

# Commercial Insurance Update

Topics Affecting Buyers of Commercial Insurance

MSP C 02/2004 – “Employers Liability: What Does It Cover?”

February, 2004

## Employers Liability: What Does It Cover?

By Jeffrey W. Cavnac, CPCU, RPLU

Employers liability (EL) is Part II of the standard workers compensation policy. Every employer that buys workers compensation in California (or every other state for that matter except the monopolistic states) has this coverage but very few understand what it actually provides.

Basically, EL is intended to protect an employer from legal liability arising out of employee injury, which is not covered by the workers compensation policy. Although coverage applies to all employers liability claims not specifically excluded, the policy does list the four most common types of claims:

- **Third Party Over Actions** – A lawsuit filed by a third party, seeking indemnity because it was held liable for an employee’s injury. Take, for example, an employee who was injured using a piece of machinery that the employer had not properly maintained. In addition to the benefits received under the workers compensation program, the employee also sues the manufacturer of the equipment. In turn, the manufacturer of the equipment sues the employer for contributory negligence due to poor maintenance.
- **Loss of Consortium** – A lawsuit typically filed by an injured employee’s spouse for loss of the “services” of his or her spouse who was injured in the course of employment.
- **“Dual Capacity” Suits** – Lawsuits brought by an injured employee, against the employer when the injury arises from a product the employer manufactures. In such a case, the employer is

liable not only as an employer but also as a manufacturer.

- **Consequential Bodily Injury** – A lawsuit filed by a family member for injuries suffered as a consequence of the employee’s injury. An example would be the spouse of a severely injured employee who suffers a heart attack or a nervous breakdown upon learning of the injury of his or her mate.

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As previously mentioned, these are the most common exposures that are covered by the employers liability policy but other circumstances can give rise to claims as well.

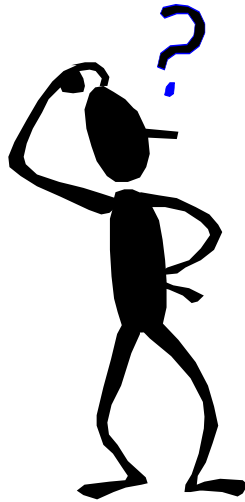
If you have ever reviewed your workers compensation policy, you will note that Part I, Workers Compensation, applies to the laws of the State of California, and does not specify a limit. This is because workers compensation applies to “benefits.” Workers compensation benefits are determined by the state, so coverage is virtually unlimited.

However, Part II, Employers Liability, does have a limit (usually \$1 million for each of the three coverages listed). EL applies to damages that the insured must pay, much like a general liability policy and hence, is subject to the limits shown.

Employers liability coverage is written on a per occurrence basis. With bodily injury, this is pretty straightforward. For coverage to apply, the bodily injury must occur during the policy period. For occupational disease, it is a little more complicated. Coverage would only apply if the employee was exposed to the conditions causing or aggravating the disease during the policy period.

Coverage is also restricted to the United States of America, its territories, possessions and Canada. If you have a foreign exposure, you should purchase a foreign voluntary workers compensation policy, which includes employers liability. You should also be aware that there are several countries that require you to buy employers liability in that country if you have employees permanently working in that country. (This is required in the United Kingdom.)

Employers liability does not apply in those states or jurisdictions that have monopolistic state funds; specifically, Ohio, North Dakota, West Virginia, Wyoming, Washington, the U.S. Virgin Islands and Puerto Rico. Employers whose only exposures in the monopolistic fund states are neces-



sary and incidental to their work in other states would have employers liability coverage for the exposure without the need for any endorsement. If an employer has operations in a monopolistic state, however, they will need to purchase workers compensation directly from that State Fund. They will also need to add employers liability for that state onto either their workers compensation or general liability policy. This is called “Stop Gap” coverage.

Defense costs are paid in addition to and will not reduce the policy limit. In general, an umbrella or excess policy will extend over the employers liability policy to provide additional coverage.

Like just about every other insurance policy you’ve read, an employers liability policy does contain exclusions. Basically, everything is covered except that which is excluded. Fortunately, the exclusions in the EL policy are pretty straightforward:

1. **Liability Assumed Under a Contract** – Employers liability only covers liability imposed by law. Liability assumed under a contract is not covered. However, claims for employee injury assumed under contract are covered under a standard Insurance Services Office, Inc., (ISO) commercial general liability policy. This is because there is an exception to employers liability exclusion for contractually assumed liability. (You may recall that employers liability specifically covers third-party-over actions. However, the contractual liability exclusion eliminates this coverage if it is assumed contractually. The general liability policy closes this gap.)
2. **Punitive or exemplary damages** because of bodily injury to an employee employed in violation of the law.
3. **Bodily injury to an employee while employed in violation of the law** with the employer’s knowledge.
4. Any obligation imposed by a **workers compensation**, occupational disease, unemployment compensation or disability benefits law, or any similar law. These types of losses would be covered under the specific policy designed for these exposures, such as workers compensation.

## Employers Liability (Continued from page 2)

5. Bodily **injury intentionally caused** or aggravated by the employer.
6. **Bodily injury occurring outside the United States of America**, its territories, possessions and Canada. Note that this exclusion does not apply to bodily injury if a citizen or resident of the United States of America or Canada is temporarily outside of the country. Although “temporarily” is not defined, 90 days is a good rule of thumb. (As previously mentioned, any out of country exposures should be evaluated, and a foreign voluntary workers compensation program should be considered.)
7. Damages arising out of **wrongful termination, discrimination, harassment** and other **workplace related torts**. Coverage for this exposure would be provided under an employment practices liability policy.
8. **Exclusions 8-10** – These three exclusions specifically carve out coverage for **various exposures covered by Federal law**, including longshoremen and harbor workers, Federal Employers Liability Act and masters or members of the crew of any vessel.
9. **Fines or penalties** imposed for violation of Federal or state law.
10. Damages payable under the **Migrant and Seasonal Agricultural Worker Protection Act**.

## How much does it cost?

It’s hard to believe, but there is actually no separate premium charge for employers liability. EL suits are rare, and the expense is built into the workers compensation rates.

## Summary

As mentioned before, if you have workers compensation coverage, you have employers liability coverage. The two go hand in hand. However, you should make sure that:

- Your limits are adequate.
- Your umbrella or excess policy extends over your employers liability coverage.

- If you have operations in a monopolistic state fund state that you have purchased workers compensation in that state and endorsed either your primary workers compensation or general liability policy to provide “Stop Gap” coverage to protect you from your employers liability exposure in those states.
- If you have employees traveling abroad or full time workers abroad, you should evaluate your exposure carefully and consider the purchase of a foreign voluntary workers compensation policy which includes employers liability.✘

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*Disclaimer: This article is written from an insurance perspective and is meant to be used for informational purposes only. It is not the intent of this article to provide legal advice, or advice for any specific fact, situation or circumstance. Contact legal counsel for specific advice.*

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# Explanation of 2004 Workers Compensation Insurance Assessments

All California insurance carriers are required by law to participate in the following assessment programs. This involves collecting statutory assessments (surcharges) from policyholders to assure the success of each program. The table shows the differences between 2003 and 2004.

Description	2003 Level	2004 Level
Workers Compensation Administration (WCA)	.0971%	.2296%
Workers Compensation Fraud Assessment (WCFA)	.1180%	.0685%
Uninsured Employers Benefit Trust Fund (UEBT)	New	.1115%
Subsequent Injuries Benefit Trust Fund (SIBT)	New	.0192%
California Insurance Guarantee Association (CIGA)	2.0%	2.0%
Total Assessments	<b>2.2151%</b>	<b>2.4988%</b>

## **WCA Surcharge**

One of the features of the Workers Compensation Reform Act of 1989 was the creation of the Workers Compensation Administration (WCA) Revolving Fund. The purpose of the Revolving Fund is to help finance the administrative cost of implementing some of the provisions of reform.

## **WCFA Surcharge**

California's anti-fraud law SB1218 makes workers compensation fraud illegal. If convicted, the person can face up to 5 years in prison and/or up to a \$50,000 fine. The anti-fraud law created the Workers Compensation Fraud Assessment (WCFA) to fund investigation and prosecution of workers compensation fraud.

## **UEBT Surcharge**

Mandated by Assembly Bill 227 (09/03), the Uninsured Employers Benefit Trust Fund (UEBT) provides benefits to injured employees whose employer was illegally uninsured.

## **SIBT Surcharge**

Mandated by Assembly Bill 227 (09/03), the Subsequent Injuries Benefit Trust Fund (SIBT) provides benefits to employees who have suffered a serious injury and who are suffering from previous permanent disability and impairment.

## **CIGA Surcharge**

Created by the California Legislature, the California Insurance Guarantee Association (CIGA) settles unpaid claims of injured individuals when an insurance carrier is unable to make payments because of insolvency.

If you have any questions, please contact our office.✧