



Property Insurance

## Commercial Rates Climb as Risks Add Up



**C**OMMERCIAL PROPERTY insurance rates are on the rise across the country as insurers continue wrestling with the toll of increasing natural disasters, rising social unrest around the world (including the U.S.) and the COVID-19 pandemic.

The rate increases and stricter underwriting are not a function of the COVID-19 pandemic, but the outbreak has added more pressure to rates.

According to a report in the trade publication *Business Insurance*, brokers are reporting average property insurance rate increases of 20% for policies that renewed on July 1, 2020. But rate increases are even higher for firms with complex risks, a history of losses or natural catastrophe exposure.

Insurers have taken various steps to restrict coverage, including:

- More strike, riot and civil commotion exclusions (this coverage was common in most commercial property policies).
- More stringent communicable disease exclusions for business interruption coverage.
- Reduced coverage for business interruption claims that don't include physical damage to the business.
- Reduced limits.
- Higher deductibles.

### Civil disturbance coverage

Coverage of riots and civil disturbances is a standard part of most property policies, and insurance experts estimate the insured damages could surpass \$10 billion as the rioting was not just limited to one city.

There had never previously been a civil disturbance event of the magnitude of this year's protests, riots and looting that has been taking place in cities across the country. The U.S. and insurers had not priced the likelihood of this kind of risk happening across the nation at one time.

Globally, insurers started introducing exclusions and raising rates after large-scale protests and civil unrest mushroomed in Hong Kong and Chile last year, causing widespread economic damage and disruption.

Lately, some insurers have started restricting or removing coverage for strikes, riots and civil commotion. The change is not industrywide.

Policy and rate changes for this coverage are also based on geography, as the risks of civil disturbances are greater in cities than in suburbs and smaller municipalities and towns.

### COVID-19

Terms and conditions are also being tightened due to the COVID-19 pandemic, after a number of insurers were sued for not paying business interruption claims on the grounds

that there must be physical damage to the property.

As a result, many insurers introduced more explicit wording to make their infectious disease exclusion "bulletproof," as one broker told *Business Insurance*.

### Catastrophe exposure

Insurance companies are re-examining how much exposure they have to natural catastrophes, and are hence scaling back coverage or pulling out of some markets. They are looking at markets that have exposure to:

- Hurricanes
- Earthquakes
- Wildfires
- Floods
- Storms

For example, in California a number of commercial and personal property insurers are restricting the number of policies they will write in areas that are at risk from wildfire.

Some are also requiring that property owners create buffer areas around their buildings to reduce the chances of them catching fire during an event.

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# Protecting Against Employee Benefits Legal Actions

**E**MPLOYMENT PRACTICES and employee benefit-related lawsuits are on the rise – and employers have to be eternally vigilant when it comes to meeting their compliance obligations as plan sponsors.

Take the case of Visteon, a global automotive industry supplier, which outsourced its payroll and enrollment/disenrollment functions to outside plan administrators.

But because of internal mistakes at the firms that Visteon outsourced these noncore HR functions to, some of its former employees who should have received COBRA eligibility notices after leaving the firm never received them. At first it was just a handful, but ultimately 741 co-workers signed on to a class-action lawsuit

Visteon argued in court that it was not its own mistakes that had caused the error, and that it had made a good-faith effort to hire outside experts to take over this function for them.

Payroll and enrollment, after all, are not core competencies for an auto parts supplier, the company said, and it had been relying on the expertise of these other payroll companies to properly execute these functions and provide these notices.

The court didn't buy Visteon's argument. Rather, it held the company responsible in 2013 for poor internal tracking systems, negligence in overseeing its third party administrators, and failure to accept responsibility for its COBRA notification efforts.

That exposed them to the statutory penalty of \$110 per worker per day for failure to provide notification.

In the end, for doing what tens of thousands of employers are doing nationwide – relying on third party administrators to handle payroll functions that are regulated under COBRA – Visteon was slapped with \$1.8 million in penalties.

## Employers are frequent lawsuit targets

As much as companies rely on their employees to generate profits, simply having them around and administering their benefit plans potentially exposes employers to significant possible liability.

According to a survey by insurer CNA, employment-related disputes are the fastest-growing category of civil lawsuits in America.

Employers face risk from the potential of lawsuits employees may bring for alleged failure to fulfill their fiduciary duties as sponsors of retirement plans under ERISA, for example, or for accidental or unauthorized leaks of personally identifiable information, which carries significant penalties under HIPAA.

Sponsors of defined contribution pension plans, such as 401(k)s, are particularly frequent targets of lawsuits for various fiduciary failures, errors or omissions. ❖

## WHAT YOU CAN DO

- Carefully monitor your plan third party administrators. Insist that they document their own compliance practices to you. Don't take their word for it.
- Reconcile your own lists of recently departed employees with your payroll company's COBRA notifications.
- Understand that your commercial general liability insurance policy usually will not cover you against liability arising from improper administration of employee benefit plans, ERISA, COBRA, USERRA, wage and hour laws, Title VII-related lawsuits, and the like.
- Consider employment practices liability insurance. This coverage will often protect against lawsuits like this and cover legal expenses, and even judgments.
- Conduct regular reviews with advisers on investments in pension and 401(k) plans. Investments should be reviewed at least annually – and quarterly is not unusual.
- Ensure that fees paid to 401(k) and other plan administrators are not excessive. You don't have to go with the cheapest provider (that can be trouble, too). But if you do choose a higher-fee vendor, document why you made that decision so that you can show your reasoning in court and defend your decision-making as sound and prudent.
- Invest in data security and HR compliance expertise.



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## To Mitigate Risks, Follow Insurers' Recommendations

### The takeaway

As a business property insured, you will want to do all you can to make your organization as insurable as possible in order to enjoy the best rates. That means taking measures to mitigate risks and following insurers' recommendations.

That could include installing security cameras and alarms, as well as sprinklers and other fire prevention systems.

If your business is exposed to a regular natural catastrophe, you should also take steps to reduce the chances of your property being damaged or destroyed. ❖

# Ten Employee Lawsuit Risks During the Pandemic

**T**HE NOVEL coronavirus pandemic has caused immeasurable suffering, both physical and economic.

For employers struggling to stay in business, this is a fraught time where mistakes in managing their workforces could lead to employee lawsuits. Here are 10 potential trouble spots to watch for.

**1. Workplace safety** – Businesses that still have employees working on-site run the risk that a single infected worker may send the virus ripping through the entire workforce.

While workers' compensation laws may prevent employees from suing, their family members who become ill or suffer through a worker's illness face no such constraints.

**2. Sick time and paid leave** – Congress enacted the Families First Coronavirus Response Act in March, guaranteeing full-time employees of small businesses 80 hours of sick leave (part-timers get a prorated amount.)

Mistakes in administering these benefits could prompt lawsuits.

**3. Workplace discrimination** – Because the coronavirus originated in China, there have been reports of Asian-Americans being targets of racist actions. Employers must take care to avoid the appearance of making workplace decisions based even partly on employees' race.

**4. Americans with Disabilities Act** – The ADA prohibits discrimination against disabled individuals and requires employers to make reasonable accommodations for these workers.

Employees who become ill from COVID-19 may suffer after-effects that include trouble breathing, speaking and working at their former pace.

Employers must accommodate these workers to the extent that is practical.

**5. Wage and hour violations** – Non-exempt employees working remotely may be working more than their regular hours, missing rest and meal breaks, and using their own equipment.

Employers must keep careful records, reimburse employees for their use of personal equipment where warranted, and remind employees to take mandatory breaks.

**6. Battered retirement plans** – Stock markets cratered at the start of the pandemic taking retirement account balances down with them.

Questions may be asked about whether fund managers did enough to limit the damage. Employees who are not satisfied with the answers may go to court.

**7. Health information privacy** – Employee health information privacy is protected by law. Employers must secure the records of infected employees from unauthorized access by individuals within and outside the company.

**8. Union contracts** – Collective bargaining agreements may contain provisions that go beyond federal requirements for breaks, paid leave, layoff notices, and workplace safety.

Employers must keep their CBAs in mind and work with their unions to avoid contract violations.

**9. Disparate impact from layoffs** – If layoffs are necessary, employers must take a thoughtful approach when deciding which employees to part company with.

An appearance of singling out older workers or other protected classes under discrimination laws could invite lawsuits.

**10. WARN Act** – The Workers Adjustment and Retraining Notification Act requires some employers to provide at least 60 days' notice before layoffs. Many businesses' revenues fell off the cliff so quickly that they were unable to provide that much notice.

## A final thought

The pandemic is a crisis that few businesses foresaw. The effects, including the litigation, may haunt them for a long time to come. ❖



# Trump Issues Executive Orders to Reduce Drug Costs

**P**RESIDENT TRUMP has issued executive orders aimed at reducing the cost of medications by tying Medicare payment for outpatient drugs to international prices, passing drug-maker rebates to patients and not middlemen, and allowing individuals to import prescription medications.

Another executive order aims to force community health centers that receive 340B drug discounts to pass discounts for insulin and injectable epinephrine on to patients. Here's a run-down of the orders:

## Drug importation

The Executive Order on Increasing Drug Importation to Lower Prices for American Patients calls for new regulations that would:

- Allow individual state health plans to import certain drugs.
- Authorize the reimportation of insulin products that were made in the United States and later exported, and
- Set up a system to grant drug importation waivers for individuals to use at authorized pharmacies.

Federal law already grants the Department of Health and Human Services the authority to allow drug imports, as long as the department's secretary certifies the imported drugs are safe and effective and would lower costs to U.S. consumers.

HHS and the Food and Drug Administration in early August unveiled two pathways that entities could use to import drugs.

Under one pathway, HHS and the FDA would use existing rulemaking authority to allow states, pharmaceutical manufacturers and pharmacists to develop pilot programs to import drugs from Canada "that are versions of FDA-approved drugs that are manufactured consistent with the FDA approval."

## Eliminating secret deals

Another order would prohibit secret deals between drug makers and pharmacy benefit manager (PBM) middlemen, ensuring patients directly benefit from available discounts at the pharmacy counter.

The Executive Order on Lowering Prices for Patients by Eliminating Kickbacks to Middlemen would pass drug-maker rebates to patients and allow them to apply the rebate to their cost-sharing, such as deductibles in Medicare Part D plans.

This would be a significant step in getting drug-maker discounts to patients instead of the PBMs. One of the reasons pharmaceutical prices are so high is the complex mix of payers and negotiators that often separates the consumer from the manufacturer in the drug-purchasing process.

## Epinephrine and insulin discounts

The Executive Order on Access to Affordable Life-saving Medications would require federally qualified health centers to pass along discounts on insulin and injectable epinephrine received from drug companies to certain low-income Americans.

Only patients with low incomes; those with high cost-sharing requirements for insulin or epinephrine; those with high, unmet deductibles; and/or those without health insurance would be eligible for the discount.

## International reference pricing

Another executive order, which hasn't yet been published publicly, would establish an international pricing index that would set the price Medicare Part B pays for the costliest medications covered under the program to the lowest price in other advanced countries.

## What's next

The executive orders will require the Centers for Medicaid and Medicare Services to draft new regulations, a process that cannot be completed this year.

Regulations often take months to draft and then have to be sent out for public comment before final regs are written.

The regulations will likely only come to fruition if Trump wins the presidency for a second term, however. ❖

