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# E&O Insights: Why Workers' Compensation Leads in E&O Claims

Every year, errors and omissions (E&O) claims arising out of the placement of workers' compensation account for approximately 10 percent of all claims. Many of those workers' comp claims are well in excess of \$100,000. Details of those claims show that there are several areas where "errors" can occur.

While the following list may not be all inclusive, it covers the majority of claims:

- Questions involving coverage for sole proprietors, partnerships or single-member LLCs;
- Dealing with a broker to place coverage for that "tough" risk;
- Dealing with the state workers' comp market to place coverage;
- Ensuring employees in all states are covered;
- Placing clients in a trust/alternative program; and
- U.S. Longshoreman and Harbor coverage.

## **Sole Proprietors**

Does the sole proprietor of a business want coverage? There is no uniformity in how different states handle this. In many states, coverage for the sole proprietor/partner is excluded; they can "opt in" if they elect coverage. In other states, they are covered but can opt out. Bottom line, it is critical to know how your state handles this issue.

In addition, explain the issue to your client and let him or her make the decision. Unfortunately, it is often not until there is an on-the-job accident with an injury that the client discovers they were not covered.

As evidenced by the following claim example, which occurs with some frequency, agents must avoid making the decision for the client.

The loss surrounds whether the agent was told by a client who owned a pizza shop that the shop's owner wanted workers' comp coverage for himself. The agent initially said the client did not want to insure himself. The client was robbed, shot and killed during the robbery. The widow made a workers' comp claim, which was denied, because coverage for the owner was not requested. It was later determined that the agent, not the client, signed the application. This "making the decision for the client" was a major factor in the E&O carrier settling the claim.

For accounts that fall into this corporate structure, do the owners know if they are covered, or worse yet, do they strongly believe they are covered when they might not be? Do they understand how the policy addresses coverage for themselves? This must be resolved before the policy goes into effect, so be sensitive to timing issues, and ensure the necessary paperwork or specific forms are completed within the proper time frame.

This issue would make for a great discussion/education session at an upcoming staff meeting. After all, it's difficult to educate your clients on this — or any — matter if there is potential confusion among the agency staff.

Plus, when completing a certificate of insurance, show evidence of the workers' comp coverage. The certificate form includes a question under the workers' comp section that must be answered "yes" or "no" — "Any proprietor or partners or executive officer or member excluded?" How this is addressed on the certificate could come into play if a problem develops.

This is definitely a "hotspot" in workers' comp. Take the initiative to ensure the agency staff and your customers are knowledgeable about this issue.



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## **Multiple States**

The next big issue involves coverage for employees in all of the states where your client is doing business (excluding monopolistic states). A great way to keep this issue from becoming an E&O headache is by bringing along the workers' comp application when you meet with the account — to secure the information to provide a proposal or issue a policy, and so specific risk questions can be asked and documented. Obviously, answers to these questions could determine the risk's acceptability and what endorsements are provided.

What if there is a chance the client will have an employee temporarily working in another state? While the policy may provide coverage, it's possible the benefits of that other state will be greater than the home state, with the employer forced to pay the difference. If the client is looking to set up a permanent new location, absent the policy reflecting that additional state, there would be no coverage.

A highly recommended approach is adding the "Other States" endorsement to the policy to ensure injuries to employees in the other states will be fully covered. Alleged failure to provide the proper coverage has been a significant workers' compensation issue, resulting in many E&O claims.

If you have issued the policy with specific states listed and no "Other States" coverage, secure an update each year with your client concerning what their plans will be for the next policy term. There have been many E&O claims where the client did not understand the rules and opened a permanent location in another state, only to have an employee injured — and then discover there was no workers' comp coverage in effect.

In New York, it is mandatory to list New York if the insured has any New York exposure — even if it's incidental. In fact, New York has levied fines against employers if there is an exposure in New York but the state is not listed.

Thus, keep up — and comply — with the various state regulations!

## **Longshoreman and Harbor Coverage**

Do you have a client that is subject to the U.S. Longshore and Harbor Workers' Compensation Act? This act, administered by the U.S. Department of Labor, provides medical benefits, compensation for lost wages and rehabilitation services to longshoremen, harbor workers and other maritime workers injured during the course of employment, or who suffer from diseases caused or worsened by employment conditions. Placing this coverage may not be easy, and extra caution should be exercised.

## **Trusts/Alternative Programs**

If you are looking to use a trust to place one or more of your workers' comp customers, it is important to understand these trusts, how they operate and, certainly, their financial condition. In New York, a number of these have declared insolvency in the past few years. Without a guaranty fund to provide protection, a high degree of due diligence should be exercised. This lack of a guaranty fund should also be clearly communicated in writing to your customers.

Placing workers' compensation isn't that difficult — doing it right is. When placing this coverage, pay attention to detail. Working with the application and documenting the responses from the prospect should make your job much easier.

*Curtis Pearsall is President and Founder of Pearsall Associates Inc., a Risk Management Consulting firm specializing in helping agents protect themselves. He is the former SVP of a national E&O program where he oversaw Underwriting, Marketing Services and Claims from 1987 to 2009. Mr. Pearsall holds the following designations: CPCU, AIAF, ARM, AU and CPIA.*