

*Risk Awareness Series:
How Cyber Risks, Sexual Harassment
Claims and the Regulators Can Wreak
Havoc on Your Practice*

Practice Risk 301: Cyber Risk Review & Sexual Harassment and Regulatory Defense

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Introductions



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Recap Cyber Risk 101: Top Risks

- Failure to Encrypt Data Access
- Cloud And Security Software Reliance
- Lack of Security Training and Awareness
- Third Party/Vendors
- Lack of HIPAA Knowledge & Compliance





Kevin Joyce, Executive Director

Recap Cyber Risk 201: Prevention and Solutions for Cyber Risks

- It's Not If, But When
- Proactive – What You Can Do Now
- Get HIPAA Compliant
- Traditional vs. NextGen Cyber Coverage
- Why Do I Need Additional Cyber Coverage?



**CYBER
INSURANCE**

Employment Practices Liability Insurance (EPLI)

- Medical practice susceptibility to employment practices claims has increased dramatically in recent years due to the evolving economic, political, and legal environment.
- The past 8 years has seen an increase in employment laws that have expanded employee rights.
- EEOC has seen steady increase in complaints since 2012 and collected over \$1B in monetary awards.

Employment Practices Liability Insurance (EPLI)

Continued...

The Top Five EEOC Complaints:

- 1. Retaliation
- 2. Racial Discrimination
- 3. Religious Discrimination
- 4. Disability
- 5. Age Discrimination



Employment Practices Liability Insurance (EPLI)

Continued...

Some Striking Employment Liability Facts:

- Over 40% of all EPL lawsuits are filed against employers with less than 100 employees
- 75% of litigation involves employment disputes
- Legal defense costs average \$75,000 prior to trial

Takeaways

- Every employer is at risk
- EPL claims are on the rise
- MPL & GL policies do NOT provide protection
- Use value added resources to reduce risk

Employment Practices Liability Insurance (EPLI)

Continued...

Some of the federal laws that address employment liability, in addition to the numerous state and local laws and rules and regulations, governing healthcare providers include:

- Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1991, which amended Title VII to include additional recoveries for the claimant and gave claimants the right to a jury trial
- Family Medical Leave Act (FMLA)
- Age Discrimination in Employment Act (ADEA)
- Americans with Disabilities Act (ADA)

Employee Lawsuits Are Costly – Win or Lose

According to Westlaw, a legal research service by Thomson Reuters, plaintiffs win 51 percent of the time when employment practices liability (EPL) claims go to trial.

Losses from certain types of EPL lawsuits are also getting larger. Employment law firm Seyfarth Shaw LLP found that settlements for the 10 biggest class actions increased 55 percent from 2016 to 2017.



4 Trends Are Making the Risks More Severe

1. It's not just about lost wages and compensation; juries are increasingly focused on emotional damages.

In New Jersey, for example, two brothers sued their former employer for racial discrimination, hostile work environment and retaliation under the New Jersey Law Against Discrimination (LAD). The jury awarded them \$2.5 million in damages, including \$800,000 in emotional distress damages to one brother, and \$600,000 to the other.



2. Social media and movements like #MeToo intensify reputational risk.

The “Me Too” movement has brought national attention to the issue of sexual harassment in and outside of the workplace. And while “Me Too” has provided a platform for victims to speak about their experiences and prompted a re-evaluation of what constitutes appropriate behavior, it has also increased the public profile of claims that may be false.



#metoo

3. Plaintiffs' attorneys drive class action disability discrimination cases.

Discriminatory practices that violate the Americans with Disabilities Act may similarly garner large settlements and present reputational risk. Recently, attorneys have sought out such potential problematic practices in places companies often overlook — their company websites.

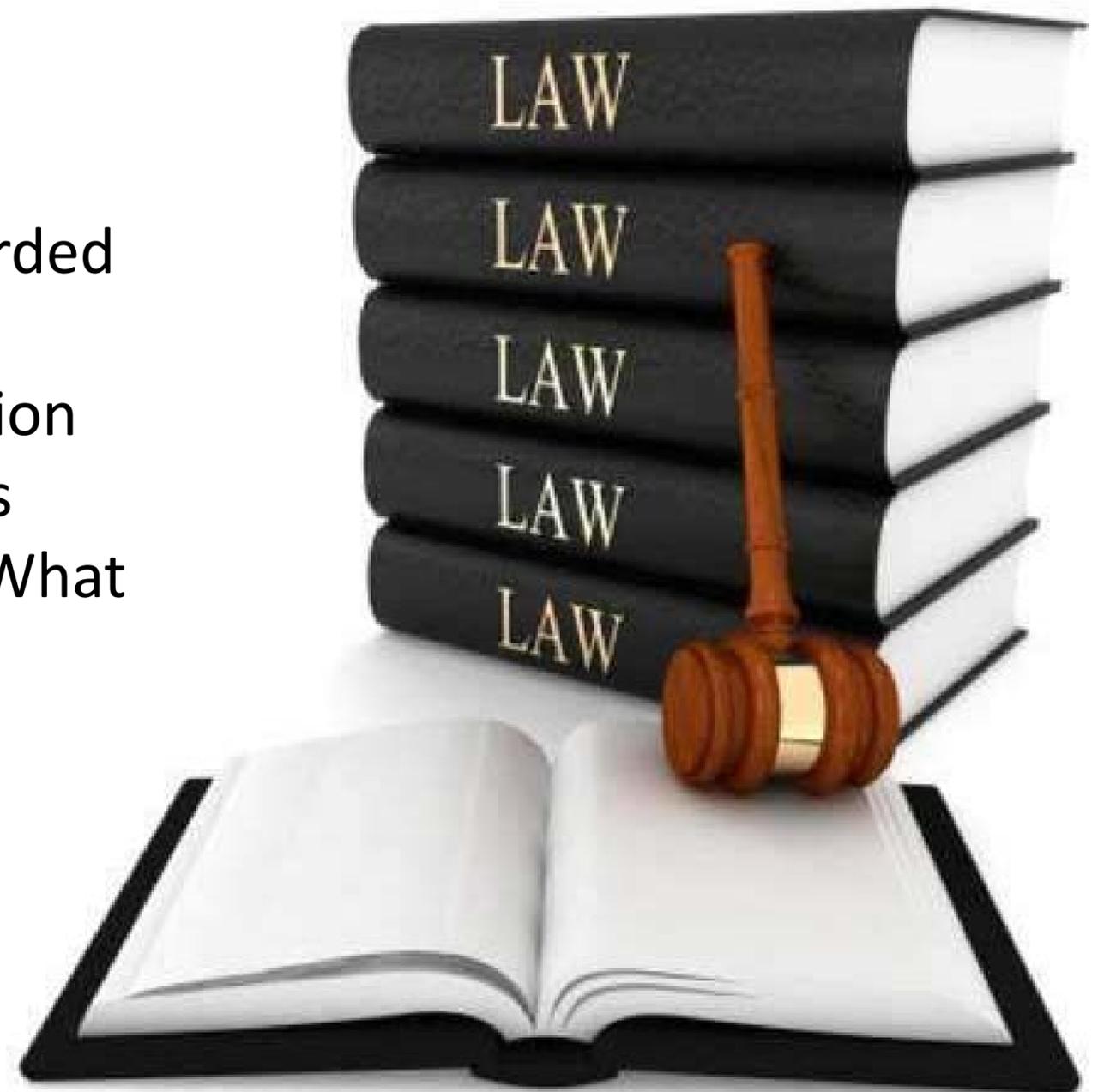


4. Varying state regulations add complexity to compliance.

In addition to federal regulations, companies must also contend with variances in state law.

"In particular, states vary in their protection of rights afforded to the LGBTQ community. Companies should have an understanding of discrimination based on sexual orientation or gender identity, and what their obligations are as far as bathroom access, or using non-gendered pronouns, etc. What rights are protected and to what extent?"

- Lisa Lockhead, Vice President,
Head of Private & Not For Profit –
Financial Lines, Starr Insurance Companies



It's More Important Than Ever to Ensure Internal Controls Are in Place

There are several risk control and risk transfer strategies organizations can deploy to mitigate the EPL losses. Some basic controls are critical, like employee handbooks that detail a code of conduct, policies and procedures around hiring and firing, thorough training, and a dedicated leader of human resources.



The ADA published a [27-item checklist](#) to help companies make their websites accessible. Most are easy fixes, such as including text descriptions for links and navigation menus, and HTML alt tags for images for hearing-impaired visitors, or corresponding audio descriptions for the visually-impaired. Sites should also offer a way to contact a web manager with questions or complaints about accessibility.

Employer Liability vs. Workers' Comp: Know The Difference?

Confusion can reign when it involves employers trying to determine if something falls under their workers' compensation coverage or their employer liability coverage. The fact is, many employers/medical practices do not even carry employer liability insurance, otherwise known as EPLI. In Florida, any non-construction employer with four (4) or more employees is required by law to carry workers' compensation insurance. There is no requirement for employers to carry EPLI.

Employer liability insurance is becoming ever more important for all businesses, since we have been seeing a rapid increase in complaints and claims in the world of medical practices in the past two years and with the recently formed #MeToo movement. This, combined with the rise of social media, has created the perfect storm for the increase in employer liability claims. The most prevalent claims currently being experienced are employer retaliation, sexual harassment, and discrimination.

The aforementioned issues and many others fall under employer liability and could be serious enough to lead to an Equal Employment Opportunity Commission (EEOC) complaint or a lawsuit, or both. In 2017, almost 6,700 sexual harassment complaints resulted in a recovery of almost \$46 million from employers to the EEOC, an increase of almost 15% from 2016, and the numbers keep growing. This does not include personal claims and lawsuits, which cost employers far more in defense and payments.



BY TOM MURPHY

Conventional wisdom has always taught us that politics, religion, and sex are topics we should refrain from discussing at work. Given the current political atmosphere in this country, as well as other hot-button issues and the explosion of social media, employers should be mindful of these issues and would be well-advised to implement policies to prevent or reduce these problems. It may be time to update the employee handbook.

Workers' compensation is fairly simple and straightforward, with the exception of allowing attorneys into the system that was set up to be "no-fault" and designed to compensate employees regardless of fault involving an injury on the job. Workers' compensation pays for all reasonable medical bills, as well as lost time, with the goal of

returning the injured employee back to work at the earliest opportunity.

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Regulatory Defense Insurance

Designed to respond to actions brought by or on behalf of government entities for billing errors and omissions.

Also covers claims brought by commercial payors and defense expenses for formal voluntary disclosures to the government.

Regulatory Defense Claims Triggers

- Defense reimbursement and external forensic audit expenses, civil fines and penalties (where applicable) for various billing errors and omissions, as well as other regulatory violations including:
 - Medicare and Medicaid billing investigations
 - False Claims Act allegations
 - Commercial Payor actions
 - Anti-kickback statute violations
 - Stark Law violations
 - Qui Tam actions
 - Government or private contractor audits
 - Search warrants/subpoenas
 - Voluntary disclosure to a government entity

What Does Regulatory Defense Include?

- Legal Fees / Associated Costs
 - **Usually around \$100-120k**
- External auditor and medical expert costs associated with defending these claims
 - **Usually around \$400-450 an hour**
- Fines and penalties and damages attributed at the time of settlement.
 - **Varies but can be around \$100k-300k depending on if negligence is found**



Why Regulatory Defense Insurance

- Pressured to provide access to affordable healthcare to a growing number of Americans, the Feds are pursuing billions wasted annually in healthcare through aggressive government and commercial payer audits.
- While commonly referred to as “fraud prevention efforts”, the allegations in these audits are rarely fraud or abuse.
- Rather, the allegations are more subjective in nature, leaving every healthcare provider vulnerable to accusations

Changing Game

In the past, healthcare providers knew they were audited when federal agents came through their door requesting a handful of medical records.

Now, anyone with a national provider identification number is susceptible to physical or electronic data mining audits.

It's important to note that the majority of auditors are also being paid on a contingency fee basis as a financial incentive to find “aberrant billing patterns” using predictive algorithms.



Increasing Billing Audits and Investigations

The U.S. Department of Health and Human Services reported expected recoveries of more than \$3 billion in audit and investigative receivables in 2015, and identified roughly \$20.6 billion in savings based on regulatory or administrative actions that were supported by OIG recommendations.



False Claims Act Penalties Doubled in 2016

Effective August 1, 2016, civil penalties for violation of the False Claims Act nearly doubled to \$21,563 per violation. Healthcare providers would also be required to pay three times the amount of damages that the federal government sustained because of the false claims.



Comprehensive Insurance Coverage

- Stand-alone coverage is the best
- Med Mal policies have very inadequate coverage
- Best coverage includes fines and penalties
- This component offers coverage for regulatory fines and penalties This component offers coverage for regulatory healthcare providers facing many regulatory challenges, including Medicare and Medicaid billing errors investigations.
- Complex regulatory requirements, as well as increased government scrutiny of medical billings, can distract providers from doing what they do best – taking care of patients.
- Beware of hefty awards incurred in privacy regulatory proceedings/investigations brought by federal, state, or local governmental agencies, such as proceedings/investigations alleging HIPAA violations.

Q&A

Thank You!

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