

## RISK MANAGEMENT

# Don't Let a Subcontractor Derail Your Safety Efforts

**W**HEN RUNNING your business, particularly if you are in the construction sector, one of the biggest challenges is preventing contractors' and suppliers' safety practices from denting your own safety program.

While you may consider a number of factors when vetting a new contractor or vendor, one area that is often overlooked is their workplace safety practices. This is a mistake and can cost you dearly if one of their workers causes an incident at your worksite.

Not only could you see one of your own employees injured, but you could also get a visit from an Occupational Safety and Health Administration inspector.

The National Safety Council's Campbell Institute recently conducted a study of organizations with excellent safety records to identify the best practices for contractor and vendor safety.

As part of the study it identified five steps during a contractor or vendor relationship when it's incumbent on a hiring company to evaluate the workplace safety habits of their business partners.

### Prequalification

The institute recommends looking at more than just a company's experience modification rate. It says safety-minded firms assess contractors in multiple areas, such as their total recordable incident rate, fatality rate, days away from work for injured workers, restricted or transferred rate, and other OSHA recordables for the last three years.

Many firms also ask for environmental reports, written safety programs, permits, licenses, and continuous improvement programs.

### Pre-job task and risk assessment

Before a contractor begins work, institute members recommend having a method for evaluating the risk of the work to be performed. Doing this can help you understand the scope of the work and give you a chance to put into place a new written safety program if the risk is deemed high.

Most importantly, you should require subcontractors to adhere to the same safety standards as you do.

### Training and orientation

You should require safety orientation and skills training for contractors before they step onto your jobsite. Also, if they are doing highly specific work, you should ensure they have any

required permits or special training. Some of the jobs that fit into that category are confined-space entry, electrical work, hot work, energy control, forklifts, and elevated work.

### Job monitoring

Many safety-minded companies monitor work with daily checklists, pre-shift tailgate or safety meetings and weekly walk-through inspections. Some of the companies surveyed for the study also require contract employees to submit a certain amount of safety observations and utilize mobile applications to report non-compliance or unsafe conditions.

Also, you need to keep up-to-date incident logs, as this is crucial to monitoring contractor safety during a project.

### Post-job evaluation

Conduct a post-job evaluation. During this phase look at safety, customer service and the quality of the finished work, and use those factors in determining the contractor's eligibility for future contracts. ❖

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## HUMAN RESOURCES

# New Workplace Notice Requirements Take Effect

**I**F YOU have more than five employees you are required to have in place as of April 1 anti-discrimination, anti-harassment and complaint investigation policies.

You are also required to post starting April 1 a notification to your employees about California's pregnancy disability leave law.

The regulations, updated by the California Fair Employment and Housing Council, were spurred by recent court decisions. If you have not done so, now is the time to review your anti-harassment, discrimination and retaliation policies. ❖

### ANTI-HARASSMENT POLICY REQUIREMENTS

- Set the policy in writing.
- List all current protected categories covered under the Fair Employment and Housing Act.
- Indicate that the FEHA prohibits not only supervisors and managers from engaging in prohibited conduct, but also co-workers and third parties with whom employees come into contact.
- Create a complaint process to ensure that complaints receive the following:
  - Designation of confidentiality, to the extent possible.
  - Timely responses.
  - Impartial and timely investigation by qualified personnel.
  - Documentation and tracking for reasonable progress.
  - Options for remedial actions and resolutions.
  - Timely closure.

### STEPS YOU NEED TO TAKE NOW

- Include a mechanism that permits employees to complain to someone other than his or her immediate supervisor, such as a human resources manager or other supervisor, a complaint hotline, or an ombudsperson. It should also include contact information for the California Department of Fair Employment and Housing and the U.S. Equal Employment Opportunity Commission as additional avenues for employees to lodge complaints.
- State that you will conduct a fair, timely and thorough investigation and that all parties will be given due process.
- State that you will ensure that you will keep the matter confidential to the best extent possible, but not that it's completely confidential.
- Require supervisors to report complaints of misconduct to a designated person, such as a human resources manager.
- Have a mechanism for remedial measures if you find misconduct.
- Assure your workers that you will not retaliate against them for filing a complaint.



### Pregnancy disability notification

Starting April 1, if you have five or more employees you are also required to post the "Your Rights and Obligations as a Pregnant Employee" notice alongside all of your other mandatory employment-related postings at your workplace.

You can find a copy of the new poster from the state at this website:

[www.dfeh.ca.gov/res/docs/Publications/Brochures/2016/DFEH-100-20%20\(04-16\).pdf](http://www.dfeh.ca.gov/res/docs/Publications/Brochures/2016/DFEH-100-20%20(04-16).pdf)

Employers with 50 or more workers will continue to be required to post the "Family Care and Medical Leave and Pregnancy Disability Leave" notification that has been required since July 2015.



## NEW LAW

# Wage/Hour Violations Can Create Personal Liability

**A** NEW LAW gives the state labor commissioner new powers to go after employers that have judgments against them for non-payment of wages, including issuing stop-work orders and holding officers personally liable.

The Fair Day's Pay Act, which took effect Jan. 1, adds a new section to the state Labor Code aimed at reducing wage theft and making employers pay for skirting wage and hour laws. Specifically, those violations relate to:

- Final payment of wages at termination.
- Issuing wage statements.
- Meal and rest break laws.
- Overtime.
- Expense reimbursement.
- Payment of minimum wage.
- Attorney's fees for complainants.
- Waiting time.

The new law is likely to increase litigation against employers and it comes at a time when overall wage and hour cases have ballooned 58% between 2013 and 2015.

The average value for these types of claims in California is \$6 million.

The new law gives the labor commissioner tools to enforce collection of judgments in wage and hour law cases. It adds a new level of liability to companies, as well as the individuals who run these enterprises as they can be held personally liable for judgments.

### Officers in the crosshairs

The law imposes criminal and personal liability against individuals who act for the employer, such as owners, officers, directors and managing agents. Because of this new law, those individuals have potential personal liability for a liability that didn't exist before.

With this new area of liability opening up, and in light of the boom in wage and hour litigation anyway, it's important for all employers to consider director's and officer's liability insurance and employment practices liability insurance.

Typically, EPLI policies have excluded coverage for unpaid wages and associated fines and penalties. Some insurance companies, though, will carve back a sublimit of coverage for wage and hour claims, but that is usually only for related defense costs.

There are also some novel options available from Bermuda and London insurers that blend a wage and hour policy with an existing EPLI policy. These policies vary in price and are still evolving.

Unfortunately, your typical D&O policy includes an exclusion for wage and hour claims.

But there is an option in specialty products called Side A "Differences in Condition" policies that can be attached to a D&O policy. Differences in condition policies generally don't include an exclusion for wage and hour claims.

Depending on how the terms of these policies are written, they could include coverage for defense costs and possibly for settlements and judgments in suits that name directors and officers.

As the highly litigious area of wage and hour law evolves, please talk to us to evaluate your coverage and minimize your exposure.

Also, now is the time to revisit all of your wage and hour policies, including breaks and waiting time, to make sure they comply with state law.

Don't get left blindsided by a lawsuit that can bankrupt your company. ❖

### LABOR COMMISSIONER'S STICKS FOR OFFENDERS

- Issuing stop orders against employers.
- Issuing levies against employers' bank accounts and accounts receivables.
- Placing liens against an employer's real and personal property.



## ACA COMPLIANCE

# The Delicate Subject of Cash in Lieu of Coverage

**WHAT** IF you hire a new employee, who rejects your offer of health benefits because they want to stay on their spouse's plan and they ask for a higher rate of pay instead?

The "employer shared responsibility" requirement of the Affordable Care Act bars employers – with the threat of a \$36,500 penalty – from giving an employee cash with which to purchase insurance on their own.

But how about if you are increasing their pay based on the fact that you are not paying for the employer portion of their premium?

Employment law attorneys have been receiving more queries about how to deal with such a request, and in this article we'll explore how employers can legally do so as long as they are willing to deal with the downsides and potential for conflict with regulators.

To make sure they protect themselves, some employers require employees that opt out of the company health plan to certify that they have other coverage. This is also a questionable move that can have certain ramifications for employers.

It is legal to offer employees cash in lieu of health plan benefits, but it has to be done appropriately through a cafeteria plan that includes a "cash-in-lieu" agreement. If they opt out for cash in the agreement, they will be taxed on those funds as if they were wages.

## CASH-IN-LIEU GOLDEN RULES

- Cash should not be provided to enable an employee to purchase an individual policy in the open market or an exchange.
- The cafeteria plan must clearly state that each eligible employee has the option to either enroll in the benefits or receive cash.
- The agreement must be part of your cafeteria plan. Explain that only employees who choose the cash option will be taxed on the cash.
- The cash amount must be uniform for all employees. If not, you run the risk of failing the non-discrimination test of the ACA.



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## What you should do

If you offer or are planning a cash-in-lieu arrangement, you should talk to us or an employee benefits attorney first. You need to make sure that:

- You are not opening yourself up to scrutiny by regulators or the tax authorities, and the resulting penalties.
- You ask if you should require that employees sign a statement affirming they have coverage from another source.
- The option does not result in employees who opt in to your group health plan being taxed.
- You offer the option only through a cafeteria plan.
- Your Section 125 plan document is updated with the appropriate language to show that employees choose either to enroll in benefits or to receive cash.
- Your plan-related materials are updated to ensure that the option is disclosed to all eligible employees.
- All written waivers for coverage include the cash-in-lieu option, and that employees clearly indicate that they are waiving coverage that the employer has offered as required under the ACA and the employer mandate.
- You offer the opt-out option to all eligible employees, not to just a select few. ❖

## THE \$36,500 MISTAKE

Do not give employees cash to purchase their own plan. This is what's known as an employer payment plan, which could result in a penalty of \$100 per day per employee (or \$36,500 per affected employee per year).

