

RISKY BUSINESS

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Miami **V**alley **R**isk **M**anagement **A**ssociation

November 2018

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FYI

MVRMA Employment Practices Legal Consultation Helpline

By Tom Judy

We have witnessed a cultural shift in the last year as a result of the #MeToo movement which has made a high profile impact upon the entertainment industry, news media, government and other industries. Insurance industry experts believe the frequency and severity of employment practices liability claims will rise as a result.

Although the #MeToo movement may have captured the nation's attention recently, employment practices liability (EPL) is certainly not a new area of concern. The most frequent types of EPL claims include wrongful termination, discrimination, harassment and retaliation. Such claims are costly and time-consuming. In an article titled "5 Top Trends in Employment Practices Liability Claims," AmTrust North America reports that the average cost to settle a discrimination lawsuit is \$125,000, the median discrimination judgment is about \$200,000, the average cost to settle an employee lawsuit out of court is \$75,000 and the average amount awarded to employees in jury trials is \$217,000. Beyond the dollar cost to the employer – or its insurer – is the cost of a damaged reputation, decreased employee morale and lost productivity.

The best defense against an EPL lawsuit is prevention. A key component of prevention is a robust employee and supervisor training program. In 2018, MVRMA has offered training on employment practices liability, employment law, workplace violence, workplace harassment and discrimination, the workplace life cycle from hire to termination and general supervisory training. Members are encouraged to take advantage of such offerings and to make suggestions to MVRMA staff if there are other topics you would like considered for a future training session.

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FYI...CONTINUED

The MVRMA Risk Management Best Practices checklist includes various other recommendations to control EPL claims covering topics such as employment policies, selection and hiring practices, orientation, employee training, discipline, and substance abuse. Members are evaluated annually on their compliance with these standards.

Another key to controlling EPL claims is to ensure you have adequate access to competent in-house or outside counsel with expertise in employment law to advise you in all employment actions involving significant discipline or termination. Toward that end, effective November 1, 2018, MVRMA is implementing its Employment Practices Legal Consultation Helpline. The MVRMA EPL Helpline is a resource to provide members with access to expert legal advice prior to taking employment actions that could potentially result in an employment practices claim or litigation.

MVRMA has contracted with the law firm Mazanec, Raskin & Ryder to provide MVRMA members with access to attorneys in the firm's Employment & Labor Law practice. By contacting these attorneys before taking adverse employment actions, MVRMA members may be able to reduce the likelihood of a claim occurring or provide for a successful defense in the event a claim does occur.

Members may receive up to three (3) hours of legal consultation per issue at no cost to the member.

The program will encompass employment matters arising under the Americans with Disabilities Act (ADA), Fair Labor Standards Act (FLSA), Family Medical Leave Act (FMLA), Age Discrimination in Employment Act (ADEA), Title VII (discrimination on the basis of race, color, religion, sex or national origin) and other similar laws, as well as employment matters involving wrongful termination, harassment, retaliation and hostile work environment. The program will not cover benefit plan disputes, collective bargaining issues or union-related matters except as they are tangential to a permissible matter.

The EPL Helpline is designed to supplement the members' existing legal services. It is not intended to replace the members' law director, solicitor or labor counsel.

Please contact MVRMA staff if you have questions about the MVRMA Employment Practices Legal Consultation Helpline.

Loss Control Lowdown...

OSHA: How It Applies To Your City

By Starr Markworth

In the State of Ohio the Federal OSHA standard is applied differently to local governments.

With the ratification of Ohio House Bill 308 in December 1992, the Public Employment Risk Reduction Program (PERRP) went into effect. The purpose of the program is to ensure that the public employees in the State are provided with a safe and healthy working environment. Prior to PERRP, only state agencies, under an executive order first enacted in 1973 and updated in 1982, were held responsible for the occupational safety and health of their respective employees. House Bill 308, therefore, greatly expanded the responsibility of all public employers in Ohio as it extends safety and health coverage to approximately 600,000 employees across the state. However, House Bill 308 exempts peace officers, firefighters, and correctional officers in county or municipal correctional institutions from coverage. (See Ohio Revised Code 4167 for more detail on PERRP)

The role and mission of PERRP is to ensure public employees in Ohio have safe and healthy working conditions. Public employers must furnish each public employee a workplace free from recognized hazards that are causing or are likely to cause death or serious physical harm. This fundamental requirement is the foundation of the Public Employment Risk Reduction Act (the Act) which is also referred to as House Bill (HB) 308.

PERRP provides a variety of specialized workplace safety and health services for Ohio's state, county and local government agencies, school districts, public colleges and universities. PERRP services promote safe workplaces and the prevention of injuries and illnesses by raising awareness of occupational safety and health hazards and risk factors.

PERRP is your partner in workplace safety and health risk reduction and they provide the following compliance assistance to public employers at no additional cost.

- Voluntary compliance assistance inspections
- Written safety program reviews
- On-site safety training and presentations
- Work-site surveys related to noise, chemical exposures, ventilation, biological and other health hazards
- Industry-Specific Safety Program services
- Safety Intervention Grants

Importance of PERRP recordkeeping

Injury and illness recordkeeping is an integral component of a successful workplace safety and health program. Accurate recordkeeping helps public employers analyze their working environment for existing and predictable hazards that are likely to cause serious injuries and illnesses.

Loss Control Lowdown Continued

PERRP Recordkeeping Forms

All Ohio public employers must complete the PERRP recordkeeping forms (or an equivalent). This includes the State of Ohio and its instrumentalities; and "any political subdivisions and their instrumentalities, including any county, county or state hospital, municipal corporation, city, village, township, park district, school district, state institutions of higher learning, public or special district, state agency, authority, commission or board" as defined in Ohio Revised Code 4167.01.

Required forms can be found at:

<https://www.bwc.ohio.gov/employer/programs/safety/SandHPERRPDetails2.asp>

Public employers are required to post PERRP posters in areas where there is employee traffic to inform them of their right to work in a place free from recognized hazards and must include a "notice" to inform employees of their rights and responsibilities. You can **order** a printed copy of the required poster or you can **download** and print a copy on 8 ½ x 14 (legal) size paper.

PERRP, through a comprehensive safety and health consultation, strives to ensure a safe and healthy workplace for all public employees. PERRP, in conjunction with responsible management, identifies actual and potential hazardous conditions, reviews required written programs (bloodborne pathogens, hazard communication, confined space, etc.), and will prepare a detailed report for the employer, to assist in developing specific programs and abatement methods.

If you would like more information regarding PERRP, please visit their website or use contact information below: <https://www.bwc.ohio.gov/employer/programs/safety/sandhperrp.asp>

PERRP Questions

If you have questions about any PERRP occupational safety and health activities or adopted standards, staff is ready to assist you. You can contact them by mail, phone, fax and email.

Ohio Public Employment Risk Reduction Program (PERRP)
13430 Yarmouth Drive
Pickerington, OH 43147
Phone: 800- 671-6858
Fax: 614-621-5754
[Email us](#)



Broker's Beat - Property/Casualty Insurance Outlook

2017 was the worst year on record for the commercial insurance sector with estimated insured losses in excess of \$100 billion. Despite this, the outlook for the U.S. property/casualty commercial insurance sector for the next 12 to 18 months remains stable given healthy core earnings and sound balance sheets in the view of analysts at Moody's Investors Service.

Global natural disaster losses reached \$36 billion during the 1st half of 2018, considerably lower than the 10-year average of \$125 billion; insurance payouts are estimated at \$20 billion, according to Swiss Re. It is the second half of the year that usually brings higher losses. For example, in 2017 the series of major hurricanes, Harvey, Irma and Maria, pushed overall economic losses for the year to \$340 billion. Florence and Michael estimates are starting to come in, and the year is not over.

Key Industry Metrics that we use to gauge the financial health of the property/casualty commercial insurance sector include.

- The U.S. property & casualty industry posted a combined ratio of 94.8 in the first-quarter 2018, the lowest three-month combined ratio of the last five years, according to AM Best. The combined ratio for 2017 was 103.7.
- Policyholder surplus was \$752.5B as of 12/31/17 - A record high.
- Private U.S. property/casualty insurers saw their net income after taxes more than double to \$17.1 billion in first-quarter 2018 from \$7.9 billion in first-quarter 2017, helped by lower catastrophe losses and increased reserve releases.

Looking ahead, the expectation is that there will continue to be upward pressure on property rates. Poor performing accounts and classes will experience increased pressure. Buyers of property insurance should budget conservatively. We could see rates flat to up 10% and bigger increases for insureds with attritional losses.

General casualty lines of coverage may see modest increases, while others such as law enforcement liability, commercial automobile liability and employment practices liability (EPL) may see higher price increases. Dramatic price increases and reductions in coverage can be expected for Sexual Abuse and Molestation.

Counselor's Comments

By Dinsmore & Shohl

The Ohio BWC's New Rule on Health and Behavioral Assessment Intervention

Medical treatment in workers' compensation claims has typically been limited to treatment of conditions that are "allowed" in the claim itself. For example, if a claim is only allowed for conditions related to an injured worker's right knee, he/she can only seek treatment for the right knee under the workers' compensation claim.

Recently, however, the BWC has taken on a new initiative to address cognitive, emotional, behavioral, social and psychological issues in a claim that are not directly related to the allowed conditions. It believes that these kinds of issues increase the risk of prolonged pain and disability. To this end, new rules were enacted which will allow Health and Behavioral Assessment and Intervention Services (HBAI) for injured workers. Codified as OAC 4123-6-33, the rules provide that when an injured workers' physician of record (POR) determines recovery may be delayed due to either behavioral or health issues, the POR can request an assessment of the injured worker by an independent medical provider who will determine any potential behav-

ior issues which may serve as a barrier to overall recovery. This request may only be submitted, however, after the POR determines that (1) the injured worker is not progressing with their initial course of treatment, (2) the injured workers' healing appears to be delayed due to behavioral barriers, and (3) the injured worker has the capacity to understand and respond meaningfully during the face-to-face encounter.

The face-to-face encounter (assessment) may be performed by any professional whose practice includes health and behavior assessment services. After the assessment is conducted, the examiner then submits a report to the POR outlining the intervention services that should be performed, if any. A C-9 form requesting these services must then be submitted by the POR. The services may be performed by "any provider whose professional scope of practice as defined under state law includes health and behavior intervention services." However, these services are limited to "coaching and counseling" services that address the behavioral barriers

identified in the assessment.

While HBAI services are limited to six hours per year, additional services may be approved within the year if the POR documents that the services are medically necessary. Finally, HBAI services are not to be directed toward the diagnosis or treatment of psychological conditions. The rationale behind this exclusion is that the focus of these services is not on mental health, but rather factors impacting the "prevention, treatment, or management of physical health problems and treatment."

The purpose of HBAI services is to attempt to speed up the recovery of injured workers, thereby reducing claims' costs and time off of work. While these are worthy goals, it is unclear how frequently these requests will be seen in actual practice. It is also unclear how emotional/behavioral barriers to recovery can and will be differentiated from the treatment of psychological conditions, which are not part of the underlying workers' compensation claim and which is excluded under the rules.



The Claims File...

Craig Blair

During the summer of 2018 there were numerous weather events involving high winds or record rainfalls over a short period of time. MVRMA covers damages to city property from these events, but these storm events may have created issues for your residents as well which lead to questions regarding how the city should respond.

Major storm events often generate 2 to 3 inches of rainfall in the course of a couple of days. Our members' water/drain systems are expected to be able to handle these events. This summer, events generated up to 4 inches of rainfall within a 24-hour period, accompanied by high winds in several of our member communities. These types of events lead to the storm or sewer systems becoming surcharged and overflowing. There could also be hazardous road conditions from "ponding" water on the roadways, sewer backups from water infiltration into the system or water infiltration into the sanitary system through the manholes.

The legal standard our cities are held to in these situations is a "maintenance standard." This means that cities are to respond in a timely manner to remedy the situation when put on notice of a problem.

The city would be expected to pump away water from roadways if possible, place signs, cones, or other type of barriers where high water occurred.

When a back up occurs at a resident's home or business, the city would be expected to respond in a timely manner to the scene to pump away water, to clear any blockages that have occurred in city lines from the storm water. Frontline employees that respond to these situations should not answer any questions regarding liability issues with the resident. Once MVRMA receives a report on the claim it is MVRMA's responsibility to review the claim and determine if the city would be held liable.

Calendar of Events

Upcoming Training Events

- **Back Safety**
TBD - November 5th, 6th and 15th
- **Communicating in a Crisis**
Centerville Police Training Room, November 29th

Upcoming Board Events

Committee Meetings

Risk Management - December 4th 10:30 AM Finance - December 4th 1:30 PM

Board Meeting

December 17th - 9:30 AM followed by Holiday luncheon at Kohler's Catering

From The Board Room

Actions taken at the June 18th Board meeting included:

- Approved EPL Helpline agreement
- Accepted the 2017 Financial Audit and CAFR
- Accepted the 2019 Loss Funding Study
- Accepted 3-year renewal with Pinnacle Actuaries
- Approved the 2019 preliminary budget