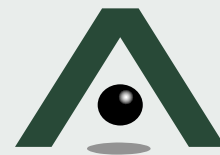


# Managing Risk

## THE ADDIS GROUP

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W B N  
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## D&O: Not Just for Public Companies

Private companies and nonprofits need D&O, too!

Directors and officers liability insurance, commonly known as D&O, protects corporate directors and officers from liability arising from acts or omissions they commit in the course of their official duties. Directors and officers owe the corporation they serve, and its shareholders, three fiduciary

duties: the duty of care, or of acting with reasonable prudence in the performance of their duties; the duty of loyalty, or of putting the corporation's interests above their own; and the duty of obedience, or of acting within the scope of their authority. Directors who fail to carry out these responsibilities

can be held personally liable if their errors or omissions result in a loss to the corporation or its shareholders.

In recent years, those "official duties" have become more onerous, due to increasing regulatory scrutiny. For example, in 2002, the Sarbanes-Oxley Act became law. In addition to tightening responsibilities for outside auditing companies, the law also placed greater financial oversight responsibility on a company's principal executive and financial officers. These individuals must now agree in writing that they have personally reviewed the corporation's annual or quarterly SEC filings and certify the information contained therein is true to the best of their knowledge. Increased responsibilities such as these have made some individuals who might have served as outside directors in the past hesitate to take an outside directorship.

Other developments have increased outside directors' interest in D&O insurance. Last year, in derivative suits involving Enron and WorldCom, outside directors agreed to contribute personal funds to resolve claims against them. (A judge tossed out the WorldCom settlement agreement because of its potential impact on other defendants; the Enron settlement still stands.)

## Risk Notes

Cybercrime costs more than "physical" crime, according to nearly 60 percent of U.S. businesses surveyed by IBM. Respondents considered lost revenue, loss of current and prospective customers and lost employee productivity as costs of cybercrime. However, no reliable national statistics on the cost and prevalence of cybercrime exist to date. On a related note, the Bureau of Justice Statistics and the National Cyber Security Division (NCSA) of the U.S. Department of Homeland Security will be sponsoring the first National Computer Security Survey during 2006. The survey aims to "produce reliable national and industry-level estimates of the prevalence of computer security incidents (such as denial of service attacks, fraud, or theft of information)" against businesses and the resulting losses incurred by businesses.





# Telecommuting and Injuries

**Telecommuting can bring some legal pitfalls for the employer. Read below for some pointers on avoiding them.**

With current gas prices, telecommuting has once again become a popular topic of discussion among employers and employees. Whether you already have employees who telecommute or you are discussing such an arrangement for the first time, you will need to prepare for the possibility of employee injuries.

Because a telecommuting location – generally the employee's home – is an extension of the employer's office or jobsite, telecommuting arrangements can create some legal pitfalls for the employer. One such pitfall includes reporting, handling and investigating employee injuries that occur at the location.

First, employers need a clearly written policy for telecommuters. The policy must address the type of work to be performed,

establish work hours (whether fixed each day or total hours worked each week), home office and equipment requirements, and other related guidance. The policy must also provide direction to an employee on when and how to report a work-related injury from the telecommuting location, with instructions on how the employer will investigate the injury to determine preventive measures.

Second, employers must understand that workers' compensation laws and benefits cover telecommuting employees. When an injury occurs at the typical worksite, there is generally someone to witness the injury or, at least, a means for the injured employee to report the injury promptly to the employer. When a telecommuter is injured, you may not have any witnesses, he

or she may have difficulty in reporting the injury promptly, and since the injury occurs at what is both the employee's workplace and home, the employee has an opportunity to abuse the system.

In addition, an injury occurring at the telecommuting location can fall into a gray area. For example, if an employee slips and falls on the stairs while going from the second floor office to the kitchen to get lunch or a snack, is that "work-related"? Or when the employee goes outside to retrieve the mail, which may include documents from the employer, and slips in the driveway – is that "work-related"?

Third, employers need a plan to provide modified or restricted duty if a telecommuter has an injury. And the employer must also consider ADA (Americans with Disabilities Act) accommodations if the employee is to work from home but does not already have reasonable accommodations for the injury. If the employer elects for the employee to not perform work while recovering (does this make it a lost-time injury?), does this eliminate the employer's need to make a reasonable accommodation in the employee's home?

## OSHA and telecommuters

In 1999, OSHA indicated an interest in inspecting telecommuting workplaces, but withdrew the directive shortly after releasing it. This does not prevent an inspection, however, where an employee has a complaint regarding imminent danger from equipment or work practices in which the employer has not provided adequate safeguards.

Additional OSHA requirements might apply to the telecommuting employee, including training (such as the HazComm Standard and access to material safety data sheets, fire extinguisher and evacuation procedures, for example), hearing conser-





## Liability

D&O—continued from Page 1

In a derivative suit, a company's shareholders file a claim on behalf of the company itself, alleging that the directors or officers violated their fiduciary duty. Ordinarily, a corporate charter contains language agreeing to "indemnify," or protect directors and officers from financial liability arising from their corporate duties. However, many states have "good faith" provisions that prohibit insurers from covering directors and officers in suits alleging fraud. In these cases, directors and officers must pay for their own defense costs and, if the plaintiffs' claims are upheld, any settlements. Although Enron had D&O coverage, which can cover attorney fees, the magnitude of the case and the likelihood of the defendant directors losing had the case gone to trial could have prompted the directors' settlement agreements.

### Typical D&O claims

Publicly traded companies clearly need D&O insurance to protect their directors and officers from the risk of shareholder suits. According to the 2004 Tillinghast Directors & Officers Liability Survey, only 23 percent of D&O claims against publicly traded companies were brought by employees. For this group, shareholder suits represent the largest risk, although regulators and other outsiders can also file suit against directors and officers. The 2005 Directors & Officers Liability Study also found that the risk of shareholder suits increased with the size of the organization and if it had undergone a merger recently.

Privately held corporations have much lower exposures to shareholder suits. However, shareholders can—and sometimes do—sue directors and officers of private corporations.

Although nonprofits have no shareholders, directors and officers must manage the organization's assets well and in accordance with the bylaws. Considering that some nonprofits have multimillion-dollar budgets, their directors' responsibilities can equal those of a publicly traded corporation's. In fact, Sarbanes-Oxley's executive liability and whistle-blower protection provisions apply to nonprofits as well

as for-profit corporations.

For nonprofits and privately held companies, employee suits present a much greater risk to directors and officers. Among nonprofits, 96 percent of D&O claims were filed by employees during 2005, according to the Tillinghast survey. Privately held corporations are also more likely to have D&O claims filed by employees rather than shareholders, regulators or others. For these sectors, insurers have developed specialized policies that combine D&O coverage with employment practices liability insurance, or EPLI. In addition to protecting corporate directors and officers from liability relating to their fiduciary responsibilities, it will protect them from employment practices liability claims as well, including:

- ✱ Discrimination
- ✱ Harassment
- ✱ Wrongful termination
- ✱ Retaliation
- ✱ Wrongful discipline

It's important to note that the D&O/EPLI policy covers only directors and officers—it will not cover managers or supervisors from employment practices claims. If you have significant employment practices liability exposures, you might need a separate EPLI policy. Or, depending on your firm's structure and exposures, a management liability policy might provide the coverage you need.

To obtain a proposal for a D&O policy, an insurer will want copies of the following:

- ✱ Financial statements
- ✱ Resumes of senior managers
- ✱ Resume of human resource manager (or person who handles personnel issues)
- ✱ Employee manual
- ✱ Procedures for handling employment practices complaints, including sexual harassment complaints
- ✱ Outlines or description of training provided to managers or supervisors
- ✱ Information on labor litigation, employment practices complaints or investigations by the Equal Employment Opportunity Commission

- ✱ Information on recent or planned layoffs, including criteria used to select layoff candidates
- ✱ Information on recent or planned mergers

The Addis Group can help you evaluate your D&O and employment practices liability insurance needs. For more information, please call your account manager. ■

TELECOMMUTING—continued from Page 2

vation, respiratory protection and other safety and health standards, depending on the employee's duties.

OSHA also requires the employer to report workplace injuries on the OSHA 300 log, regardless of where the injury occurs. It is necessary, then, to determine and ensure that an injury reported by a telecommuting employee is work-related. The only way to determine if the injury is work-related is to conduct an injury investigation. An employee must know that the employer can investigate a reported injury, which may mean giving the employer access to the employee's home office.

Other employment laws may apply to telecommuters, such as the Fair Labor Standards Act or the Family and Medical Leave Act. A clearly written policy and position description will define the employer's responsibility in some of these areas, as will requiring telecommuters to "sign-in" and "sign-off" on the company server to track hours worked.

Telecommuting can offer benefits to both the employer and the employee. To minimize the possibility of injuries or employer liability, the employer will want to have a clearly written telecommuting policy that covers safety, minimum home office requirements and injury reporting. Don't take the "out of sight, out of mind" position, as this can leave you wide open to legal and insurance liabilities. Telecommuters require the same level of attention as your regular workforce. For more information on workers' compensation, safety and telecommuters, please call Jim Sheridan, director of risk management services at The Addis Group. ■



# Joanna Grauel

Joanna joined The Addis Group as an account manager in the Employee Benefits Department. Her responsibilities include designing and installing medical and ancillary plans, as well as providing service and support to our clients' human resource staff and their employees. With more than 16 years' experience in the employee benefits industry, Joanna brings significant knowledge to the organization with her excellent problem-solving skills and attention to detail.

Joanna began her career in 1989 with a Boston-based insurance carrier, where for eight years she was promoted to various positions in the

medical claims department. She served four years as a senior benefits administrator for an international company in their HR department. For one year she was with a local benefits consulting company conducting employee benefit/enrollment meetings in Alaska, Tennessee, Texas and the Tri-State area. Just prior to joining The Addis Group, Joanna served three years as a client service manager with a local employee benefits broker focusing on service and retention of their key accounts.

Joanna attended West Chester University where she obtained a bachelor of arts degree in liberal studies, with a concentration in communication. Joanna resides in Montgomery County, Pennsylvania with her husband David and their dog Bear. ■

## 2006 Employer of the Year

Each year The Insurance Women of the Main Line selects an Employer of the Year in recognition of its contributions to and support of employees, education and professional development. On June 21, 2006 the Insurance Women of the Main Line awarded The Addis Group the 2006 Employer of the Year at its annual "All Industry Night" dinner and awards ceremony.

The Addis Group is proud to have been a supporter of The Insurance Women of the Main Line for many years by encouraging membership in professional organizations and acknowledging the value of networking and leadership training provided by those organizations. Several employees of The Addis Group are members of this worthwhile orga-

nization, who devote their personal time to giving back to the insurance industry through education as well as contributing to charitable organizations in the general community. ■

## The Franklin Award



The Philadelphia Chapter of the Chartered Property Casualty Underwriter Society (CPCU) presented its 24th Franklin Award to The Addis Group. The award recognized the firm's outstanding achievement

and contribution to the insurance industry in the Delaware Valley. ■

## Compliance Check...it out.

The Addis Group has introduced a series of workshops to help companies identify, measure and reduce the sources of human resource-related risks. Two sessions have already been completed—one on employee manuals and the Family and Medical Leave Act (FMLA), and another on job descriptions and the Americans with Disabilities Act (ADA).

On November 30, The Addis Group will hold its third session, covering the Equal Employment Opportunity Commission (EEOC), sexual harassment and the Uniform Services Employment and Reemployment Rights Act of 1994 (USERRA).

For more information, please call Andrew Addis at 610.755.4975 ■



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**MANAGING RISK Newsletter**