HEFFERNAN INSURANCE BROKERS
Because You're Different

News You Can Use

May 2017 Volume 5, Issue 7

WORKERS' COMPENSATION

Legislators Look to Fix Owners' Exemption Law

THE ABRUPT change in California law that quickly altered the rules of who can claim a workers' comp exemption prompted enough of an outcry that the legislators in Sacramento are scrambling to fix its shortcomings.

If you remember, last year all employers with policies in force in California were required to submit to their insurers forms that listed all owners and officers who are claiming an exemption. The forms were due by Dec. 31, 2016.

The sudden legal change left many employers scrambling to submit the forms and comply.

Right now, the legislature has made some changes that would affect a small segment of employers in California and perhaps reduce the ownership percentage required.

The law was put in place last year to undercut employers who claim that individuals who are actually just employees are owners of the company and hence do not need to be covered for workers' comp.

But it was rolled out haphazardly at the end of the year, putting employers on the spot to provide the waivers – and insurers on the spot to amend in-force policies last year.

One of the big concerns from employers is the new formula for deciding who is and who is not considered an owner and hence eligible for being excluded for workers' comp. Under the law, an individual must own at least 15% of a corporation or partnership in order to claim the exemption.

SB 189

The bill that's been tabled to address such issues is SB 189 and much of its current content was created after complaints by medical providers about the 15% rule.

The new amendments exempt medical corporations from a stock percentage requirement to determine ownership. They also apply to veterinarians.

The current law, ushered in by AB 2883 last year, allows for employees who are officers or members of a board of directors that each own at least 15% of the stock in a quasi-public or private corporation to be exempt from workers' comp coverage. The organization must provide a signed waiver for each person to the insurance company.

The law also failed to take into account the impact on small, professional corporations with multiple owners each with less than a 15% stake in the corporation.

These corporations were not even part of the discussion and were unaware of the bill until it became law.

In its current form, SB 189 would exempt medical providers from the law – and would also reduce the percentage required to qualify for an exemption to 10% ownership.

For now, the bill is still being debated and much can change in the coming months to address other parts of the law. ❖

Contact Us

HEFFERNAN INSURANCE BROKERS

If you have any questions regarding your coverage or our products, please call us at one of our offices:

Walnut Creek
San Francisco
Menlo Park
Portland
St. Louis
Petaluma
Los Angeles
Orange County
New York

Sales: 877-731-7905
Service: 800-234-6787

RISK MANAGEMENT

Staff Texting Blows Holes in Communications Policies

YOU MAY not be aware of it, but your employees are most likely communicating with each other and clients using texting or instant messaging.

While the immediacy of texting and instant messaging is great for business as it allows faster communications, better collaboration and more responsiveness, the downside is that your organization likely can't track and retrieve those communications.

It becomes even harder if the communications are via instant messaging apps like Whatsapp and Facebook's Messenger.

As an employer, it's important that you understand the issue and that you have clear rules for communications among employees in order to protect your company's interests.

You'll need a policy in place when something goes wrong and you need to track the thread of communications to see what was said or promised by whom, and when. These details can be crucial to resolving problems with clients, or if you are ever sued and your communications are subpoenaed for discovery.

Plaintiff-side lawyers in employment cases have already started demanding the production of text messages and e-mails during discovery. And if litigation ensues on an issue, you may have a duty to preserve text messages.

Roadblocks

There are a few issues that you need to consider, especially in light of the fact that many companies are allowing staff to use their own devices for company communications, including giving them access to the business's e-mail system on their phone.

If your employees are exchanging texts and instant messages on company phones, the history of communications would be preserved and you would be able to access the content by asking for the phone.

But, if your employees are sending and receiving work texts and instant messages on their personal devices, the issue gets murkier, particularly if you don't have a bring-your-own-device (BYOD) policy. Accessing messages about company business on an employee's smartphone may raise privacy issues.

The problem especially arises in the case of wrongdoing by an employee. If they are using their phones for communications that could provide insight into their behavior, they can erase those messages before you ask to see them.

In other words, you cannot rifle through their phone without first obtaining it, meaning you can't look at it without them knowing as you could if you looked at their e-mail on your company server.

There are also privacy issues that arise if you are trying to access an employee's personal phone to view texts and messages.

The big issue is: how do you capture those communications? After all, it will not be done over your network, unlike your company's e-mail system that preserves all communications which are available to you. The messages reside on the phone instead.

What you should do

Obviously texting and instant messaging are a potential minefield for employers who want to be able to access all company communications among employees and between your staff and clients, vendors or partner organizations.

To ensure you have a handle on it, you should set rules outlining what method of communication employees may use for business purposes.

If you don't want texting or instant messaging of any kind for company business, that needs to be spelled out – including ramifications for breaking the rule.

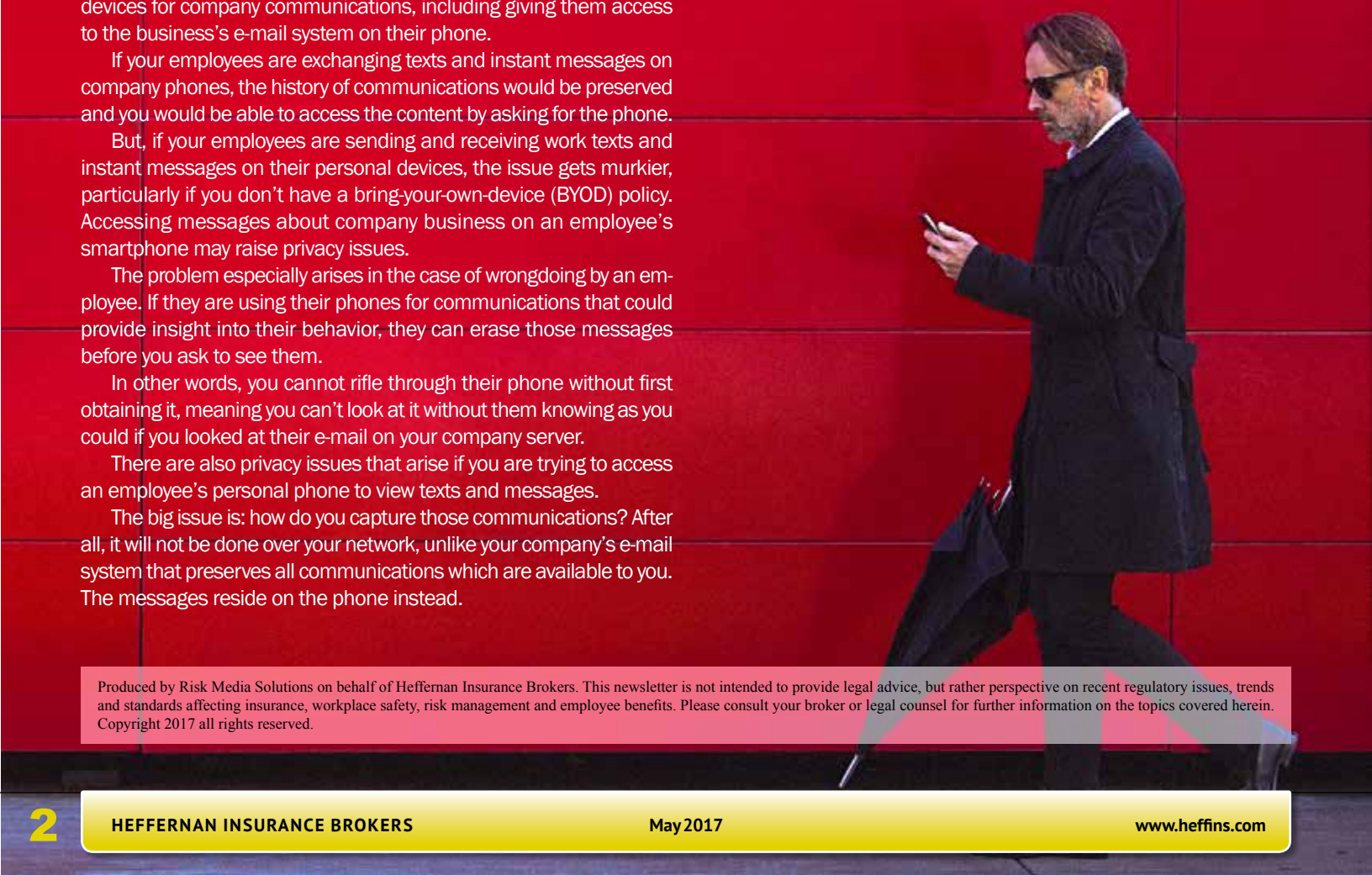
If you decide to allow texting and instant messaging, your policy should be clear on what kind of communications are okay.

You will need to amend your policy related to employee communications and record retention to make sure texts and instant messages are included.

If you have a BYOD policy, at a minimum it should include allowing you to take custody of the employee's phone for legitimate purposes like a dispute with a client, or discovery for litigation.

As you can see, it's important that you initiate a policy on employee communications that takes into account texting and messaging.

If you haven't done so, you should do it now as this faster method of communication is becoming the new normal, particularly as Generation Y continues filtering into the workforce. ❖



EMPLOYMENT PRACTICES LIABILITY

Preventing the Many Forms of Workplace Bullying

ONE WAY TO risk an employee lawsuit is workplace bullying, if you don't investigate when you learn about it and nip it in the bud if you find it's going on.

Old-school cajoling and demeaning employees can these days land a company in hot water and at the receiving end of a costly lawsuit. The problem that many employers face when confronted with bullying is that it's not always cut and dried and there are different types of bullying, some more or less overt than others.

And you also have to decide where the boundary is between harsh words or rude behavior, and bullying. Bullying can be verbal or non-verbal, and it can be overt or someone can be bullied behind their back through rumors and actions that mask the identity of the perpetrator.

To create a bullying-free workplace you need prevention rules in place. But in order to prevent it, you should first understand how it manifests itself. The article "The Dimensions of Workplace Bullying Behavior" by Edward Stern in EHS Today outlines it this way:

OVERT BULLYING

- Refusing to talk to someone or meet with them, or sidelining them from meetings they should be in.
- Shouting or cursing at someone either privately or publicly.
- Public humiliation.
- Physical intimidation like gestures or expressions, standing too close to someone and invading their space or blocking someone from entering or leaving an area.

HIDDEN BULLYING

Someone being bullied may not even know it until they learn about it from somebody else. It's done behind their back to undermine them and put their job at risk. It includes:

- Spreading rumors or gossip about a person to hurt their reputation. Gossip, true or not, is a malicious act.
- Not informing someone about meetings that they would normally be included in.
- Purposefully withholding vital information from the worker when they need to know it to do their job.

What's not bullying

Not all moments when a worker is feeling uncomfortable due to the actions of another employee or supervisor are bullying, like:

- A civil disagreement or argument.
- Factual, civil, professional criticism of work by a supervisor.
- Bad management decisions that were not intended to degrade or undermine a worker.
- Not greeting someone when they arrive at work.

Setting the rules

Fold your anti-bullying rules in with the rules you have in place for prevention of discrimination and harassment. They should:

- Define bullying so that both employees and management can easily identify the behavior and address it.
- Make it clear that victims should not be fearful of losing their jobs or risk retaliation should they report bullying.
- Set up a system for employees to report bullying or use the same mechanisms you have in place for reporting discrimination or harassment.
- Require management to respond quickly to reports of bullying. They should conduct an investigation immediately and, even if names are not provided, the organization needs to let others in the company know when it has taken action – and what the consequences were.

One big danger is to ignore bullying because you think it adds to productivity or profitability. That's a big mistake.

Your organization should have a zero-tolerance attitude around bullying – no matter who the bully is, or how high up they are in your hierarchy. ❖

BULLYING ONLY BOSSES CAN DO

There are some forms of bullying that can only be done by supervisors or managers to undermine or disgrace an employee, like:

- Removing responsibilities without cause.
- Frequently changing work guidelines.
- Setting impossible deadlines to set the person up for failure.
- Cancelling an employee's vacation.
- Underworking someone so they feel useless.

DISCRIMINATION RULING

Court Extends Protection to LGBT Employees

IN A LANDMARK decision, a U.S. appellate court has held that legal protections for workplace discrimination also extend to LGBT employees.

The decision by the 7th U.S. Circuit Court of Appeals breaks new ground and paves the way for a lower court to hear the complaint by a community college teacher who accused her employer of firing her because she is a lesbian.

In its 8-3 decision, the court strayed from decades of rulings that gay people are not protected by the civil rights law, because they are not specifically mentioned in it. But instead of creating a new protected class, the court said that the discrimination falls under the aegis of gender discrimination.

The decision overturns a lower Indiana court's ruling to throw the case out after the college had filed a motion for summary judgment.

In her lawsuit, the plaintiff said that Ivy Tech Community College in South Bend, Indiana, had passed her over for a permanent position and refused to renew her contract as an adjunct professor after school administrators learned that she is a lesbian.

What makes this case especially interesting is that the school says that it already has policies in place barring discrimination on grounds of sexual orientation.

Also, the school says it won't appeal the case to the U.S. Supreme Court, opting instead to fight it at the local level.

Ivy Tech Community College also rejects the assertion that it discriminated against the plaintiff.

In its decision, the Court of Appeals held that protections against sex discrimination in Title VII of the Civil Rights Act of 1964 protect people from job discrimination based on their sexual orientation. Title VII also includes protections against discrimination based on race, color, religion, age and national origin.

A number of other courts in similar lawsuits over the years have held that sex in this context refers to whether someone is a man or a woman.

The 7th Circuit Court, however, said it can also mean "sexual orientation" based on today's norms.

"We understand the words of Title VII differently," Judge Richard Posner wrote in the majority opinion, "not because we're smarter than the statute's framers and ratifiers but because we live in a different era, a different culture."

With the school opting not to appeal, the issue will obviously not be going to the Supreme Court for this case. But it paves the way for future LGBT discrimination cases to go all the way to the nation's highest court.

Attorneys in those cases will certainly cite the findings of the 7th U.S. Circuit Court of Appeals, which has in the past had significant influence on cases in other districts thanks to its judges' reputation for intellectual rigor.

The great unknown

Now that Neil Gorsuch has ascended to the U.S. Supreme Court and reinstated its slightly more conservative bent, it's not clear how successful an LGBT discrimination case would be on appeal.

The Supreme Court, when the conservative Anthony Scalia presided before his death last year, has tended to split between liberals and conservatives on controversial social issues.

The deciding vote has often come down to moderate Justice Anthony Kennedy, who cast such a vote in a 2015 ruling that gave same-sex couples the right under federal law to marry.

Since this is a similar social issue, Kennedy could side with the more liberal side of the court.

The takeaway

Although it's not illegal to discriminate against LGBT individuals under the wording of current law and regulations, the social trends are moving in favor of protected status at some point.

For employers, the safest bet is to have a non-discrimination policy in the workplace, period, regardless of the class – including sexual orientation – employment attorneys say. ❖