

SPECIAL REPORT

A RISK MANAGEMENT AND CORPORATE COMPLIANCE PROGRAM COULD REDUCE YOUR PREMIUMS

(07-11-2014)

This Special Report was written by Kenneth R. Hale, J.D., CPCU, AAI, LIC of Marsh & McLennan Agency LLC. Mr. Ken Hale can be contacted at 734-525-2412 or khale@mma-mi.com. More Special Reports are available at www.mma-mi.com.

Insurance premiums for property and casualty coverages represent a significant portion of the expense of operating a business, and business owners need to understand how to control their insurance premiums both in the short term and in the long term. Loss control is a critical part of this process.

As a general rule, insurance companies look for accounts that have a track record of low losses. This means that, in general, the accounts with historic loss records of less than 50% of the premium paid are viewed more favorably than those with higher loss ratios.

Losses can be controlled in many ways. The purpose of this Special Report is to provide suggestions on property and casualty risk management and corporate compliance.

A. Premises Liability

You can reduce slip-and-fall claims through effective snow and ice management programs. Snow removal contractors can be transferred liability in properly drafted contracts. Slip-and-fall claims can convert to large losses, making your insurance program unprofitable and increasing your rates.

B. Driving Records and Vehicles

Loss control can also involve carefully checking the driving records of all of the drivers of your owned or leased vehicles and the employees who

utilize their own personal vehicles on your behalf. You should be able to secure the driving records overnight, which will allow you to identify the poor drivers who may already be on your payroll.

1. Examine if private passenger autos should be company owned or if employees should be paid a car allowance.
2. Establish driving record standards and a procedure for reviewing driving records prior to hiring and periodically thereafter. Be certain you are in compliance with the Fair Credit Reporting Act.
3. Review contracts with contract trucking carriers.
 - Examine responsibility for transportation exposure both incoming and outgoing.
 - Examine corporate liability for use of hired trucks.
4. Implement a policy/procedure on renting vehicles. Cambridge has developed a multi-page special report on this topic.

C. Sprinkler and Main Systems

Another part of loss control is maximizing the protection that is available for your property. For example, if you have a choice of leasing a building with an automatic sprinkler system versus one without, you would want to (all things being equal) secure the building with the automatic sprinkler protection in order to reduce the risk of catastrophic loss and to take advantage of the substantial premium reductions for buildings with automatic sprinkler protection.

Similarly, buildings with alarm systems for burglary and for smoke and fire will tend to have fewer losses and, by virtue of having these protective devices, you will be in a better position to reduce your insurance premiums.

D. Crime Loss Control

Be proactive in controlling your exposures to loss. For example, if your business has a high cash exposure, you will want to make deposits more frequently. Also consider the following:

1. What procedures have been established to minimize this exposure?
2. To what extent does insurance cover this?
3. Is there any third party employee dishonesty exposure?

E. Computer Hardware, Software and Media

1. Do you have a file retention policy?
2. Is there an e-mail/internet/voice mail policy disclaiming employees' right of privacy?
3. Is all-premises backup occurring daily?
4. Do you have worldwide laptop coverage?
5. If you have a website, would you lose business if it was inaccessible? Is this covered under your insurance program?
6. Is computer virus damage covered under your property insurance?
7. If you work on other computers or websites/software, do you have professional liability insurance?
8. Is source code accessible to employee theft?
9. Is there an exposure for on-site theft by non-employees?

F. Emergency Plan

Regarding business interruption, loss control involves having emergency plans so that you can remain in business in the event a fire or other casualty loss shuts you down.

1. What procedures have been established to assure the continuation of income flow in the event of an interruption of business?
2. Would your cash flow be impacted if any other company, such as a supplier or customer, has a business interruption?
3. To what extent would insurance protect the business?
4. Would reconstruction be delayed because of zoning or building and use limitations?

G. Contractual Transfers/Leases

One of the most effective risk management techniques that does not involve purchasing insurance relates to transferring potential liability to others by way of a contract, agreement or lease. This is often seen in the contractor field where such indemnity agreements are

commonplace. Leases also typically contain such provisions. Such language should be examined closely to be certain that the contractual transfer of liability would hold up in court and is broad enough. Boilerplate lease agreements often state that the tenant agrees to indemnify and hold the landlord harmless from liability associated with the premises. For example:

“The Tenant agrees to indemnify and hold the Landlord harmless from any liability for damages to any person or property, in, on or about said leased premises from any cause whatsoever; and Tenant will procure and keep in effect during the term hereof public liability and property damage insurance for the benefit of the Landlord in the sum of....”

Such language does not refer to the defense obligation which presents, at a minimum, an ambiguity as to whether the tenant would owe a defense. Previous litigation has involved this exact issue. Closing this gap by inserting the word “defense” would have the effect of transferring liability (including defense costs) to the tenant from the landlord and would reduce the landlord’s loss experience.

A waiver of subrogation is needed for lease agreements to prevent the landlord or tenant’s insurer from attempting to obtain reimbursement from your company due to a loss.

The following is sample language:

WAIVER OF SUBROGATION

In the event of fire or other loss or damage to the premises, the Landlord and Tenant mutually waive their rights of subrogation and recovery against each other, their agents, employees or sublessees.

The Landlord agrees to maintain insurance against loss or damage to the building and personal property owned by

the Landlord including loss of rental income. The coverage shall be on the Special Cause of Loss form as published by the Insurance Service Office and shall be on a replacement cost, no coinsurance basis.

The Tenant shall maintain insurance on personal property owned by the Tenant and property of others in its possession on a replacement cost (not coinsurance) basis and also will carry business interruption insurance with coverage to be on the Special Cause of Loss form as published by the Insurance Services Office. Both Landlord and Tenant will maintain said coverage at a minimum with limits equal to the full replacement cost of building and/or personal property as the case may be and the full twelve (12) month exposure for loss of rental income and business interruption.

1. Determine the impact of real property lease provisions relative to:

- Rebuilding
- Lease cancellation
- Rent abatement
- Leasehold improvements
- Assumption of liability
- Liability for building damage
- Insurance obligations
- Waiver of subrogation

2. Review personal property leases relative to:

- Hold harmless and indemnity provisions (include "defend" language)
- Insurance obligations
- Cancellation provisions
- Time to supply replacement

H. Independent Contractors

Control losses by having independent contractors that work for you provide you with evidence of their insurance coverage and have them hold you harmless from any claims arising out of their activities.

I. Employment Risk Management

1. Utilize arbitration agreements signed by the employee to reduce the risk of high jury awards. Recent Michigan and federal law benefits employers by stating that where consistently applied, arbitration agreements can be enforced. Such agreements must be treated like any other contract. Utilizing such agreements can significantly reduce the employers' exposure to large jury verdicts in employment lawsuits in many cases.
2. Implement updated and consistent employment policies. One of the first exhibits to be marked in employment litigation is the employer's personnel policy manual. Attorneys specializing in employment law should regularly update such a manual. These policies should usually confirm the existence of an "at-will" employment arrangement so as to guard against suits alleging wrongful discharge and breach of contract.
3. Be cognizant of pre-employment inquiries. In Michigan, like in most states, employers are limited in what they can ask at the time of considering a prospective employee. For example, the age or race of an applicant cannot be asked. There are other less obvious requirements.
4. Ensure that your company is complying with wage and hour regulations. Employers are routinely faced with highly technical regulations on what they can and cannot do on the payment of overtime for nonexempt employees. If you would like additional information about what standards should be applied, please write the Cambridge Group.
5. Obtain legal counsel if a lawyer calls you or if you question whether termination or disciplinary action is appropriate. There is no substitute for obtaining legal advice if presented with an

employment situation that could give rise to a claim. Employers should avoid attempting to handle such matters on their own given the highly specialized regulations and laws that apply. Moreover, any statements made might be used against the employer at a later time.

6. Be cognizant of the fact that personnel files of other employees may be the subject of review in litigation. Many plaintiffs' lawyers attempt to obtain documents from an employer before filing suit. If an employer is asked for documents, the request should be forwarded to legal counsel instead of simply producing the documents given the issues of confidentiality. In fact, this policy should be applied to all documents whether related to personnel files or not.
7. E-mail is the plaintiffs' attorney's new best friend. Crafty plaintiffs' lawyers have wised up to the technological age where e-mail is in almost universal use. Specialized computer companies can obtain such e-mail and computer messages from an employer's computer system, even if such messages have previously been "erased." Employers should adopt a communication policy prohibiting non-business use of computers and phones.
8. Documents can be an employer's best friend in employment litigation. One of the most effective tools in defending companies in litigation is documents, particularly those signed by the former employee plaintiff. Employers should use error-proof systems for obtaining signatures on acknowledgment forms and at-will policies as well as other important documents.
9. Implement an anti-harassment/sexual harassment policy that includes a "notice to employer" provision. All personnel manuals should include anti-sexual harassment policies which are carefully drafted by legal counsel.
10. At-will policies should be the rule rather than the exception. Although in Michigan the general rule is that an at-will employment arrangement is presumed, employers should take active steps to clearly solidify such policies for the sake of consistency.

11. Avoid giving negative feedback to potential employers. Acknowledging employment dates should generally be the limit of what information is provided to potential employers regarding terminated employees.
12. Save all documents and notes, regardless of how trivial. At the time of a claim or suit, much emphasis will be placed on documentary evidence to show the scope of the employment relationship and what was expected of the employee claimant. This underscores the need to maintain such documentation. One of the most powerful documents is one signed by an employee, such as an at-will policy or a sexual harassment policy.
13. Utilize employee benefit plan systems and procedures to avoid COBRA and ERISA claims. Insurance coverage can be purchased for mistakes in administering employee benefit programs, and such coverage should be included in every commercial insurance program. The additional cost for such coverage, if any, is nominal.
14. Purchase employment practices liability insurance, which is less expensive than you might think. Employment practices liability coverages are widely available today. Such coverages may be as inexpensive as \$1,500 and can be purchased to cover defense costs and judgments for a host of employment claims. Such coverage should be included or at least considered as a staple to virtually every commercial insurance program.
15. Be cognizant of the Worker Adjustment and Retraining Notification Act. This applies to employers who have 100 or more employees. This law requires 60 days advance notice in the event of plant closings and covers mass layoffs.
16. Utilize a 180 day statute of limitations agreement with employees. Michigan law now recognizes this as acceptable in many cases.
17. Implement a clear policy on the Family Medical Leave Act (FMLA) if you have 50 or more employees.
18. Implement a clear policy on drug testing and uniformly apply this. See our separate Special Report on drug testing.

19. When was the last time you did anti-harassment training or seminars?
20. Are you displaying the requisite posters?

J. Employee Injury Procedures/MIOSHA

1. How quickly are reports being made to the insurer?
2. Do you have a return-to-work program?
3. Are you participating in a loss-sensitive dividend workers' compensation plan?
4. Do you have a procedure for MIOSHA reporting in injury cases?
5. Do you have posters covering any hazardous chemicals on premises?

K. Inventory and Equipment Risk Management

1. Has an inventory system been developed to establish the basis for proving a loss?
2. Any personal property that could not be replaced new or used?
3. Review appraisals to determine valuation basis.
4. Consider a hold harmless agreement for equipment sold or donated.
5. To what extent can the corporation self-insure?
6. Review off-premises operations and storage exposure.
7. Review transit exposure.

L. Non-Owned Inventory and Equipment Risk Management

1. Inventory system to track location of non-owned personal property.
2. Determine responsibility for replacement if lost or damaged.
3. Has a waiver of subrogation been executed?
4. Does a die, mold or form limitation exist on the present insurance?

M. Environmental Risk Management

1. Any existing environmental exposures?
2. Would a fire cause environmental damage to owned land or to third parties, property or people?

3. Can or should insurance be provided to protect the corporation for environmental claims?
4. Would environmental damage delay rebuilding?

N. Real Property Risk Management

1. Would existing buildings be rebuilt in the event of substantial damage?
2. Could they be rebuilt?
3. If they are not rebuilt, how would demolition and cleanup be handled?
4. Would insurance cover demolition and cleanup?
5. Does an uninsured collapse exposure exist?
6. If rebuilding takes place, would the city require a better building?
7. Is there any flood exposure?

O. Miscellaneous Liability Risk Management

1. Examine any assumption of liability.
2. Does insurance fully cover these assumptions?
3. Are limits adequate?
4. Any non-owned watercraft and aircraft exposure?
5. What foreign liability exposure exists?
6. Review primary liability and umbrella liability exclusions.
7. Is there an ERISA bond or liability policy required by IRS for pension/profit-sharing plans?
8. Are you exposed to intellectual property liability?

P. Directors and Officers Liability Risk Management

1. Check indemnification provisions of all by-laws.
2. Review need for directors and officers insurance.
3. Subsidiary sign-off on directors and officers application incident warranty?
4. Is "Entity" coverage needed?
5. Are punitive/exemplary damages covered under your policy?

Q. Fiduciary Liability Risk Management

1. Review all employee benefit plans for a fiduciary liability exposure.

2. Where beneficiary funds are invested, what controls are provided?
3. Does company have fiduciary liability coverage?
4. Who is/are the trustees?

R. Other Loss Control Risk Management

1. Review outstanding loss control recommendations including feasibility and appropriateness of same. If the insurance company makes loss control recommendations, follow up with them in writing with what you have accomplished. If they have not made recommendations, ask for an inspection. Not only will compliance with insurance company loss control recommendations assist you in having a more favorable loss record, your compliance with these recommendations will indicate your willingness to cooperate with the insurance company, giving you another tool to negotiate lower premiums.
2. Institute a structured loss control inspection program.
3. Utilize insurance carrier loss control personnel for ISO 9000.
4. Review existing disaster plan. Utilize experts that may be available from the insurance companies.
5. What debt collection do you do with consumers?
6. Are you involved in employee leasing?
7. Do you have a document retention policy?

This document is not intended to be taken as advice regarding any individual situation and should not be relied upon as such. Marsh & McLennan Agency LLC shall have no obligation to update this publication and shall have no liability to you or any other party arising out of this publication or any matter contained herein. Any statements concerning actuarial, tax, accounting or legal matters are based solely on our experience as consultants and are not to be relied upon as actuarial, accounting, tax or legal advice, for which you should consult your own professional advisors. Any modeling analytics or projections are subject to inherent uncertainty and the analysis could be materially affected if any underlying assumptions, conditions, information or factors are inaccurate or incomplete or should change.