

# Managing Risk



125 Hillvue Lane  
Pittsburgh, PA 15237

6371 Business Blvd.  
Sarasota, FL 34240

Main (412) 318-8110 • Toll free (800) 886-8911 • Fax (412) 318-8170  
info@teamrti • www.teamrti.com

Liability

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## Employee Privacy: Where Employers' Rights End and Employees' Begin



### Video Surveillance

In 2005, 10 percent of companies surveyed by the American Management Association/ePolicy Institute used video surveillance to track select employees' on-the-job performance. Six percent of respondents videotaped all employees.

No federal law prohibits video monitoring of the workplace, even if employees do not know or consent to monitoring. Only two states, Connecticut and Delaware, require employers to disclose monitoring to employees. Elsewhere, employees generally have no privacy rights in "pub-

lic spaces." However, in areas where they have a "reasonable expectation of privacy," such as an enclosed office, rest room or locker room, courts have generally ruled in favor of employees' privacy rights.

If your video equipment records sound as well as images, wiretapping and eavesdropping laws might apply. Federal law and the majority of states permit recording of phone calls and other electronic communications with the consent of at least one party. Twelve states (California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania and Washington) require all parties to a conversation to consent to being recorded. In every state, employers should disclose that employees might be subject to audio and video recording while

on company property. For further advice, please contact an employment attorney.

### GPS Tracking

The AMA/ePolicy Institute survey found that 5 percent of employers used GPS technology to monitor employee cell phones, 8 percent used it to track company vehicles, and 8 percent used it to monitor employee ID or smartcards.

No federal laws address GPS tracking of employees. However, courts could find "...the use of GPS to monitor employees could meet the necessary legal standards for invasion of privacy," even within the workplace, according to a National Workrights Foundation report. The report further cautions, "...[Collecting] information regarding employee activities-

### This Just In

**W**ork injuries and fatalities cost employers a total of \$42.5 billion dollars in 2008, according to the National Safety Council. The NSC's estimate included insured costs, such as employers' workers' compensation expenses, along with their uninsured costs, which include "the money value of time lost by uninjured workers..., time spent investigating and reporting injuries, giving first aid, production slowdowns, training of replacement workers, and extra cost of overtime for uninjured workers."

Average cost per workplace fatality reached a staggering \$1.4 million when employers' indirect expenses were added in. Disabling work injuries cost an average of \$48,000 with indirect expenses included; \$44,000 without indirect expenses.

The NSC cautions these figures do not include the cost of nondisabling injuries or property damage resulting from accidents.

The Bureau of Labor Statistics received 3.7 million private industry injury and illness cases reported nationally in 2008. Of these, approximately half were of a more serious nature that involved days away from work, job transfer, or restriction.

# Why You Need Increased Cost of Construction Coverage

Your property is properly insured to value. But if you don't have this valuable coverage, you might not have enough to rebuild after a disaster. Here's why.

**B**uilding codes are constantly evolving. No doubt your community has stricter codes than it did 20 or even only 10 years ago. If you built your facilities today, you might have to meet new seismic and fire-safety standards, accessibility standards to comply with the Americans with Disabilities Act, and, in many communities, new standards designed to conserve water and energy. All these translate into more expensive construction.

Property policies can be written on an actual cash value or replacement cost basis. This refers to the way the insurer values lost or damaged property covered by the policy. With actual cash value coverage, your policy will pay the value of your lost or damaged property, minus depreciation for age, condition and obsolescence. With replacement cost value coverage, the policy will pay the cost of replacing your lost property with property of a like kind and quality without any deduction for depreciation.

As an example, let's say fire and smoke

If you haven't reviewed your property policy lately, your limits might not be enough to cover the cost of reconstruction—even if your property values have declined. Owners often confuse a property's market value with its replacement value. While the market values of commercial properties have dropped dramatically in many areas, construction costs have not. For information on the importance of insurance-to-value, please contact us. ■

damaged the 1970s-era lime green carpeting in your building past repair. With actual cash value coverage, your claim settlement would be very small or even nonexistent, since the carpeting would have little to no cash value due to age and obsolescence. But with replacement cost coverage, your policy should pay enough to replace your carpeting with new carpeting of a similar kind and quality. A replacement cost policy therefore provides better coverage; however, it does cost more.

There are times, though, when even replacement cost coverage isn't enough.

When damage forces you to rebuild or remodel, you will have to bring your construction up to current codes. Most property policies contain an exclusion for losses or portions of the loss due to complying with an ordinance or law regulating construction, repair or occupancy of any building. So even if your building is properly insured to value, your policy will not cover the additional costs of bringing it up to current codes. To make matters worse, after a portion of your building is damaged, local authorities will likely require you to make repairs to undamaged portions of your building to bring them up to current codes. And since remodeling usually costs more on a square-foot basis than new constructions, these repairs can be costly.

The answer to this problem is to buy a policy endorsement, or addition, called "ordinance or law coverage," sometimes known as "increased cost of construction coverage." This endorsement provides three types of coverage when laws or ordinances require you to spend more on reconstruction.



- **Coverage A** covers you for the cost of making required repairs to the undamaged portion of a building.
- **Coverage B** covers you for the costs of demolition and debris removal.
- **Coverage C** provides coverage for increased costs of construction, or your actual costs of bringing the damaged portions of the building up to current codes.

The standard property policy covers none of these costs, so without ordinance or law coverage, the building owners would have to bear these expenses. You can select the amount of additional coverage that makes most sense for your risk exposure, which will vary with the age of your building, the stringency of applicable building codes, and your exposures to covered causes of loss, such as fire.

When you decide to relocate rather than rebuild after a total loss, your replacement cost coverage will pay the replacement cost of your building. However, the increased cost of construction will not apply, since no reconstruction actually occurred.

In order to obtain ordinance or law coverage, your property policy must be written on a replacement cost basis, rather than actual cash value basis. For more information on properly insuring your business property, please contact us. ■

**Liability**

**PRIVACY**—continued from Page 1

during breaks and their activity in sensitive areas such as rest rooms might be actionable. Outside the traditional employment setting and during hours traditionally regarded as personal, monitoring using GPS technology raises even stronger privacy concerns.”

To avoid violating employees’ privacy, employers using GPS technology should inform their employees which devices have GPS technology, what information the company will gather and when, and how the information will be used. Most GPS-equipped devices allow users to turn off tracking. If your employees can use GPS-equipped phones or vehicles for personal purposes, you can instruct them how to turn off tracking features when off duty.

**Computers, Internet and Email**

Software programs with names like IAmBigBrother, SpyTech and Activity Monitor can let you monitor your employees’ computer use without their knowledge. They can show you employees’ screens in real time, track Internet sites visited, monitor keystrokes to track productivity and show contents of email and IM messages—all without employees knowing. But is it legal?

Although the Electronic Communications Privacy Act of 1986 (ECPA) generally prohibits the interception of any wire, oral or electronic communication, it creates a specific exception for employers. Employers can intercept employees’ electronic communications if they have a “legitimate business purpose” for doing so. The ECPA also permits employers to intercept employees’ communications if they have employees’ express permission.

Courts have traditionally treated company computers, and anything on them, as company property—even when employees were using personal email accounts on company computers. However, several recent cases have come down in favor of granting employees more privacy rights over their emails.

For this reason, any company that plans to monitor employees’ e-mail or online activities should include an e-mail and Internet privacy statement in its employee handbooks and require employees to sign a document acknowledging receipt of the policy.

**Telephone Monitoring**

The Omnibus Crime Control and Safe Streets Act prohibits employers from eavesdropping on or wiretapping telephone calls, with two major exceptions. The employer can listen in on conversations “in the ordinary course of business,” such as for customer service, and “where employees have been notified expressly that their telephone conversations will be monitored.”

If your company will monitor employees’ telephone calls, you need to notify them in writing and obtain their written consent. However, even with consent, the ABA Family Law Guide says that employers’ rights to monitor employees’ conversations are not absolute: “Some courts have indicated... that once the private nature of a telephone conversation is determined, any continued eavesdropping would not be in the ordinary course of business and may subject the employer to liability. An employer violating the law can be sued for money damages.”

**Property Searches**

Although the U.S. Constitution prohibits unreasonable search and seizure, once in the workplace, the employers’ rights to protect their property usually trump employees’ privacy rights. As with video monitoring, however, employers should tread carefully before searching any area where an employee might have a “reasonable expectation of privacy.” These include his/her personal possessions (such as handbags and backpacks), personal workspace and lockers.

If you suspect an employee might have prohibited items, such as illegal drugs or firearms, at work, contact an employment attorney before conducting a search. And to protect your company from potential lawsuits, make sure your employee handbook contains a notice that the company retains the right to search company property, including employee desks and lockers, at any time and without warning.

**Liability Protections**

Although your commercial liability policy protects you from claims alleging invasion of privacy, it excludes claims brought by employees. To protect your company from the high cost of employee lawsuits, you need employment practices liability insurance (EPLI). You can buy coverage either through standalone policies or as an add-on to your business owners package. To discuss the type of coverage that best meets your needs, as well as suggestions on avoiding employee lawsuits, please contact us. ■

**ERGONOMICS**—continued from Page 4

**Analyze the jobs** or work tasks themselves to identify potential ergonomic problems before employee injuries occur. Determine if jobs present ergonomic risks that may contribute to musculoskeletal disorders.

✓ **Analysis tools** may help in analyzing jobs. While there is no one-size-fits-all approach, numerous non-OSHA, voluntary analysis tools can help you learn more about ergonomic risks associated with specific jobs.

- ✓ **Seek employee input** about the existence of ergonomic problems related to their jobs or work tasks. This may be accomplished by:
  - ✱ speaking with employees
  - ✱ conducting symptom surveys
  - ✱ using employee questionnaires
- ✓ Be aware of common contributing conditions within your industry or job classifications. If other companies in the same industry have ergonomic-related problems, it is possible these problems could affect your employees. Obtain informa-

- tion from others in your industry:
  - ✱ to see what problems others have experienced in their operations
  - ✱ to gain a better understanding of potential problems that may exist in your workplace.

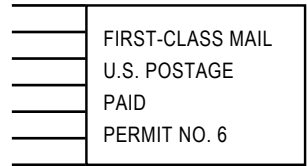
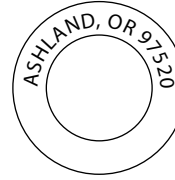
To prevent or control workers’ compensation claims, we can help you evaluate your claims history and develop an appropriate ergonomics program. For information, please contact us. ■



Here's your issue of *Managing Risk* from:



125 Hillvue Lane  
Pittsburgh, PA 15237



## Using Ergonomics to Reduce Injuries

Musculoskeletal disorders accounted for 29 percent of all workplace injuries requiring time away from work in 2007. A well-constructed ergonomics program can help reduce the incidence and severity of these costly workers' compensation claims.

**M**usculoskeletal disorders (MSDs), often referred to as “ergonomic injuries,” affect the connective tissues of the body such as muscles, nerves, tendons, joints, cartilage, or spinal discs. Examples include sprains and strains from lifting, hernias, and carpal tunnel syndrome. MSDs are some of the most difficult and costly work-related injuries to treat.

### Consider the following facts:

- ✓ Musculoskeletal disorders are among the most prevalent medical problems in the U.S., affecting 7 percent of the population. *Testimony, National Institute for Occupational Safety and Health (NIOSH)*
- ✓ Musculoskeletal disorders cost the United States approximately \$850 billion per year. *American Academy of Orthopaedic Surgeons*

- ✓ “[MSDs]... account for 14 percent of physician visits and 19 percent of hospital stays.” *NIOSH*
- ✓ “62 percent of persons with MSD report some degree of limitation on activity compared with 14 percent in the population at large.” *NIOSH*
- ✓ Workers with MSD claims lost a median of 10 work days. *Bureau of Labor Statistics*
- ✓ MSDs are chronic, painful and affect workers' quality of life.

### How can my company reduce the incidence and cost of MSDs?

Ergonomics is the science of fitting workplace conditions and job demands to the capabilities of the working population. Ergonomics is an approach or solution to deal with a number of problems—including work-related musculoskeletal disorders.

If your company has never experienced an

MSD, you may need only a basic ergonomics program. This involves assigning someone to be responsible for ergonomics. This person should provide information to employees on the risk of injuries, signs and symptoms to watch for and the importance of reporting problems early; and set up a system for employees to report signs and symptoms.

### How do I look for conditions that may contribute to musculoskeletal disorders?

Both work-related and non-work related conditions can either individually, or by interacting with each other, give rise to MSDs. Several approaches can determine whether conditions in the workplace might be contributing to employees developing MSDs. These approaches can be used individually or in combination.

**Review and analyze injury and illness records** to determine whether there is a pattern of ergonomic-related injuries in certain jobs or work tasks.

- ✓ OSHA 300 Logs and supporting 301 forms
- ✓ Workers' compensation claims

