical component of the action plan's success is notifying the employee of their progress towards meeting the goals agreed upon in the action plan. By following these guidelines, the action plan serves as clear evidence that the employee was given an opportunity to

improve his/her performance, and having failed to achieve the objectives, termination was a fair and final resort.

If an employee is terminated because of misconduct, employers must be able to verify that an investigation into the alleged misconduct was prompt, thorough, and unbiased. The investigation's purpose is to act as a fact-finding mission that denies or confirms the assertion that the employee did, in fact, commit the act in question. The investigation should avoid concluding whether or not the employee broke the law; instead, the review should determine whether the employee violated company policy, which is the reason for the termination.

When employees are being laid off, the layoffs must be conducted in accordance with the Worker Adjustment and Retraining Notification Act (WARN) and the Older Workers Benefit Protection Act (OWBPA). Employers are subject to WARN's stipulations if they have 100 or more employees. WARN's policies do not include employees who have worked less than six months in the past twelve months, and/or employees who work fewer than twenty hours a week. Both private and nonprofit employers are covered by WARN and OWBPA. Additionally, public entities that operate commercially and are not part of the government are also covered. Federal, state, and local government entities, which provide public services, are not covered by either of these acts.

WARN requires covered employers to give their employees sixty days' notice prior to either a mass layoff or a plant closing that is expected to last six months or longer. WARN-covered employers must also notify both local government officials and the state dislocated-worker unit.

When a laid-off worker is forty or older, an employer will likely seek a release from the worker indicating that they will not sue the company on the basis of age discrimination. The OWBPA contains specific requirements for waivers of age discrimination claims. Courts have ruled that these statutory requirements are strict and unqualified, and if an employer fails to meet any of the requirements, the obtained waiver is ineffective. Employers seeking such age-related waivers should consult in-house counsel prior to pursuing these releases.

This article should not be relied upon as legal advice. Please consult with an attorney familiar with the issues and laws of your state before taking any action.



# Don't Let Your Office Party Become a Liability

Finding reasons to celebrate can certainly help bring a group of office acquaintances together and help them become a more cohesive unit. While nothing builds a feeling of family like sharing a meal together, partying in the workplace can be a double-edged sword. You hope people will loosen up and relax around each other, but there is always the danger they will become too relaxed and forget how to behave. And if alcohol is thrown into the mix, you have the makings of a lawsuit.

So what can you do to ensure that everybody has a great time, but nobody steps out of line? To begin with, employers need to clarify what constitutes improper behavior and what doesn't. A day or two before the event, it is a good idea to have line managers/supervisors review company policy with their staff members, especially where it refers to sexual harassment. It is also worthwhile to remind staff members that while everyone wants this to be a party to remember, it is still a business event. Employees should be cautioned to be sensitive to inappropriate touching, offensive personal remarks and off-color humor. Keep in mind that under Title VII, it only takes one incident to have a lawsuit on your hands.

You may have added concerns if clients are attending the event. If a client makes improper advances towards an employee, you may find yourself on the business end of a legal action;

especially if the employee was put in the precarious situation of making sure the client had a good time. Any employee assigned to look after a client should be given a way of extricating himself from an uncomfortable situation before it becomes explosive. Prior to the party, develop a "buddy system" in which an out-of-control client can be passed off to some other designee so that no one has to remain in an uncomfortable situation. You can also have an adjoining room where you offer a flavored coffee bar or smoking lounge that an unruly client can be taken to decompress. Of course, limiting the amount of time alcohol is served can go a long way in preventing a potentially explosive situation from developing or from a guest leaving the party to drive home while intoxicated. A system of



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