

INSURANCE COVERAGE AND TEMPORARY STAFFING

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In today's economic climate, the last thing any business wants to hear is that it should spend money on additional overhead—especially more insurance. In fact, many businesses may look to cut expenses by paring back on their insurance coverage or cancelling certain policies entirely. However, the temptation to eliminate insurance coverage as a cost-saving measure can produce drastic consequences. In today's litigation-driven world, a single, uncovered claim could send any business down the road to financial ruin. For this reason, it is even more important for a business, during lean economic times, to make certain it has *appropriate* insurance coverage.

The importance of maintaining appropriate insurance coverage particularly applies to temporary staffing agencies and businesses using their services. Despite the success of temporary staffing agencies today, the fact remains that the majority of insurance policies approach coverage based on the assumption that the insured organization falls within a “traditional” business model. In other words, most insurance forms expect that the insured will employ people directly (and generally on a permanent basis) to perform work at the insured's place of business. In contrast, the temporary staffing agency succeeds by providing solutions outside of this traditional business model. As a result, potentially significant insurance coverage gaps may arise. Given the unique issues facing temporary staffing agencies and arising from the use of temporary workers, temporary staffing agencies and businesses using temporary workers should consider the purchase of appropriate insurance coverage as one of the best investments they can make.

Often, workers' compensation coverage dominates any discussion of insurance in the temporary staffing arena, and maintaining proper workers' compensation coverage is essential for any business. However, because state law generally controls or, at least, outlines workers' compensation coverage, a business may have very limited ability to alter this coverage. In contrast, a temporary staffing agency and its clients have an array of options for other types of insurance coverage. As a starting place for ensuring appropriate insurance coverage, as discussed below, temporary staffing agencies and their clients should obtain a commercial general liability (“CGL”) policy; a temporary staffing liability policy; and an employment-practices liability insurance policy.

COMMERCIAL GENERAL LIABILITY: THE STARTING PLACE.

As the name implies, a commercial general liability (“CGL”) policy provides general insurance for a variety of business risks/losses. CGL policies provide two general types of coverage: (1) coverage for bodily injury and property damage caused by accidents and (2) coverage for “personal and advertising injury.” The standard CGL policy also contains a third type of optional coverage—medical payments coverage.

Every business needs a CGL policy. Once a business examines the coverages and exclusions of the CGL, the business can then decide what other specific coverages it needs.

Bodily Injury & Property Damage Coverage. Under the bodily injury and property damage coverage part, the CGL provides coverage for accidental injury/damage. Under a typical CGL, the insurer agrees to pay the amount (up to the policy limit, often one million dollars) that the insured becomes legally obligated to pay as damages because of bodily injury or property damage caused by an accident. For example, this coverage part generally provides coverage in the case of a slip-and-fall that occurred at the insured's business

Of course, the bodily injury and property damage coverage part does not limit coverage to slip-and-falls. However, a slip-and-fall represents the type of claim that *any* business could face. And, even though the law in many states makes it difficult for an injured person to win a slip-and-fall case, many people will nevertheless file a lawsuit. In many of these lawsuits, the person suing recognizes that the business will spend a considerable amount in legal fees to defend the case. The person suing (and usually his or her attorney) hope that the business will decide to settle the case because doing so actually costs the business less than defending the case. In this regard, the bodily injury and property damage coverage part contains an important provision regarding defense of lawsuits. In the event that a lawsuit is filed against the insured business for bodily injury or property damage caused by an accident, the CGL requires the insurer to defend the insured business in that lawsuit. The insurance company will retain a lawyer to represent the insured and will pay the lawyer directly for the fees and costs associated with the insured's defense. For many insureds, this agreement to defend the insured is the most important aspect of the CGL coverage.

Because the general coverage for bodily injury or property damage by accident is broad, this coverage part of the CGL does contain a number of exclusions. As noted above, many of these exclusions relate to items or activities specifically covered by other coverage parts or policies. In addition to the auto and employment-related practices examples already mentioned, the typical CGL also generally excludes coverage for the following because specific policies, coverage parts, or endorsements are intended to apply: (1) injury or damage arising from furnishing alcoholic beverages (liquor liability policy or endorsement); (2) injury to an employee of the insured arising in the course and scope of employment (workers' compensation); (3) injury arising from rendering of professional services (various types of professional policies, such as medical malpractice insurance); (4) property damage to property owned or occupied by the insured (commercial property policy); (5) property damage to the insured's product (surety bond). The typical CGL contains additional exclusions that more specialized policies may cover. As well, a specific CGL policy often contains other exclusions adopted generally by the specific insurers or added to the policy based on the business of the particular insured.

Personal And Advertising Injury. A CGL also generally provides coverage for "personal and advertising injury." A typical CGL defines "personal and advertising injury" as injury arising out of one or more of the following offenses, provided the offense arises out of the insured's business: (1) false arrest, detention, or imprisonment; (2) malicious prosecution; (3) wrongful eviction; (4) slander or libel; (5) oral or written publication that violates a person's right to

privacy; (6) insured's use of another's advertising idea in the insured's advertisement; and (7) insured's infringing upon another's copyright, trade dress, or slogan in insured's advertisement. This coverage part also contains a defense provision and, thus, requires the insurer to defend a lawsuit against the insured seeking damages for "personal and advertising injury."

Medical Payments Coverage. A typical CGL also contains a third coverage part for medical payments. Generally, an insured purchases medical payments coverage on an optional basis. Under the medical payments coverage part, the insurer agrees to pay medical expenses for bodily injury caused by an accident that occurred (1) on premises owned or rented by the insured; (2) on the ways next to the insured's premises; or (3) because of the insured's operation. Importantly, medical payments coverage applies regardless of fault. Thus, this coverage does not duplicate the coverage provided by the bodily injury and property damage coverage part because that coverage applies only if the insured is legally liable to pay the damages for the bodily injury caused by the accident.

The medical payments coverage part generally incorporates the exclusions applicable to the bodily injury and property damage coverage part. The medical payments coverage also expressly excludes coverage for anyone qualifying as an insured under the policy or any person hired to do work for an insured.

Given the no-fault nature of this coverage, policies with a limit of \$5,000 or \$10,000 per occurrence are common. Although often overlooked, this coverage can play an important role for a business—especially for minor injuries sustained at the insured's place of business or caused by the insured's operations. In such cases, the policy will pay a person's medical bills even though the injury occurred through no fault of the insured. For example, a patron enters the insured's place of business and trips simply as a result of the person's own clumsiness. The person goes to the doctor a few times, and the injury quickly resolves. Under the law, the insured did anything wrong to cause the fall. Thus, the coverage for bodily injury by accident would not pay the person's medical bills because the insured has no legal liability to pay. However, despite the person's own clumsiness, the person may believe that the insured is nonetheless responsible. Such a belief may result in the person's filing a lawsuit. In many cases, having this coverage to pay a person's medical bills will satisfy the person and prevent a more significant claim for damages or even the lawsuit. Moreover, this coverage can contribute to the insured business' good will.

TEMPORARY STAFFING LIABILITY POLICY: THE NEXT LEVEL

Like any business, a temporary staffing agency or a business using the services of one needs a CGL. However, both also need a temporary staffing liability policy. A typical temporary staffing liability policy provides the insured coverage for claims arising from "wrongful acts" of an employee, temporary employee, or independent contractor committed within the scope of their duties for the insured. A temporary staffing liability policy both fills a potential gap in coverage under a CGL and provides coverage different from that provided by a CGL.

First, a temporary staffing liability policy ensures that a temporary staffing agency or its client does not have a gap in coverage under a CGL. A CGL limits coverage to those qualifying as

insureds under the policy. As generally discussed above, under the bodily injury and property damage coverage part and the personal and advertising injury coverage part, the insurer agrees to pay damages an insured is legally liable to pay. Thus, as with any policy of insurance, the insurer only has an obligation to provide coverage to a person or entity that qualifies as an insured.

Under the typical CGL, any “employee” of the insured business also qualifies as an insured. However, the CGL specifically defines “employee.” For purposes of the CGL coverage, an “employee” includes a “leased worker” but *does not include* a “temporary worker.” Under the typical CGL, a “leased worker” “means a person leased to [the insured business] by a labor leasing firm under an agreement between [the insured business] and the labor leasing firm, to perform duties related to the conduct of [the insured’s] business.” In contrast, the typical CGL defines “temporary worker” as “a person who is furnished to [the insured business] to substitute for a permanent ‘employee’ on leave or to meet seasonal or short-term workload conditions.” As these definitions suggest, the CGL expressly excludes coverage for anyone falling within the definition of “temporary worker.”

Because the typical CGL does not extend coverage to “temporary workers,” a business using the services of a “temporary worker” could encounter a gap in coverage related to the CGL. For example, a temporary staffing agency places a “temporary worker” at its client’s place of business. While working at the client’s business, the “temporary worker” does something that accidentally causes bodily injury to a patron of the business. The patron asserts a claim based on the conduct of the “temporary worker.” The business’ CGL policy would not provide coverage to the “temporary worker.” Depending on the specific circumstances of the case and the specific state laws at issue, the CGL insurer might also decline coverage to the business or might provide coverage for the business but then seek to hold the temporary staffing agency and its insurer responsible for any damages resulting from the “temporary worker’s” negligence.

A temporary staffing agency may also encounter issues if it seeks coverage for the damages resulting from the acts of the “temporary worker” that occurred while at the client’s business. Under the typical CGL, a person qualifying as a “temporary worker” with respect to a temporary staffing agency’s client would not qualify as a “temporary worker” with respect to the temporary staffing agency. The CGL definition of “temporary worker” requires that the person be “furnished to” the insured at issue. Under the temporary staffing agency’s CGL, the person was “furnished to” the client by the temporary staffing agency—the person could not, therefore, be “furnished to” the temporary staffing agency. Thus, the person would qualify as an “employee” with respect to the temporary staffing agency rather than a “temporary worker.” However, the person’s status as an employee may not resolve the issue. Although the employee of an insured business also qualifies as an insured under a CGL, the employee is an insured “only for acts within the scope of their employment by [the insured] or while performing duties related to the conduct of [the insured’s] business.” The temporary staffing agency’s CGL insurer may argue that the employee, while performing work for the temporary staffing agency’s client, was not acting within the scope of employment of the temporary staffing agency or performing services related to its business. At least one state court has already rejected this argument. However, under different state law or given slightly different insurance provisions, the temporary staffing agency might also encounter a gap in coverage.

Both temporary staffing agencies and their clients can ensure coverage for the acts of temporary employees by obtaining temporary staffing liability policies. Because the temporary staffing liability policy covers wrongful acts by employees, temporary employees, and independent contractors, these policies can protect both the temporary staffing agency and its clients from potential gaps in coverage.

Second, a temporary staffing liability policy provides coverage that a CGL does not provide. Unlike a CGL, a temporary staffing liability policy provides coverage for certain errors or omissions of an employee or temporary employee. Because the typical temporary staffing liability policy provides coverage for wrongful acts of both employees and temporary employees, its coverage provides benefit to both the temporary staffing agency and businesses using the services of temporary workers. From the perspective of the temporary staffing agency, the policy provides protection should the temporary staffing agency's client seek to hold the temporary staffing agency liable for an error made by a temporary employee the staffing agency placed. From the perspective of the business using temporary employees, the policy provides protection should a third-party seek to hold it liable for an error made by a temporary employee.

Often, the standard exclusions in a temporary staffing liability policy relate to specialized fields of service. For example, the typical temporary staffing liability policy excludes coverage for claims involving many professional services, such as medical or legal services; work as an architect or engineer; work as an investment counselor, broker, or advisor; certain accounting and actuarial services; and possible others. Given the specialized nature of a temporary staffing liability policy, any temporary staffing agency or business using temporary staffing should consult its insurance agent to ensure it obtains a temporary staffing liability policy that meets its needs and provides sufficient coverage.

EMPLOYMENT-PRACTICES LIABILITY INSURANCE & BEYOND.

Even with coverage under a CGL and temporary staffing liability policy, temporary staffing agencies and businesses using temporary workers should obtain employment-practices liability insurance coverage. Although prior Newsletters have addressed the importance of employment-practices liability insurance, the discussion of any CGL would be inadequate without, at least, a brief mention of this coverage. Employment-practice liability insurance ("EPLI") provides coverage for claims arising from termination of employees; refusal to hire; discrimination; harassment; retaliation; and similar claims. Both the typical CGL policy and temporary staffing liability policy expressly exclude coverage for these types of claims. A business may obtain this coverage through a stand-alone policy or as a coverage endorsement to a CGL or other package policy.

Of course, any business may require a number of other coverages. For example, many businesses require a separate commercial auto policy. Almost all businesses will require some form of property coverage. Many temporary staffing agencies will also want to consider specific crime coverage since they send people out to work at and deal with the property and goods of their clients.

Ultimately, a business should work closely with an insurance agent to find the *appropriate* insurance coverage for its needs. Although appropriate insurance coverage for any business generally starts with a CGL policy and EPLI coverage, as well as temporary staffing liability coverage for businesses in the temporary staffing field, a business can only determine its exact needs by discussing its specific situation with an insurance agent.

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