

## RISK MANAGEMENT

# What Keeps Business Owners up at Night?

**B**USINESS OWNERS have a lot of risks on their minds these days. Complying with regulations, holding on to their best workers, the constant threat of computer hackers, increasingly unpredictable weather – all of these have businesses worried.

According to the “2016 Travelers Risk Index” from the Travelers Companies, fewer business leaders saw the world as riskier than they did the year before. However, they expressed concern about the following factors:

**Benefit cost inflation.** The rising cost of medical care is the top concern for all businesses. This worry is rational: Government data shows that medical costs rose by nearly 20% between 2010 and 2016, almost twice as fast as the general inflation rate.

**Workforce issues.** Finding and keeping skilled employees is the second greatest area of concern. Retaining their best workers is the top workforce issue, followed by finding and hiring qualified employees and the cost of training them.

The Congressional Budget Office forecasts that the percentage of the population older than 16 participating in the labor force will decline

for the foreseeable future as the baby boom generation retires.

**Legal liability.** Business owners worry that professional errors and omissions will land them in court. They also worry that their own employees will sue them for discrimination, harassment, wrongful termination, or other employment practices.

These worries are well-founded, as law firm Seyfarth Shaw reported that the value of employee lawsuits over wage and hour law violations tripled between 2014 and 2016.

Liability for auto accidents and faulty products is also a concern.

**Cyber and data breach risks.** Large businesses are particularly worried about cyber risks, with 23% of them having suffered external data breaches and cyber attacks. Malicious cyber attacks and criminal activity are seen as the biggest threats, while human error and poor system performance are lesser concerns. The FBI has reported that cyber crime jumped 24% in 2016.

**Automobile risks.** Two-thirds of businesses have employees using their personal vehicles for work. They are particularly worried that their employees are looking at their smartphones instead

of the road in front of them. The U.S. Centers for Disease Control and Prevention has found that nine Americans are killed and more than 1,000 injured daily in distracted driving incidents.

**Supply chains.** Businesses worry about being unable to ship products to customers; being unable to obtain materials from suppliers; receiving poor quality goods; and having goods damaged while in transit.

**Weather.** Half of all businesses believe that severe storms are becoming more frequent, while a minority have observed changes in their own geographic areas.

**Regulations.** Nearly half of businesses worry about complying with new laws and regulations. Many are concerned about complying with the Affordable Care Act and the costs that come with it.

### The takeaway

Some of these issues – such as weather, liability, driving and supply chains – can be insured. Others, like keeping a skilled workforce, are not insurable. In either case, business leaders are right to worry about these risks. The search for solutions is time and money well spent. ❖

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## ADA LITIGATION

# Access Demand Letters Rear Their Heads Again

**D**ESPITE THE fact that a California law was enacted in 2013 to curtail “drive-by” Americans with Disabilities Act access lawsuits, the practice has been revived by crafty plaintiff attorneys.

According to recent news reports, employers still receive letters from lawyers who demand payment on behalf of disabled clients in exchange for not suing the establishment for violating ADA access rules.

The lawyers are banking on the business owners not knowing about the 2013 law that bars attorneys from making monetary demands in initial letters complaining about a possible ADA violation.

If you have a business that deals with the public, you need to understand where you stand legally and what recourse you have if you receive one of these letters.

### How it works

A business receives a letter from an attorney who says they represent a disabled client who was unable to enter the facility because there was no disabled access.

The letters usually state that failure to comply with the ADA amounts to disability discrimination and that violators can be required to pay three times a client’s damages, but no less than \$4,000 for the offense, as per California code. Some lawyers will even list multiple ADA “infractions” that they see when driving by and demand \$4,000 for each.

The letter usually states that the business could be ordered by a court to make the necessary modifications and upgrades to accommodate disabled customers. It also states that the business, if found liable, could also be ordered to pay the plaintiff’s attorney fees and costs.

### These demands are illegal

These types of demands for money were made illegal by SB 1608, a measure that became law in 2013 and allows an employer a grace period to fix any violations before being sued. This was supposed to address the “shakedown” lawsuits that have recently resurfaced.

The complaint letter may actually be pointing out a real ADA violation on your property, but you are in no way required to pay the senders anything to make them walk away, under SB 1608.

## Typical Language in Attorney Letter

*“We are willing to settle this matter as follows: \_\_\_\_\_*

- 1. You will obtain an accessibility evaluation of the property.*
- 2. You will make all required repairs and accessibility barrier removals.*
- 3. You will pay the sum of \$4,000.00 to reimburse my client for costs, attorney fees incurred and for damages.”*

If you receive one of these letters, this is how the law protects you now:

- Businesses have 60 days to fix an ADA violation, after receiving notice of the violation, if their facility was completed after January 1, 2008.
- SB 1608 sets up a process whereby business owners can voluntarily hire a certified access specialist to inspect their buildings to ensure compliance with disability access standards and obtain an inspection report as proof they did so.
- Qualified businesses are also able to get damages reduced from \$4,000 to \$1,000 when the violation is corrected (these are civil fines and they don’t go to the plaintiff or the attorney).
- A small business that does not have a CASp inspection, and which has fewer than 25 employees, has up to 30 days to correct a violation. The statutory fine for a violation can be reduced from \$4,000 to \$2,000 if the corrections are completed within 30 days.
- Businesses whose structures have been approved by CASps will be able to request a window sign signifying they have been CASp-inspected.
- Demands for money are forbidden. Attorneys who send “demand letters” must also send the letter to the California Commission on Disabilities and the California State Bar, for review of compliance with the law. The letter may not make a demand or request for money, and may only state the potential for civil liability.

Finally, the best way to avoid being sued is to ensure that your facilities are in compliance with the ADA. ❖



## WORKERS' COMP

## Five Tips for Streamlining Your Insurance Policy Audit

**I**S YOUR firm due for a workers' compensation premium audit? Audits are how insurance companies check to see if you the premium they charged you at the start of the policy still reflects your risk.

The audit will check to see if your employee counts and job descriptions have change, so that the premium can accurately reflect your current operations.

The audit can be stressful, but the key is preparation. These five tips can help you get ready:

**Tell your broker when there are changes in your staffing, payroll or areas of operation** – This is important not just at audit time, but all the time. Your rates are based on variable rating information, including the number of employees, job classifications, and the states in which you operate. Updated information results in more accurate premium assessments.

**Get your records ready** – Your auditor will need to see records such as federal and state tax returns, ledgers, checkbooks, contracts, and employee or contractor tax documents. If you prepare your records in advance, you'll speed up the audit process.

**Break out various types of compensation** – For example, to set your premium, your broker considers pay but not contributions to employee benefits packages and other perks, so it's important to make sure your records are clear on the various types of compensation.

Also make sure overtime pay is clearly defined, since it's classified as regular pay for workers' comp insurance purposes.

**Ensure that contractors have their own insurance** – This is important from an audit standpoint, and also from a liability perspective. If an uninsured contractor has an accident while working on your behalf, you can be held liable. If an audit identifies contractors for whom you don't have certificates of coverage, you can be charged for their premiums.

**Remain on hand to answer questions** – The auditor may have questions or need more information. If you are available to provide answers, your audit will be completed more quickly.

By following these tips, you'll be more prepared for your workers' compensation premium audit. A fast, efficient audit process can save time for both you and your auditor, so it pays to be prepared. ❖



## SLANDER AND LIBEL

# Does a Business Policy Protect against Defamation?

**W**HAT WOULD you do if your business got SLAPPed? SLAPP stands for “strategic lawsuit against public participation.” A business that gets SLAPPed has been sued for speaking out against or about a person or entity.

In these actions, the plaintiff accuses a person or business of harming them by speaking out publicly with malicious intent. For example, small businesses in a village may protest plans to build a huge shopping mall nearby and in the process spread a false rumor about the developers.

The owners of the proposed mall might sue them for alleged defamation – written statements (libel) or oral statements (slander) that are false and harm the victim’s reputation.

A court may eventually rule the lawsuit groundless. But, in the meantime, the party being sued accrues great costs, including attorneys’ fees, court costs and lost income.

The business will have to find the money to cover these costs from somewhere, and the source may well be its commercial general liability (CGL) insurance policy.

Standard CGL policies provide personal and advertising injury liability coverage. The policy would pay for damages arising out of, among other things:

*“Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services.”*

In addition, it covers the costs of defending against a lawsuit. The most the insurance company will pay for any one loss is the amount shown in the policy’s information page as the Limit of Insurance for Personal and Advertising Injury Liability. This amount could be \$500,000, \$1 million or higher.

But the CGL insurance does not cover all accusations of wrongdoing. The insurer will not pay to defend or settle a claim for damages if:

- The insured person knew the statement would violate the other party’s rights and injure them.
- The insured person knew the statement was false.
- The material was published before the date the insurance policy took effect.
- The insured person’s action was a criminal act.
- The insured person is in the media or Internet business.
- The injury arises out of an electronic chatroom or bulletin board that the insured company hosts.

The first, second and fourth items on the list involve deliberate misconduct; insurance will not cover the liability costs for such behavior. The third item would be covered by the policy in effect before the current policy took effect.

Companies in the media or Internet business need to buy special liability insurance designed for them; the CGL policy is

**SLAPPed SILLY:** *Your commercial general liability policy may take the sting out of lawsuits alleging slander or libel.*



designed for businesses that do not face a media company’s special risks.

### The takeaway

Being accused of libel or slander can be a traumatic experience for a business owner. A SLAPP suit can be especially upsetting because the victim of such a suit was exercising the constitutionally protected right to free speech.

Personal and advertising injury liability insurance can ease the financial worries that accompany such a claim. Talk to us and we can take you through the options available. ❖