Liability Beyond Your Workers' Compensation Coverage

Insights
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Pop quiz!

True or False? Workers' compensation is the exclusive remedy for employees pursuing a recovery against their employer. The answer is of course false. The exclusive remedy doctrine provides that when an employee is injured within the course and scope of employment, the employer's liability is limited to benefits payable under the state's workers' compensation statutes; mainly lost wages and medical benefits.

This doctrine was a trade off, giving employers "immunity" from being sued for their actions (or inactions) that resulted in injuries to employees. In return for this immunity, the employee's negligence would not be grounds to deny a workers' compensation claim. Instead, workers' compensation systems adopted the concept of "no fault" coverage.

While the no-fault end of the tradeoff has remained relatively unchanged, legislatures and particularly the courts have continued to chip away at the Exclusive Remedy doctrine. This erosion allows employees to bring suit against employers, outside of the workers' compensation system, under certain defined legal theories. Consequently, it generated uncertainty as to the insurability of suits brought by employees. A standard comprehensive-general-liability policy excludes coverage for any suit brought by an employee.

Dual Coverage Under Standard Workers' Compensation Policies
The insurance industry responded to this gap in coverage by expanding a standard workers' compensation policy beyond the scope of simply providing benefits for statutory workers' compensation issues. Workers' compensation policies now have two parts: Part One, (sometimes referred to as Coverage A) provides workers' compensation coverage; and Part Two, (sometimes referred to as coverage B) provides employer liability coverage.

Part One covers the benefits your company is required to pay under state law. There is normally no limit to this coverage. The insurer will pay all compensation and medical benefits your company is legally obligated to pay under your state's workers' compensation statutes, without limit. Part Two insures your company for the obligation to pay damages because of bodily injury by accident or disease, including death, if the condition arises out of and in the course of employment and if there is a legal-recovery theory available to the employee beyond the workers' compensation statutes.

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Part Two, Employer Liability Coverage

At first glance, it may seem unlikely that any injury to an employee occurring while an employee is at work could fall outside the workers' compensation system. But there are a few potential situations in which an on-the-job injury can result in further liability beyond a comp claim. Some states have legal theories that will carve out exceptions to the exclusive-remedy doctrine and each state must be looked at individually. Outlined below are general areas of law in which Part Two coverage issues could arise.

Third-Party-Over Liability

Part Two provides coverage for suits filed by an employee against a third party where there is a contract between the employer and the third party which requires the employer to hold the third party harmless. These situations arise most often in the construction industry when a sub-contractor's employee is injured, files a workers' compensation claim and then sues an upstream contractor for failure to maintain a safe worksite. The upstream contractor then hands the suit off to the sub-contractor/employer because the sub-contractor/employer has agreed by contract to hold the upstream contractor harmless.

Because the suit is by an employee, the general-liability will not apply. However, Part 2 of the employer's workers' compensation policy almost certainly would provide coverage for the employer. There are other types of actions that would be considered third-party-over liability including potential subrogation actions against the employer by a third party that has been successfully sued by an employee.

Dual Capacity

Part Two coverage can apply in situations where you may be exposed to liability in a suit by an injured employee in a non-employer capacity. This is known as "dual capacity." An example of a dual capacity would be where the employee is injured during the course and scope of employment by a product that is manufactured by your company.

For example, an employee of a forklift manufacturer is using a forklift made by his or her employer to move product around a warehouse. The forklift malfunctions which results in injury to the employee. The employee files a workers' compensation claim and also sues the manufacturer (the employer) under a products-liability theory. Dual Capacity would allow the employee to maintain both the workers' compensation action and a lawsuit for product defect.

Intentional Tort

Where permitted under state law, employees may have a cause of action beyond a workers' compensation claim when an employee is injured at work and files suit against an employer alleging the intentional acts of the employer resulted in injury to the employee. These types of cases involve a common law cause of action for damages. As a practical matter, these suits may be defended under

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Part Two coverage because it is a question of fact as to whether or not the injury was caused by the intentional acts of the employer. In many jurisdictions, the concept of what constitutes an intentional act has been expanded beyond a deliberate intent to injure, to injuries that result from the willful indifference of the employer.

No Unified Theories

Many states have variations to the above three theories that allow employees to by-pass the exclusive remedy doctrine, including a number of states that allow a cause of action for "bad faith" when the employee can prove that workers' compensation benefits were inappropriately withheld. An interesting twist to employer's liability is the Texas system where employers are literally allowed to withdraw from the workers' compensation system altogether.

As noted above, not all injuries sustained in the course and scope of employment are exclusively covered by workers' compensation benefits. Employers need to look beyond Part One of their workers' compensation insurance contract and make sure they have broad adequate coverage under Part Two of the contract or under a separate employer's liability policy.

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