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## EMPLOYMENT LIABILITY

# Lawsuit Threat Grows; What to Watch Out For

ONE OF THE biggest lawsuit threats businesses face is from their own employees. Any company with employees can be sued, and even if the case never goes to court, it can create a major burden for your business.

While most cases are settled out of court, they can drag on for years. Even if they are dismissed as meritless, the employer is often out thousands of dollars as a result.

To protect your business from these claims and more, you need to learn how to identify potential claims, avoid practices that can expose you to litigation, and create formal policies for your personnel and management.

The litigation trend includes the following:

### DISCRIMINATION

There are a number of protected classes in the U.S. workforce and more are being added. Have policies that treat everyone equally in your firm, ensure that certain groups of people are not kept from promotions, and ensure a harassment-free workplace.

### UNEQUAL PAY

Most of these actions are filed under the California Fair Pay Act, which bars employers from paying workers of one gender less than those of another for "substantially similar" work. Violations can result in fines, plus interest and liquidated damages.

To reduce liability, conduct a self-audit:

- Have you updated job descriptions, including established criteria for assigning values such as skill, education, seniority and responsibility?

- Are you consistent in your pay for similar jobs performed by individuals with similar skills, education, seniority and responsibility?
- Are your male and female employees given projects or clients with commission or bonus potential on a consistent basis?

### WORKER CLASSIFICATION

The federal and state governments and the IRS have been cracking down on independent contractor misclassification.

Worker classification lawsuits are growing. UPS and FedEx face class-action suits from drivers they classified as independent contractors.

What you can do:

- If you plan to classifying anybody as an independent contractor, check to see if they pass federal and state, IRS and workers' comp tests for classifying workers.
- Classify workers who perform similar tasks consistently.
- Conduct classification audits regularly.

### WAGE THEFT

These kinds of lawsuits typically involve accusations that the employee was not paid what they were due.

Some of the more common allegations include:

- Requiring staff to work off the clock
- Not providing meal and rest breaks
- Failure to pay overtime

Write clear and consistent policies and train managers and supervisors on them.

### DON'T FORGET INSURANCE

Employment practices liability insurance should be your final backstop. Even if you are the subject of a frivolous lawsuit, you will still spend time and money fighting it.

#### An EPLI policy will cover you for:

- Legal costs, including costs of defending a lawsuit in court, whether your company wins or not
- Judgments and settlements



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# Why Your Firm Needs a Total Ban on Cell-phone Use



You can find the NSC kit at: [www.nsc.org](http://www.nsc.org)

DISTRACTED DRIVING from smart phone use is becoming one of the leading causes of accidents in the U.S., and for the first time overall roadway deaths and injuries have started rising again despite regular advancements in car safety – a change that experts attribute to the scourge.

And as if that news is not bad enough, if one of your employees while driving for you on the job injures or kills someone while using a mobile phone, your organization could face serious liabilities. This is especially true if they were either talking on the phone without a hands-free device or using texting or some other smart phone function.

But lately, juries have even been awarding large judgments in cases when a motorist was using a hands-free set while driving.

If a court were to find your driver negligent, the resulting damages could put you out of business or seriously dent your finances.

That's why you need to implement workplace rules to prevent distracted driving. If you have not done so, you should – and you can use the National Safety Council's cell-phone kit as a basis for those policies.

## SAMPLE POLICY

The NSC recommends that you have a policy that includes a total cell-phone ban for employees while they are driving, even with hands-free devices. Research has shown that hands-free devices are not safer than handheld phones because the cognitive distraction still exists.

The NSC sample cell-phone policy reads:

"Due to the increasing number of crashes resulting from the use of cell phones while driving, we are instituting a new policy. Company employees may not use cellular telephones or mobile electronic devices while operating a motor vehicle under any of the following situations, regardless of whether a hands-free device is used:

- When the employee is operating a vehicle owned, leased or rented by the company.
- When the employee is operating a personal motor vehicle in connection with company business.
- When the vehicle is on company property.
- When the cellular telephone or mobile electronic device is company owned or leased.
- When the employee is using the cellular telephone or mobile electronic device to conduct company business."

## LIABILITY WAKE-UP CALL

- A jury in Texas found a beverage company liable after one of its drivers crashed while using a hands-free device, even though the headset complied with the company's policy. **Verdict: \$21 million.**
- A jury in Arkansas found a lumber distributor liable after one of its salesmen rear-ended another car while talking on a mobile phone. **Verdict: \$16 million.**
- A jury in Ohio ordered a national technology communications company to pay damages after one of its drivers, while using a cell phone, crashed into another car and killed one of the occupants. **Verdict: \$21.6 million.**

## THE FACTS

- The NSC model estimates 21% of crashes, or 1.2 million crashes in 2013, involved talking on handheld and hands-free cell phones.
- The model estimates an additional 6% or more crashes, or a minimum of 341,000 of crashes in 2013, involved text messaging.
- Hence, a minimum of 27% of crashes involved drivers talking and texting on cell phones, according to the model.

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# New X-Mod Rules to Reduce Effect of One Large Claim

ONE OF the biggest complaints in workers' comp – that one large claim can skew an employer's X-Mod – is about to finally be addressed in California.

The Workers' Compensation Insurance Rating Bureau's "split-point" experience rating system, in which an employer's actual workers' comp losses are divided into actual primary losses and actual excess losses, will be overhauled for 2017.

The Bureau will do so by replacing the current static \$7,000 split point for all industries and employer sizes with a variable split-point system.

This change is expected to limit the impact of one large claim on an employer's (particularly a small business's) X-Mod.

At the same time, an employer's X-Mod would be more affected by the frequency of claims.

In other words, an employer that had one large \$50,000 claim over three years would likely see a lesser impact on its X-Mod than a like employer with five \$6,000 claims during the same period.

Actuaries say this is because one large claim is not necessarily indicative of an employer's safety efforts, which more claims are.

Under the current system, the first \$7,000 in losses for a claim are considered primary claims costs, which count fully when calculating an X-Mod. Any losses above \$7,000

are considered excess and have less weight in the experience rating formula.

Under the new system, the split point will vary from \$4,500 to \$75,000, depending on the size of the employer and their industry. The Rating Bureau predicts that there will be up to 90 different split points.

## THE EFFECTS

The Rating Bureau says the effects of the change to the variable split-point system are:

- There will be no overall pure premium impact (no impact on average X-Mod).
- Impacts on any employer's X-Mod will depend on their claim and exposure history.
- The variable split-point plan will be less volatile. It will be more sensitive to claim frequency and less sensitive to large claims.
- The overall impact of the new plan will be generally modest.
- Movements of modifications above/below key thresholds – such as 100%, 125% and 200% – should be less than 1%.
- Modifications over 200% for small risks will be significantly reduced.

One thing that won't change under the new rules is that X-Mods with only one loss in the calculation will continue to be limited to no more than a 25-point increase.

## X-MOD ELIGIBILITY

The Rating Bureau has also changed the way X-Mod eligibility is determined.

Starting in 2016, qualification is based on payroll over the past three years and on expected loss rates for the employer's industry. Prior to 2016, X-Mod eligibility was solely based on premium level.

As a result, some single-employee companies in high-risk industries could be eligible.

For example, in the logging industry, an employer would need just one employee earning more than \$60,000 a year to qualify for experience rating, while it would take an accounting firm 82 \$60,000-a-year workers to qualify. That's because expected claims for logging are so much more significant than those for accountants.

One of the main reasons for the change in X-Mod eligibility was that the Bureau was unable to issue X-Mods for an upcoming year until only after the insurance commissioner had approved the rates for that year.

Sometimes that didn't happen until November, which left precious little time for calculating X-Mods.

Under the new regimen, X-Mods can be issued as early as September for the upcoming year. As a result, the expected loss-rate-based eligibility for 2016 was \$10,300. That figure will change every year based on claims cost inflation.

## HIGH-RISK EMPLOYERS QUALIFY MORE EASILY FOR EXPERIENCE RATING

Number of full-time employees earning \$60,000 annually needed to meet the experience rating eligibility threshold in various industries



