

Managing Risk



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Risk Management

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Tackling the Telecommuting Risk

An estimated 45 million Americans telecommuted in 2006, up from 41 million in 2003, according to the newsletter of Worldat-Work.org. Telecommuting allows companies to save money on office space and increase productivity, while workers enjoy increased flexibility and reduced commute times. But telecommuting represents a serious challenge for risk managers, as they find themselves responsible for workers outside the controlled office environment.



employer responsibility apply equally whether the employee is toiling away on the company's premises or working in pajamas in the comfort of a home office.

Insurance Issues

Employers must provide telecommuters with workers' compensation coverage – unless they are independent contractors. However, companies can't simply declare someone a contractor to get out of paying workers' comp or employment taxes. The Internal Revenue Service and state tax authorities have very strict rules for what constitutes an independent contractor. (For details, see www.irs.gov/pub/irs-pdf/p1779.pdf.)

Risk managers must also ensure that their general liability policies cover the acts of employ-

ees working from home. They should check that their policies do not include a "designated premises endorsement" that would limit coverage to their main place of business. Similarly, they must make sure that having a dedicated home work space does not violate the employee's homeowners policy.

Identifying the Risk

The risks of injury in a home office may be far lower than in factories, mines and mills. But telecommuters are as likely as other office workers to suffer from back injuries, repetitive strain problems and other office hazards. And they face risk of injury from fire if they lack an adequate electrical system, or if they don't have a smoke detector or fire extinguisher nearby.

This Just In

A survey by ComPsych Corp has found an alarming rise in "presenteeism" — employees who come to work when they are sick. Eighty-three percent of workers surveyed had at some point ignored sickness in order to work, a 6 percent increase since 2005.

A variety of factors motivated employees to come to work sick. Thirty-seven percent cited a workload that made it too difficult to take time off; 26 percent said it feels "risky" to take time off; and 21 percent wanted to save sick days for when their children were sick.

Presenteeism increases the risk of spreading viruses and the risk of accidents, because sick workers will not perform properly, often making mistakes and misjudgments.



The courts have yet to define the exact scope of employers' responsibility for employees who work at home. But experts in the field agree that most traditional areas of



D&O Coverage: No Longer a Luxury

A recent survey found that more than 95 percent of Fortune 500 companies maintained directors and officers (D&O) liability insurance. However, D&O insurance is becoming an essential tool for companies of all sizes to attract and retain top executive talent, especially given the increased exposure stemming from the strict corporate governance laws encoded in the Sarbanes-Oxley Act of 2002.

D&O insurance is often confused with insurance for errors and omissions (E&O). But the two cover very different situations. E&O covers an individual or company for negligent acts and omissions that cause harm to clients. D&O covers corporate directors and officers from liability for negligent acts, omissions and misleading statements that harm employees or shareholders. Absent such coverage, a director could be personally liable for such claims.

Acting as a corporate director or officer imposes certain duties on individuals when acting in their official capacity:

- 1 A duty of care, whereby they follow the “prudent person rule.” This means they must make informed decisions, perform in good faith, and act in the best interest of the company.
- 2 A duty of loyalty, which includes no furthering of personal interests and refraining from personal action damaging to the corporation.

- 3 A duty of obedience, which requires them to perform their duties within the corporate charter/by-laws and to act in accordance with all laws, statutes and regulations pertaining to their industry.

Breaching any of these obligations can lead to personal liability for the individual director or officer involved, as well as an allocation of blame to the other directors and officers on the board. Many D&O claims extend to the corporation itself—80 percent of D&O lawsuits now also name the corporate entity as a defendant.

Who Needs D&O?

Corporate headhunter Nicole Weber says C-level executives now routinely demand appropriate D&O coverage before even considering a job offer. “These guys are at the top of their profession,” she says. “They are not going to put their personal financial assets in the firing line in case they get sued for actions they take as part of their jobs. It’s simple: if you want top talent, D&O coverage is an essential

part of the package.”

D&O coverage is equally important for investors. They want to know that there is adequate financial backing in case gross mismanagement makes their investment in a company go sour.

D&O coverage also insulates companies and their executives from employment practices lawsuits against company directors. According to specialty insurers Gaston & Associates, employment practices suits constitute the single largest area of claim activity under D&O policies. More than 50 percent of D&O claims relate to employment practices.

Who Sues?

Unfortunately, a whole host of constituencies are just waiting to sue company directors and officers. The most frequent legal actions come from employees who allege wrongful termination, harassment and breach of contract. Almost as prevalent are shareholders upset at a declining stock price, inadequate disclosure, dishonesty, bad decisions and missed business opportunities. D&O lawsuits can also be filed by competitors, environmental activists and government and regulatory authorities such as the EPA, IRS and SEC.

What Effect Has Sarbanes-Oxley Had?

According to insurance consultant Andrew Barile, the Sarbanes-Oxley Act of 2002 gave a huge impetus to lawsuits against directors and a corollary increase in demand for D&O insurance. “Sarbanes-Oxley...specified the legal responsibilities of directors and officers. It’s not enough to just be the golfing buddy of the CEO anymore,” said Barile.





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Many employment experts offer guidelines for safe and healthy home-office set ups, including standards to assure that the telecommuter's home office is safe and ergonomically friendly. However, a survey by the American Management Association found that only 7 percent of teleworkers had been formally trained to work outside their normal office environment. Fewer than half had the necessary equipment to conduct business from home, and they complained that they lacked adequate technical support when working at home.

Providing Solutions

Jacqueline Jones, a labor and employment attorney, encourages employers to formulate a policy reflecting their expectations for telecommuters. "The policy should provide clear outlines as to when the employee is considered to be working as opposed to personal time," Jones explains. "Employers should also inspect the home-office work site and ensure work-office standards are met."

Determining the extent of such supervision can be tricky, notes employment attorney James E. Pocius. If an employer exerts control over home working conditions, the employer probably will be responsible if an accident occurs at home. But if the employer does not exert control, dangerous home conditions might result in employer liability if an accident occurs, since courts traditionally take a broad view of employees' rights to workers' compensation.

Case Study

Financial giant Merrill Lynch & Co. attempts to finesse this potential problem with a detailed training program for potential telecommuters. Telecommuters and their managers attend training programs on topics such as how to communicate with the home office and how to plan ergonomically correct workplaces. Each employee also spends two weeks in a telecommuting simulation lab at the company. The company supplies the computers and the teleworkers purchase their own

office furniture. The company also requires workers to verify that telecommuting will not violate terms of their homeowner's insurance. The company inspects home work spaces for safety and productivity and the company requires all telecommuters to go to the office at least once a week. So far the company has not had a single telecommuting-related workers' compensation claim.

The following rules can help your company minimize telecommuting-related risk exposures:

- 1 Ensure telecommuters have workers' comp coverage.
- 2 Verify that the company's general liability policy applies to the acts of telecommuters.
- 3 Check that home work space does not violate the telecommuter's homeowners insurance policy.
- 4 Offer training and guidelines for efficient teleworking.
- 5 Provide workers with the right equipment and support. ■

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How Much Does It Cost?

No standard D&O policies exist. Underwriters will tailor coverage to your company's needs and determine your rates based on the exposure your company presents. A company with unsound management practices creates higher risk exposures for the insurer; likewise companies in unstable industries. The more information you can provide to demonstrate your company's good management practices, the better coverage terms you will be able to secure.

To apply for D&O coverage, you will likely have to present information on any past shareholder or employment practices claims, copies of corporate bylaws and minutes of board meetings, copies of employee handbooks, biographical information on your board members and more.

For more information on preparing an application for D&O insurance, please contact us. ■

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"Web access guidelines, which can help commercial sites such as Target's ensure access for people with disabilities, have been available for years," Brewer added. "Many resources exist to help organizations ensure their sites will meet the needs of all their users."

In addition, the WebAim project of Utah State University's Center for Persons with Disabilities lists several options for retailers looking to make Web sites accessible to handicapped persons. They include letting users complete mouse-driven tasks via a keyboard and providing text descriptions under graphics, photographs and other images on a site to enable automatic Web site readers that can help blind users navigate a page. See <http://www.webaim.org> for more information.

The Internet industry has made great strides with Web site interfaces, and "companies would naturally want to include all citizens in the sphere of Internet commerce," says

Raymond Van Dyke, a Washington-based technology attorney. "This class certification action indeed signals that the judge in that case feels that some interface tools are deficient for at least one demographic."

For companies doing business on the Web, this ruling could serve as a "startling wake-up call," added attorney Sean Kane. "I don't believe that most e-commerce sites out there have ever considered they have to comply with ADA provisions or California's related laws," Kane told the *E-Commerce Times*. "It's telling to see that the judge feels this is a potential ADA violation."

Your standard commercial general liability policy or business owner policy will provide some coverage for discrimination suits (as long as the claimant is not an employee). However, the negative publicity such a case could generate makes any investment in increased accessibility a wise one. ■



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Target Ruling May Extend ADA to Web

An October 2007 ruling by a federal judge could extend state and federal disability statutes to the Internet and require companies and organizations throughout the country to make their Web sites accessible to blind persons.

Judge Marilyn Patel of the U.S. District Court in San Francisco certified the case *National Federation of the Blind v. Target* as a class action lawsuit. Filed in 2006 by the national and California National Federation of the Blind (NFB) organizations and a blind college student named Bruce “BJ” Sexton, the suit claims Target’s Web site violates the Americans with Disabilities Act (ADA) and two California anti-discrimination laws. The plaintiffs alleged that retail giant Target failed to make its Web site accessible to the blind, then ignored the issue when confronted with complaints.

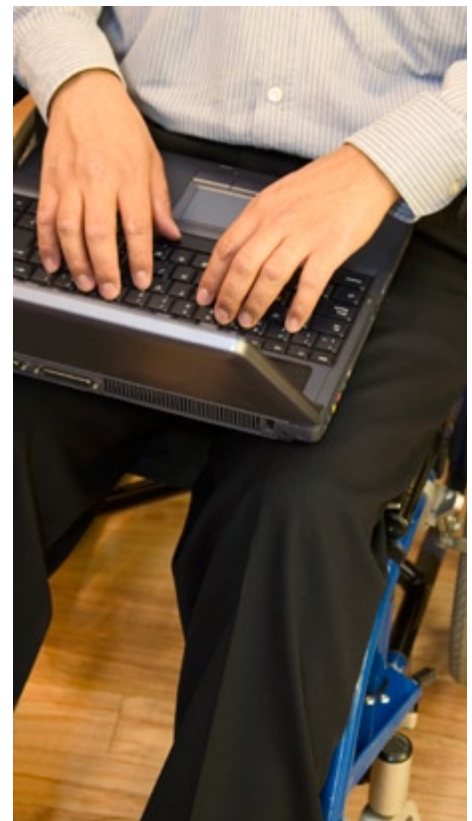
Patel dismissed Target’s request for summary judgment and concluded that the ADA requires retailer Web sites to offer similar features to those that help blind patrons shop in a company’s physical stores. According to Eric Goldman, director of the High Tech Law Institute at the Santa Clara University School of Law, the judge’s ruling also found that California disability laws require that

commercial Web sites allow handicapped persons to tackle all of the tasks that are available to other online customers. Now that the lawsuit has achieved class action status, the list of plaintiffs can include any blind person in the U.S. who tried to enter Target.com but was denied access to “the enjoyment of goods and services offered in Target stores.”

“This is a tremendous step forward,” said Marc Maurer, president of the NFB. “All e-commerce businesses should take note of this decision and immediately take steps to open their doors to the blind.”

Target said it was disappointed by the ruling, but pointed out that class certification is a procedural ruling only and in no way addresses the merit of the NFB’s claims.

“We will request an immediate review of the ruling granting class certification and we are confident that we will prevail on the merits of this case,” the company said. “Regardless of the outcome, we will continue to implement new technologies to enhance the usability of our Web site for all of our guests.”



This may not be as hard as it seems at first glance. Many applications already make sites accessible to the blind, usually with small text tags next to images, so the software can speak the words aloud. The World Wide Web Consortium (www.w3.org) has extensive guidelines to help make access to the Web easier for people with disabilities, says Judy Brewer, director of the consortium’s Web Accessibility Initiative.

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Protecting Personal Information

Many companies store personal identifying information or medical records on individuals. Losing or compromising the security of that data could cost you from \$100 to \$305 per record to fix. Here are some steps you can take to protect your employees’ and customers’ personal information and avoid becoming liable for a data breach:

- ✦ If your company uses Social Security numbers as employee ID numbers, devise another system.
- ✦ Protect personnel records and employee health information by keeping paper records stored in a safe location under lock and key. Determine who can have access and under what circumstances; put your policy in writing. Keep a log of who has reviewed data, when and why.
- ✦ Consider removing sensitive information, such as Social Security numbers, from electronic records stored on a network. Alternatively, store records containing personal information offline. Networks allow insiders to do more damage than they could in the days of paper-only files. With just a few keystrokes, they can access hundreds or thousands of records.
- ✦ Never give temporary workers or employees of contractors access to personal information on employees or customers.
- ✦ Dispose of old records containing personal information properly. Shred paper files; completely erase or overwrite old electronic files.
- ✦ Periodically audit your company’s privacy and data security procedures. Some companies hire consultants who try to obtain data from the company to point out holes in its security. ■