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MIND YOUR OWN BUSINESS

Editor: Michael J. Lentz • The Business & Commercial Newsletter of Franklin & Prokopik

Navigating Insurance Coverage for Your Business:
Preparing for, and Weathering, Natural Disasters

This past summer, Ellicott City suffered one of the most devastating flash floods in its history. Storefronts along Main Street were particularly hard-hit. To add to myriad problems facing the town, many property owners now face disputes with insurance companies over whether their damages are covered.

Flood insurance is often left out of a standard commercial general liability, or CGL policy. Accordingly, many business owners are now embroiled in litigation over whether their policies cover the costly damages. The enormous, sometimes catastrophic losses suffered by business owners may not be covered absent specific riders (or separate policies) providing flood insurance.

Coverages vary widely, and it is impossible to provide situation-specific advice without reviewing specific policy language. However, some big-picture advice is possible.

First, all small business owners should review their insurance coverage with a knowledgeable professional who is familiar with the business and how it operates. Disaster relief programs exist, but assistance is rarely immediate (or even prompt), and usually comes in the form of a loan that must be repaid. Flood insurance is available, but not all property owners are eligible for it, and costs can vary widely based on the age and location of the property to be insured, the likelihood that the location will flood, and the use of the property. All policies must be purchased either from the National Flood Insurance Program (NFIP) directly or from a private insurer selling NFIP-approved plans.

Even if a business owner has flood insurance, some damage may nonetheless not be covered. Many such policies exclude damages caused by wind-blown rain or water. Indeed, in the aftermath of hurricane Katrina, disputes over whether damages were caused by wind or flooding were commonplace.

Second, all small business owners should develop and implement a plan for what to do in a disaster. Tasks assigned to key personnel should also be assigned to at least one other key employee, in case the person primarily responsible is unavailable. Of course, critical data should be backed up and stored offsite. Cloud storage solutions are ubiquitous and relatively inexpensive, even for the newest of small businesses, but may present information security problems, especially for businesses in regulated industries. The plan should account for preserving existing data and recovering data previously backed up. The plan should also account for contacting, and being contacted by, customers, vendors, suppliers, and employees, all without using the business's primary systems. The business's physical premises must be secured, cleaned up, and restored if possible. (Be sure to photograph the premises and all damaged property, and document the value of damaged or destroyed property as best as possible under the circumstances). The plan should also include prompt notification of the company's insurer(s), and consistent (and persistent) follow-up

Upcoming Events

April 25, 2017
Maryland Workers' Compensation Seminar
Hunt Valley Inn, Hunt Valley, MD

May 18, 2017
Business Law Seminar
Turf Valley, Ellicott City, MD

June 6, 2017
Liability Seminar
Turf Valley, Ellicott City, MD

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with them. The company should promptly put its insurer on notice of a potential claim, and make sure that it timely takes all steps necessary to file a claim.

Once a plan is developed, it should be shared, in written form, with all employees who might need to implement it. These employees should be encouraged to leave a copy home or in some other safe place where it can be accessed in the event that the company's physical premises and computer systems are unavailable. (Confidential or proprietary information should generally not be included in such a plan and, if included, should be protected with non-disclosure and other agreements).

Disaster planning and response will of course vary substantially from one business to the next. Custom, individualized, advice and planning is critical to reduce the impact of, and hasten recovery from, a natural disaster.

Accommodation Under the ADA: *What's Required*

The Americans with Disabilities Act of 1990, including its 2008 amendments (the "Act") prohibits employers from discriminating against a qualified individual with a disability. If an employer is subject to its terms, the Act prohibits discrimination against employees and job applicants in employment-related decisions like hiring, promotion, or termination, and prohibits harassment of individuals on the basis of a disability if the harassment creates a hostile work environment. In general terms, the Act, if it applies to an employer, requires the employer to engage with covered individuals through an interactive process, and – unless it would cause an undue hardship - to provide reasonable accommodations to such individuals on a fact-specific, case-by-case basis.

Questions of scope and coverage may impact businesses in marginal cases, but for most business owners, the most significant questions are: (1) "What process must I follow?" and (2) "What accommodation, if any, must I provide?" After a brief discussion of coverage, this article will examine the first question – the second will be addressed in our next newsletter.

Who is Covered?

The Act generally applies to employers that have 15 or more employees on the payroll for 20 or more weeks in either the current or immediately preceding calendar year, and the 20 weeks do not need to be consecutive. So, a business that has 15 employees on the payroll for 13 weeks from June 1 through August 31, but lays off 3 employees on September 1, will nonetheless be subject to the Act if has 15 or more employees for seven weeks at any time during the remainder of the calendar year

Generally, only qualified employees with a disability are covered by the Act; independent contractors and volunteers are generally not covered. An employee is deemed "qualified" under the Act if he or she has a disability and can perform the essential functions of his or her job with or without a reasonable accommodation.

The Act defines "disability" as "a physical or mental impairment that substantially limits a major life activity." However, the Act also provides that an individual has a "disability" if he or she "has a history of a disability," or "is classified as having a disability."

The Act's definition of "disability" is ambiguous and expansive by design. In general, the question of whether an individual has a disability should not require extensive analysis. The Act suggests, and interpreting case law confirms, that the definition of "disability" is to be interpreted broadly, in favor of coverage. As a practical matter, this means that in close cases, a business owner should assume, and should act as if, the individual does have a disability.

What Process Is Required?

If your business is covered by the Act, and you are made aware of or learn of a qualified applicant's or employee's mental or physical limitations, you must communicate with the individual to determine whether you can provide some reasonable accommodation, without undue hardship, to overcome those limitations. Generally, you need not initiate the process until the person asks for an accommodation. However, if you know or have reason to know that an employee or applicant has a disability, you should initiate the interactive process without waiting for a request for accommodation. You must initiate the process (or respond to a request), and provide any reasonable accommodation promptly. Failure to respond promptly may itself violate the Act even if you eventually do everything you are obligated to under the Act.

Whether the process is initiated by you or by your applicant or employee, it need not be formal -- in-person conversation can, and often will, suffice. The process must attempt to identify the precise limitations caused by the disability and explore potential reasonable accommodations to overcome them. If you initiate the interactive process and the employee responds that no accommodation is necessary, you have fulfilled your obligation. If the employee requests an accommodation, you must continue with the interactive process.

There are no bright-line rules that you can follow to meet your obligations under the act. So, trying to initiate or continue a process to meet those obligations obviously presents a significant challenge. Of course, if the process or dialogue results in an agreeable accommodation and the employee continues working, the matter usually ends there, and the process never gets (or needs) further scrutiny. However, the inability to find reasonable accommodation risks a dissatisfied employee, and quite possibly litigation. In such litigation, a dissatisfied employee will often contend that a reasonable

accommodation could have been found had you engaged in the appropriate interactive process. A successful process will almost always include the following steps:

1) Determine the essential functions of the job – figure out, and list, what this person must do. Note that the essential functions of a job almost never include everything that the current occupant of the position actually does in a day.

2) Establish the employee's limitations – consider the employee's job-related limitations and how they might be overcome. Of course, limitations not related to an essential job function should not be considered.

3) Explore potential accommodations – confer with the employee to identify potential accommodations and determine which will be effective in enabling him or her to perform the essential functions of the job.

4) Select and implement appropriate accommodations, considering both the preference of the employee and your own situation.

Sometimes, of course, both an employee's disability and the need for accommodation will be obvious. In these cases, you need not slavishly follow an interactive process, and can simply provide the necessary accommodation.

Whether your interactive process is short and simple, long and complex, or anywhere in between, you should take great care to document the process and your efforts to provide reasonable accommodation. Informal, face-to-face conversations may best allow you and your employee to discover the precise extent of job-related limitations and what accommodations will overcome them. Nonetheless, those conversations should be documented by either sending a follow-up e-mail to your employee or summarizing the conversation in a quick memorandum to his or her personnel file.

Unfortunately, the necessary interactive process does not always result in a reasonable accommodation. Even with both parties participating in good faith, as they are required to do, reasonable accommodation is not always possible. How far an employer must go, what constitutes a reasonable accommodation, and what makes an accommodation unreasonable, will be addressed in our next issue.

In Re Dubois:
Time-Barred Debts in Consumer Bankruptcies

Most business owners are unfortunately well aware that the prospects of collecting from a bankrupt customer are often quite dim. An unfortunately increasing number of businesses have first-hand experience "holding the bag." Prompt, aggressive action is usually necessary to maximize recovery, and even then, recovery is often slight. A recent decision of the U. S. Court of Appeals for the Fourth Circuit, though, has dropped a few pebbles in the often-nearly-empty consumer bankruptcy bag, allowing time-barred debt to serve as the basis for a creditor's claim in bankruptcy.

Of course, most Maryland business owners also know that collection suits (like other lawsuits) must be filed within a certain period of time.[1] In Maryland, that time period is generally three years from the date on which the debt "accrues." When a debt "accrues" for limitations purposes is a fact-specific question. Creditors should consult counsel promptly when considering various collection alternatives, to ensure that suit can be timely filed if necessary. As with any rule, there are exceptions, but generally a creditor cannot collect a debt that is more than three years old.

However, a debtor's bankruptcy may revive the hope of at least some recovery. Creditors seeking to recover from a bankrupt debtor generally must (and almost always should) file a proof of claim with the Bankruptcy Court. The proof of claim sets forth the basis of the claim, and puts the debtor, the Court, the debtor's bankruptcy trustee, and other interested parties (such as other creditors) on notice of the claim. If the debtor has assets, the claim is generally valid, and will be allowed, unless another interested party objects.

Of course, since available money is distributed *pro rata* among valid claims, debtors, their trustees, and often other creditors, are vigilant against invalid or improper claims. In the Dubois case, a creditor filed a proof of claim based on a debt that was then more than five years old. The debtor objected to the claim and sued the creditor, claiming that the creditor had violated the Fair Debt Collection Practices Act by trying to collect a time-barred debt.

The U.S. Court of Appeals for the Fourth Circuit correctly noted that Maryland's statute of limitations does not extinguish a debt, but only bars a lawsuit to collect it. As a result, the Court held that the debt still constituted a right to payment, and could serve as the basis for the creditor's claim against the debtor's bankruptcy estate.

The Court cautioned that the claim based on the time-barred debt might ultimately be disallowed, but noted that Maryland law permits time-barred debts to be revived by, among other things, a debtor's agreement or undertaking to pay the debt.

The Dubois opinion provides yet more confirmation of the benefits of filing a (truthful) proof of claim in a debtor's bankruptcy, even if the prospects for recovery appear dim. Even in these situations, the filing of a proof of claim is "chicken soup" … it can't hurt and might help.

[1] For example, if a debt is due "on demand" or "at the convenience of" the lender, the debt accrues immediately, even if the lender has advised the borrower that it will not, or does not intend to, collect the debt for a certain period of time.

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