April 2018
Volume 3 | Issue 2

# BOLDS RISK & INSURANCE SERVICES

BoldsRisk

YOUR INSURANCE POLICIES

## Be Sure to Tell Your Broker of Any Material Changes

ONE MISTAKE that many policyholders make is failing to notify their insurance broker about material changes that could affect their coverages for a number of different types of insurance.

Various events should trigger you to inform your carriers. And depending on the type of change, it could cut across different lines of insurance, like workers' comp and employee benefits.

If you have had any material changes recently, you should read this.

### Workers' comp

**Hiring new employees** – While you don't have to notify your insurer every time you are hiring someone, you may want to consider it if you are adding a number of new staff in a short period of time.

Insurers will often conduct policy audits to catch changes in personnel and may send a notice to collect additional premium for the new hires. But if you don't want any surprises and risk misclassification, it's a good idea to reach out to your insurer about these changes.

**Ownership changes** – If you and your partners are claiming an exemption for workers' comp coverage as owners of the company, and if there is a material change – like adjusting corporate structure or ownership – you must file the correct documentation with your workers' comp carrier. Contact us, we'll get the correct documents filed.

This is critical if there is an ownership change in the middle of the policy year. If you don't notify the insurer and assume a new owner will be exempt like the one they replace, you could be in for a surprise.

If the carrier doesn't know about the change, it could treat the new owner as an employee and demand collection of back premium to the date they entered the picture.

In California, this is especially important now in light of recent legislation.

Before AB 2883 and SB 189 were signed into law, if an insurer discovered during final audit or midterm that a policyholder's entity had changed to a corporation from a sole proprietorship and the owner had previously been exempt from coverage, the insurer would simply endorse the policy with the corrected entity type and legal name and then exclude the owner again.

As a sole proprietor, the individual was not covered on the policy and, as the only officer of a corporation, the owner would still be eligible for exclusion.

Under the new laws, this is no longer possible. In order to exclude qualifying individuals from workers' compensation coverage, the organization must file a signed waiver from each of the qualifying individuals requesting to be excluded.

Insurers cannot backdate waivers. So, if there are ownership changes or structural changes to the entity type, the owners who want to be exempt from coverage must file new waivers with the insurer.

*See 'New Car' on page 2*

## Contact Us

Bolds Risk & Insurance Services
BoldsRisk

**Bolds Risk & Insurance Services**
**101 Larkspur Landing Circle, Ste 222**
**Larkspur, CA 94939**

Tel: (415) 461-RISK

*info@boldsrisk.com*
CA License No.: 0K14423

EMPLOYMENT PRACTICES

# Gender Wage Discrimination Lawsuits Heat Up

WHILE THE #MeToo movement has spurred a new wave of sexual harassment lawsuits in organizations throughout the country, there is a parallel trend that is also gaining a foothold: unequal pay lawsuits based on gender or race.

Corporate defense lawyers have expressed concern that pay discrimination cases also seem to be on the rise as more women in particular are feeling emboldened, perhaps in part by the traction of the #MeToo movement. There is even a hashtag trending in social media for it as well: #EqualPayNow.

While some high-profile cases have made the headlines, there are thousands of smaller ones that never make the news.

## Some recent high-profile cases

- A female employee sued Vice Media in February, accusing Vice of systematically discriminating against female workers by paying them less than male colleagues with the same job and same experience.
- Four ex-Google employees filed a revised gender-pay lawsuit after a court dismissed their earlier lawsuit in December 2017. This new suit more clearly defines who was affected by Google's alleged unfair pay practices.
- Oracle was sued for gender discrimination by three female engineers who allege they were paid less than men in similar roles.

The federal Equal Pay Act prohibits gender-pay discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort and responsibility.

The bar for proving wage discrimination is high. In 2017, the Equal Employment Opportunity Commission received 996 equal-wage discrimination complaints, a number that's held steady since 1997. Last year, 64% of complaints received by the EEOC were found to have "no reasonable cause" for action.

### California acts

A new pay-equity measure took effect on Jan. 1, 2018 in California. The new salary privacy law prohibits employers as well as agents of the employer (headhunters and recruiters) from inquiring into or relying on a candidate's past salary history (compensation and benefits) unless certain circumstances have been met.

Candidates, however, can voluntarily disclose their past compensation. Additionally, employers can review and consider salary history information that is publicly available pursuant to state law.

The new law also requires employers to provide applicants, upon reasonable request, with a pay scale for the positions they seek.

### What you can do

Wage discrimination cases can be difficult to prove because there are four affirmative defenses built into the Equal Pay Act. If there's a disparity in pay, an employer must prove that it's justified by one of the following:

- A seniority system
- A merit system
- A pay system based on quantity or quality of output
- Any other factor other than sex

While the first three factors are pretty straightforward, that last category makes cases difficult to prove. An employer may say that the higher-paid employee has more experience or training, or that he was simply a better negotiator.

The problem is that even if you lose a wage discrimination case, you will face substantial legal costs if sued. That's why your organization should have an employee practices liability insurance policy. EPLI policies will pay for defense costs should you be sued for wage discrimination. ❖

*Continued from page 1*

# *If You Buy a New Car, Contact Your Insurer Before Driving It*

### Employee benefits

For employee benefits, you need to notify us of new hires or recent terminations within 30 days. Health insurers have strict rules for retroactive changes. Follow the guidelines when adding new employees to your company health plan.

Employees may leave a company and new workers may take their places. Dependants may change from time to time. As such, you need to periodically review the group health insurance plan to make changes to the number of people covered in the plan. You can contact us or your insurer when you need to make these updates.

### Personal lines

If you've had renovations or purchased any expensive items that you should list on your policy to ensure they are covered, contact your insurer.

And if you purchase a car, contact the insurer before driving it.

Also, if you are accumulating more assets you may want to consider revisiting your life insurance policy as well, to see if you need to increase the limits as your net worth increases. ❖

SEXUAL HARASSMENT

# #MeToo Movement to Spawn Wave of Lawsuits

AFTER REVELATIONS of sexual misconduct by a number of high-power executives, media personalities and politicians last year spawned the #MeToo movement, defense lawyers are predicting a record number of sexual harassment lawsuits will be filed against employers in the coming year.

The #MeToo movement has emboldened women who have been sexually harassed, abused or worse by a work superior or co-worker to come out and tell their stories. Any employer whose workers were subjected to this kind of behavior is at risk of being sued, regardless of whether or not the employer knew about the incident.

The costs of sexual harassment lawsuits can debilitate, if not sink a small business, considering the high settlement costs, attorney fees – and even awards if the cases go to trial.

As an employer you should already have anti-harassment policies in place, including a safe way for an employee to report harassment without fear of losing their job. In the #MeToo era, you should revisit your policy and consider new training for all employees, supervisors and management. Companies must be ready to quickly address sexual harassment, assault and discrimination in the workplace as it is uncovered.

## What's happening

A movement that started out in high-profile, public industries and in politics will soon spread, affecting everyday American businesses.

The #MeToo movement has exposed unacceptable predatory behavior in the workplace. It has also shown that there is no room for tolerance of sexual harassment.

There are different types of sexual harassment and as an employer you should be aware of the differences.

Title VII of the Civil Rights Act of 1964 is the federal law which prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, or religion. Sexual harassment is a form of sex discrimination in violation of Title VII.

Sexual harassment can include one or more of the following::

- Unwelcome sexual advances
- Requests for sexual favors
- Visual, verbal or physical conduct that is sexual in nature.

There are two main types of sexual harassment:

- Quid pro quo, when usually a superior will make sexual advances or requests as a condition of employment or promotion. This could include a manager threatening termination unless the employee performs sexual favors, or a manager promising a promotion in exchange for sex.
- A fellow employee or superior that may engage in unwanted physical contact, making vulgar or obscene comments, making sexual requests, or in the worst case, rape.

Companies must address sexual harassment through anti-harassment policies and sexual harassment prevention training with the goal of ending harassment rather than just attempting to avoid litigation. The training should be continuous and engaging.

Employers must create and communicate sexual harassment policies and promptly investigate all sexual harassment claims thoroughly.

Businesses should also have a fair and confidential system in place for reporting sexual harassment without risk of retaliation. All complaints should be taken seriously and investigated thoroughly.

Punishments must only be meted out after the investigation, and the punishment should fit the infraction, including firing if need be.

## The final backstop: Insurance

Employers need to protect themselves financially from liability, but also create a safe work environment.

Employment practices liability insurance (EPLI) will cover many of the costs associated with a sexual harassment action by an employee, including:

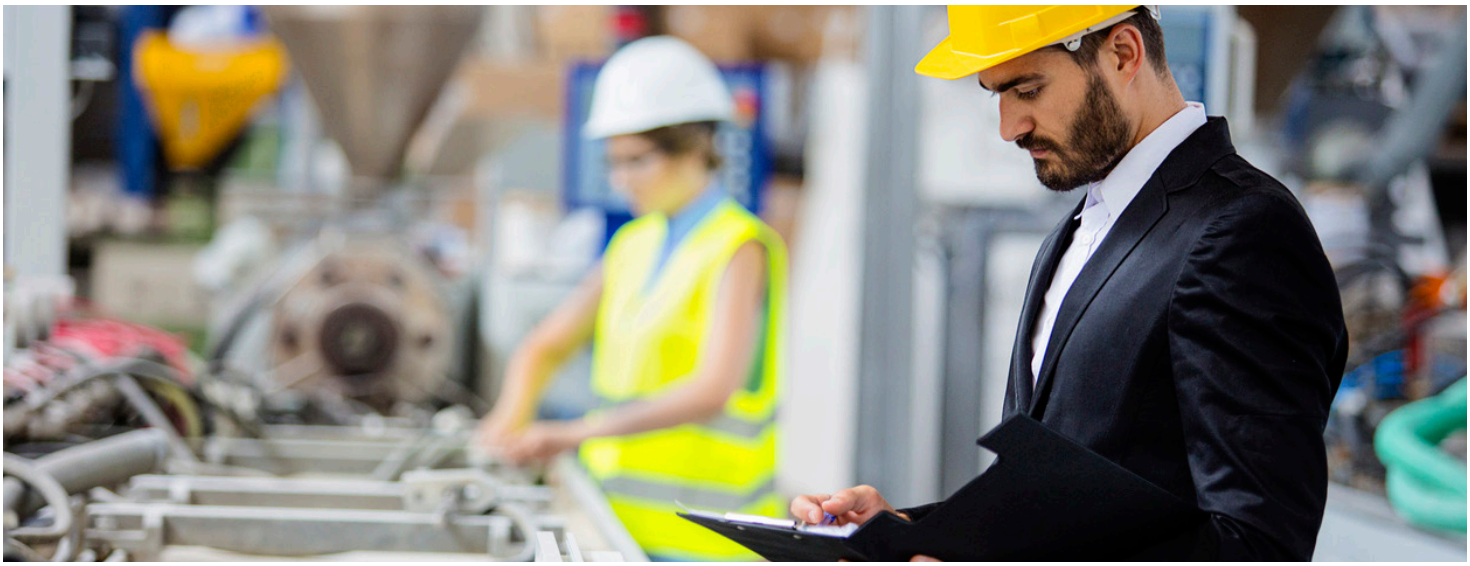
- Legal costs
- Settlements
- Jury awards

In addition, in order to provide a legal defense and pay damages, some EPLI policies may include resources to help business owners create policies and procedures, training and awareness campaigns that may reduce the potential for future claims. ❖

**Want to know more about EPLI? Call Us: (415) 461-RISK**

CITATION RULING

# OSHA Can Go Back More Than Five Years for Repeats



OSHA CAN look beyond five years to assess "repeat violations" when considering the penalties against an employer for breaching workplace safety regulations, a U.S. appellate court has ruled.

Repeat violations can be assessed at 10 times the amount of a safety violation, which makes the ruling a game-changer for companies who have been cited more than once, even if that citation was issued more than five years ago. It increases the stakes for employers who until now chose not to contest more routine violations because of the cost of defending them.

Under OSHA regulations, the maximum penalty for a serious violation is $12,934, but if it's not the first time OSHA has cited the employer for the infraction, the maximum fine balloons to $129,336.

Up until 2015, the agency would typically not look back more than three years when deciding if a violation was a repeat. But in 2015, OSHA changed that period to five years in the field operations manuals for its inspectors.

Despite those changes, the U.S. Second Circuit Court of Appeals ruled in February this year that the field operations manuals are not legally binding and that OSHA is not restricted from going further back than five years to establish repeat violations.

The court made the ruling in the case of a company called Triumph Construction Corp. that had been cited in 2015 for a repeat violation, and which OSHA had fined based on Triumph receiving a prior citation for the same infraction more than three years earlier.

Triumph challenged OSHA's authority to go back more than three years to establish a repeat violation, saying that doing so was "arbitrary."

But the court stated that the earlier guidance of three years and the new guidance of five years were not actually binding on the agency because neither the Occupational Safety and Health Act nor OSHA regulations actually set time limits on issuing repeat citations.

## What you can do

The best option for employers is to make sure they are in compliance with all OSHA regulations in the workplace in the first place, and have all the required safety precautions in place to reduce the chances of workplace incidents.

For employers that have been cited before, it's of utmost importance that they continually pay special attention to safety issues for which they've already been cited. Now that this ruling has set a precedent, it could open up all employers to repeat violations no matter how long ago they were cited for the original infraction.

The law firm of Fisher Phillips, in a blog on the lawsuit, recommends that employers who may have been reluctant in the past to challenge a citation, should consider doing so if they feel they have a good-faith defense. If they are successful in fighting the citation, it cannot be used as the basis for a repeat violation.

"The cost-benefit analysis for contesting non-repeat citations has changed. If an employer previously believed that contesting a $12,500 serious citation was not worth the legal cost, the risk of being hit with a repeat violation $125,000 several years down the road may tilt the balance toward contesting those lesser citations," Fisher Phillips wrote.

The law firm said that employers should be especially vigilant about contesting citations that involve "a routine activity, task, or equipment where a repeat [violation citation] is more likely to arise in the future."

It also emphasized the importance of maintaining comprehensive records from prior OSHA inspections and citations and documentation about actions taken to fix the problem, in order to avoid citations for the same hazards in the future.

"This will hopefully prevent the issuance of a repeat citation, no matter what the repeat time period OSHA may attempt to enforce," the firm wrote in its blog. ❖