RISKY BUSINESS

A Publication of the
Miami Valley Risk Management Association
November 2020

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FYI

Emails: - Be Careful What You Write

By Tom Judy

Email has become the primary mode of business communication. This has never been more true than now with the rapid increase in the use of remote working arrangements.

The commonplace nature of email can lull people into a false sense of security that their email communications are confidential and private. Business people often say things in a "private" email they would never think of saying in an old-fashioned letter or other such formal mode of communication.

Articles

This false sense of security can have serious consequences in litigation. The parties in a lawsuit are entitled to conduct "discovery" which includes the right to obtain documents, communications, and electronic data in the possession of the other party or even in the possession of third parties. Even "deleted" emails can be recovered from individual hard drives, servers, cloud storage, smart phones, backup tapes and internet service providers.

A few tips can help business people to avoid an email becoming damaging to them or their business in a lawsuit:

1. Write every email with the assumption that people other than the recipient will read what you have written.
2. Treat email messages like any formal communication. Avoid profanity, incendiary comments, untruths, and inappropriate statements.

(continued on page 2)

FYI (continued)

3. Try to be factual. Speculation, assumptions and guesses can look like facts when examined months or years later.
4. Skip attempts at humor especially when writing about a serious subject. Humor has little value in the courtroom.
5. Do not write emails when you are angry or upset. If angry or upset, take some time to cool down first and write a few drafts before sending. If in doubt, have someone read your draft to offer their perspective.
6. Be very careful with the "Reply All" button. We all can probably think of an example in which some one accidentally sent a reply to a group when they thought they were sending a confidential reply to one person. Such carelessness can result in embarrassment or worse.
7. An email to your attorney is protected from litigation discovery by the attorney-client privilege. However, if you forward the email to third parties outside your organization or copy such outsiders on your communications, you may lose the privilege.
8. If litigation occurs, **DO NOT** delete emails or try to hide evidence. First of all, it is wrong, often illegal, and can have dire consequences in a lawsuit. Second, trying to delete electronic data usually does not work, and most good lawyers will be able to find out when emails have been deleted. Third, when it is discovered, the "cover-up" effort is almost always more damaging than the original email would have been.
9. Train your employees on the proper use of email and why it is important for them to follow these guidelines.

By following these simple guidelines, your emails are less likely to turn up as damaging evidence in the courtroom.

FYI – Closure of Loss Year 27 (2015)

At their September meeting, the Board of Trustees voted to close Loss Year 27 (2015), resulting in a refund of about $1.9 million to the member cities. This action follows the return of nearly $900,000 to the members from the closure of Loss Year 26 (2014) at the June board meeting. Total surplus loss reserves of $22.5 million have now been returned to the members from the 27 closed loss years.

The limit of coverage for the 2015 loss year was $10 million per occurrence. (The limit was increased to $12 million in 2016.) The pool's resources covered any liability claims up to $500,000 and property claims up to $250,000. Claims exceeding those thresholds were covered by reinsurance or excess insurance policies purchased by the pool.

The refund of $1.9 million represents 74% of the $2,575,000 contributed by the members to Loss Year 27. The average refund percentage for all loss years is 54%.

These refunds result from the members' outstanding risk management practices. Congratulations to all MVRMA members for a job well done.

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Loss Control Lowdown…

Safety Committee: Utilizing Employee Input to Take Safety to the Next Level

Starr Markworth

During challenging times, workplace safety is often overlooked and given less importance. Many safety experts would argue that during these times it is more important than ever to make sure you have a strong safety culture. An active safety committee will help build and sustain that culture.

What is the purpose of establishing a safety committee, you ask? The basic function of a safety committee is to help create and maintain all employees' active interest in safety in order to minimize accidents and risk exposures. But an effective safety committee will help prevent accidents, increase compliance and improve teamwork, productivity, communication and morale.

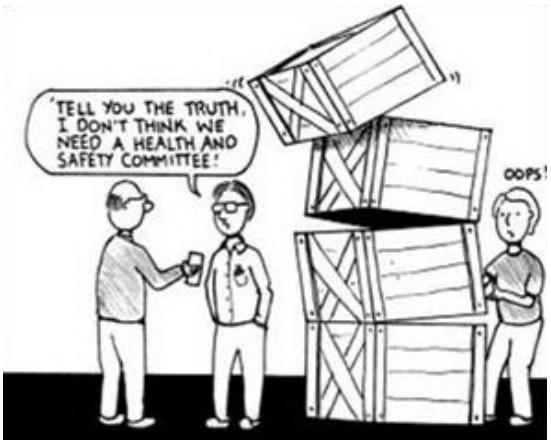
Some major functions of effective safety committees are:

- Identifying aspects of the workplace that are unsafe and recommending corrective action
- Meeting on a regular basis to discuss safety concerns
- Participating in the process of the investigation of accidents/incidents and dangerous occurrences
- Developing safety policies, procedures and handbooks
- Promoting health and safety programs, policies and training
- Safety planning for the organization when new processes, equipment, facilities, etc. are being added

Management and employees share an equal concern for accidents and injury prevention; therefore, it is in everyone's best interest to participate in an active safety program, including a safety committee. When employees are included in the decision-making process, there is a greater buy-in to the overall safety program. Greater buy-in improves communication, trust and teamwork, which improves committee effectiveness and eventually improves safety performance.

Safety committees in various forms have been around for the better part of this century. With proper direction and management support, they can continue to fill a valuable role in assisting management with safety and health responsibilities.

If you would like some assistance in creating a citywide safety committee, revitalizing an existing committee, or more information on safety committees, please contact Loss Control Manager, Starr Markworth at 937-438-8878 or by email smarkworth@mvrma.com.



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Counselor's Comments

By Dinsmore and Shohl

Changes to Ohio's Workers' Compensation Statutes Expected to Benefit Employers

On June 16, 2020, Governor Mike DeWine signed into law House Bill 81 and its impact is significant for employers in the context of workers' compensation. One of the most significant implications of this new legislation includes the codification of the voluntary abandonment doctrine – a doctrine which was judicially created and has been subject of much debate and litigation over the years. The new statute went into effect on September 15, 2020.

Under R.C. 4123.56, the statute addressing temporary total disability ("TTD") compensation and wage loss, new subsection (F) codifies the voluntary abandonment doctrine and addresses the situation where an injured worker is not eligible to receive such compensation. The new law states "[i]f an employee is not working or has suffered a wage loss as the direct result of reasons unrelated to the allowed injury or occupational disease, the employee is not eligible to receive compensation under this section." The law further states the general assembly's intent is "to supersede any previous judicial decision that applied the doctrine of voluntary abandonment to a claim brought under this section."

For employers, this new law could result in additional defenses to TTD because the law supersedes *any* previous court decision regarding voluntary abandonment. It remains to be seen how the Industrial Commission and courts will interpret this. From an Industrial Commission standpoint, the *Adjudications Before the Industrial Commission* (previously known as the Hearing Officer Manual) repealed its policy on voluntary abandonment on September 15, 2020. Hearing officers were advised that the new statute would be applied to all claims, regardless of the date of injury and would apply to issues regarding both temporary total disability and permanent total disability. Hearing officers were also advised that all prior case law concerning voluntary abandonment is to be treated as overruled by statute, but received no further guidance as to how the new standard is to be applied. For example, under the old voluntary abandonment doctrine, it was necessary for an employer to demonstrate that there was a written work rule that was violated, that the claimant had knowledge (or should have known) of that rule, and that the rule stated that discipline up to and including termination was a potential consequence. Without any further guidance from the Industrial Commission, hearing officers are able to individually interpret the new law, likely assuring that multiple individual standards will arise. From a court standpoint, courts are not required to abide by the Industrial Commission's interpretation of the statute, and there is also no mandate as to whether claims with the date of injury prior to September 15, 2020 will be handled differently (i.e., under the old standard). As such, the initial court interpretations on this issue will be very interesting. Despite what will certainly create some early frustration and varied interpretations, a broadened voluntary abandonment defense will no doubt benefit employers, while a limited interpretation of the statute will benefit claimants.

Counselor's Comments

By Dinsmore and Shohl

Under R.C. 4121.471, the time limitation an injured worker has to file a VSSR application has been reduced to one year. Currently, an injured worker has two years from the date of injury to file a VSSR application. Such VSSR applications are filed at or near the two-year deadline. While an employer should thoroughly investigate all industrial incidents as soon as possible, especially where an incident could result in a VSSR application, sometimes a timely investigation does not occur. A delayed investigation results in challenges for employers, because after two years, typically, evidence to defend against a VSSR application, such as witness testimony, is no longer available. The reduced statute of limitations should assist employers in that respect. Another added benefit is VSSR awards, based on accrued compensation, should be reduced by knocking a year off the filing deadline. The change to the VSSR statute of limitations applies to claims arising on or after September 15, 2020.

A slight but important change to the workers' compensation law addresses the length of time in which a claim remains open. The amendment to R.C. 4123.52(A) includes a bar to modifications or changes to claims under continuing jurisdiction after five years from the last date of payment of compensation or the date of the last medical services rendered. The current law is five years from the last date of payment of compensation or date of the payment of medical benefits. This slight change could shorten the period of time a claim remains "alive." This amendment applies to claims arising on or after July 1, 2020.

An additional amendment includes the increase in funeral expenses in cases of death to $7,500 (R.C. 4123.66(A)). This amendment applies to claims arising on or after September 15, 2020.

Broker's Beat

Contributing Factors to Current Market Conditions

It has been commonly discussed and widely understood that the insurance market is considered to be a "Global" market. Wildfires in California, tornadoes and convective storms throughout the Midwest, earthquakes in Mexico, as well as the recently faced Pandemic known as COVID-19 all contribute to the overall insurance marketplace stability. This will continue to affect every insured. Each event takes its toll on the market and wreaks havoc on the overall bottom line. It is no secret that the insurance marketplace has been "hardening" over the course of the last 18-24 months; with many considering our current situation the worst market conditions ever recorded, or at least since the 1980's. Rates continue to skyrocket, carrier capacity is evaporating, retentions are increasing, new exclusions and coverage limitations are being added and introduced, and the list goes on.

The most recent, and arguably most significant factor, is the once in a generation pandemic known as COVID-19. According to Lloyd's of London, COVID-19 is estimated to be a $3 - $4.3 billion event against their portfolio alone. In addition to this, social unrest, rioting, protesting, and increasingly severe Named Windstorm and Hurricane events are causing billions of insured losses. These are some of the more obvious factors behind the hard market, as they are commonly discussed and frequent contributors to the evening news. However, there are a number of additional underlying factors contributing to the current environment which are less frequently discussed.

The following outlines three underlying factors that have contributed to the current market conditions. These findings are supported by industry knowledge, real life examples, and direct market experience.

1. **"Social Inflation"**

With no real definition being offered, Social Inflation often refers to the perception — or even expectation — by plaintiffs and courtroom juries that injured parties should receive highly inflated, multi-million (or billion) dollar awards. In today's legal environment, there appears to be a common sentiment that "insurance will pay for it" when determining these large verdicts. To date, Social Inflation has large concentration in the following sectors; commercial auto, medical malpractice, certain professional and management liability lines such as directors' & officers' (D&O), and umbrella and excess liability. Social Inflation tends to be a more prevalent issue where coverage is in place for large corporations, municipalities and the perceived "deep pocket" organizations and individuals, as these are where the largest limits tend to be purchased. The Commercial Auto marketplace has been hit particularly hard by this emerging trend. Cases have involved trucking companies, or even state and federal employees, have been involved in accidents where no negligence on their part had been found. They may just happened to be in

the wrong place at the wrong time. Due to injuries sustained by the other parties involved, these entities have seen verdicts in the range of $30 million, $50 million and sometimes up to $100 million. These losses quickly erode the entity's primary layers, and pierce the excess policies in a hurry, which is where the higher limit amounts are offered. Excess and Umbrella underwriters had not fully anticipated being in play as frequently as they have been in recent history. Mike Hudzik, who is the managing director and head of casualty underwriting for the US & Canada at Swiss Re. is quoted as saying the following:

> "Probably one of the biggest drivers of social inflation is the general anti-corporate sentiment that exists, reaching back to the financial crisis. It seems like it's a long time ago in our rear-view mirror, but it really created an environment that continues to gain momentum today. Since that time, there's been a greater division or separation of wealth, and there's just generally a feeling that someone needs to pay when there's some kind of damage or injury sustained, regardless of negligence."

2. **Prevalence of Nuclear (or Super-Nuclear) Verdicts**

Nuclear, as well as Super-Nuclear jury awards, are reaching into the tens of millions, and in some cases, even billions of dollars. This is particularly seen in cases where human contemplative decision-making is prevalent. The reason behind this is due to the fact that humans are the only decision makers who can act based on emotion, with heightened emotions often amplifying outcomes rather than mitigating them. States, Counties, Public Entities and other Municipalities have all become too familiar with these large verdicts. This holds especially true in states such as California, New York, as well as others that do not have any form of tort liability reform. While some states have more "municipality-friendly" laws and tort reform to help shield them from these large verdicts, the overall insurance industry continues to feel the effects and is greatly impacted financially. According to the Wall Street Journal's analysis of data from verdictsearch.com, in 2019, there was a 300% increase in what is considered "nuclear verdicts" compared to the prior ten years. With new legislation making its way into states with favorable tort laws, insurers are choosing to shift capacity from the public sector into more favorable and profitable sectors and/or regions.

3. **Continuing Increase in Loss Cost Trent or "Loss Creep" and Valuations**

The commercial property insurance market has continued to tighten as we begin the fourth quarter of 2020. Two of the major factors that continue to impact this tightening property market are "loss creep" and "valuations." Bob Black, Executive Vice President and AmWINS' National Real Estate Practice Leader states:

> "Unlike in years past where blanket limits were many times granted without pushback, each account is now being reviewed on its own merits. Nearly every carrier is scrutinizing the valuations being utilized. Scheduled limits (applied via an Occurrence Limit of Liability endorsement) and margin clauses are making their way back into the equation for those insureds that are unwilling to increase their valuations to the point where the market is comfortable providing blanket limits."

Traditionally, property insurance was not considered to have a "tail" AmWINS explains, but "loss development", or "loss creep," is a growing concern for the market today. When a loss occurs, insurers will set an expected loss amount for that event which is known as the "loss reserve". Adjusters need to take the practice of reserving claims very seriously, and strive to be as accurate as possible. That being said, recent history shows that what we have been experiencing as of late is that months, or even years after an event occurs and a loss reserve has been set, claims are needing to be reevaluated, causing the initial reserve set for that claim to "creep" upwards. This is due in part to higher than anticipated construction and labor costs, the increased cost of materials, and improper valuation of the property originally reported to the company. This upward creeping is especially hard on insurers due to the fact that reserve funds had been previously set aside to pay for these losses, which in turn contributes to their bottom line. Insurers are now seeing those reevaluated claims increase over time by anywhere from twenty to forty percent. AmWINS states: "No longer is it just the 'magnitude' of losses that are considered: underwriting assumptions around perils that had traditionally been viewed as attritional, rather than catastrophic, are changing."

As you can see, there are multiple factors contributing to the adverse condition of the insurance marketplace; making an already complex industry even more complex. Alliant continues to stay intimately involved and in-tune to the challenges that lay ahead; actively preparing and strategizing the best course of action for our clients. We are specialists in municipality and public entity risks, but there are plenty of industry-wide concerns at play. Alliant will continue to actively track and stay abreast of each of the factors affecting the global insurance marketplace.

Works Cited

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The Claims File…

Craig Blair

At the September MVRMA Board Meeting, the MVRMA staff presented the 2021 Preliminary Budget which included the estimated 2021 member contributions. The Pool Contribution Factor (PCF) Formula is used to determine the percentage each city will pay toward the total cost (insurance costs, training budget, operating expenses, and the loss reserve fund) for the 2021 MVRMA program. There are several factors that comprise the PCF, such as the city's population, number of employees, number of vehicles, insurable property values, operating expenses and of course the member's loss experience. The member's loss experience data is triple-weighted in the PCF formula; therefore, the claim experience number becomes the primary "driver" for any upward or downward change in the amount each member will pay to MVRMA for any loss year.

It is important for the members to be diligent about reporting any possible losses to MVRMA, regardless if they are city property claims or claims that involve damages to third parties. For member property-only claims, the cities need to report the damages as soon as possible so MVRMA can inspect the damages, or damage scene, and document the file before the member completes any repairs. For third party claims, the same information noted above is applicable, but also the other parties' contact information is necessary for MVRMA to properly handle the claim. Timely reporting is imperative as the other parties are waiting to hear from the city, or their representative, as to how to proceed with the claim.

If any member city, or department, have questions on claims please contact me at MVRMA at 937-438-8878 or cblair@mvrma.com.

Calendar of Events

Upcoming Training Events

Due to COVID-19, in-person training events have been temporarily suspended. Visit www.mvrma.com for a list of on-line training opportunities.

Upcoming Board Events

Committee Meetings Via GoToMeeting

Risk Management - December 3rd, 10:00 AM
Finance - December 3rd, 1:30 PM

Board Meeting

December 21st, 9:30 AM **Via GoToMeeting**

From The Board Room

- Accepted 2019 Financial Audit and CAFR
- Approved the 2021 Preliminary Budget
- Approved Closure of Loss Year 2015