

# Insurance Buyers' News



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Automobile Claims

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## Marijuana Use Linked to Increased Car Crashes

Although the workplace impact of marijuana in states where it's been legalized has mainly been a workers compensation concern, a recent study now links marijuana use to increased auto crash claims.

In four states where marijuana is now legal — Colorado, Nevada, Oregon and Washington — the frequency of collision claims filed with insurers were higher in recent years, according to new research by the Insurance Institute for Highway Safety (IIHS) and Highway Loss Data Institute (HLDI).

In the IIHS study, researchers compared the change in crash rates in Colorado, Oregon and Washington with the change in crash rates in the neighboring states that didn't enact recreational marijuana laws. Colorado was compared with Nebraska, Wyoming and Utah, and Oregon and Wash-



## This Just In...

According to *The CPA Journal*, a new series of cyber-related class action claims against at least 15 law firms could have serious implications for how all businesses manage their computer systems and view data security.

The most troubling aspect of the class action suit centers on the fact that there was no actual breach of confidential client information, merely the possibility of a breach.

The complaint in the case alleges that the business was responsible for "a data breach waiting to happen" and claims that, among other computer-related issues, the "time record system could have been accessed without any username or password (or any other credential)."

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ington with Idaho and Montana. The study controlled for differences in demographics, unemployment and weather in each state.

The problem — and what these studies address — is that the role marijuana plays in crashes isn't as clear as the link between alcohol and crashes. Many states don't include consistent information on driver drug use in crash reports, and policies and procedures for drug testing are inconsistent. More drivers in crashes are tested for alcohol than for drugs. When drivers are tested, other drugs are often found in combination with alcohol, which makes it difficult to isolate their separate effects.

"The new IIHS-HLDI research on marijuana and crashes indicates that legalizing marijuana for all uses is having a negative impact on the safety of our roads," says IIHS-HLDI President David Harkey. "States exploring legalizing marijuana should consider this effect on highway safety."

In addition to the states studied, Alaska, California, Maine, Massachusetts, Vermont and the District of Columbia also allow recreational use of marijuana for adults 21 and older and medical use of marijuana. Twenty-two other states allow medical marijuana, and 15 more states permit its use for designated medical conditions.

Plus, legalization for recreational use is pending in New Hampshire, New Jersey, New York and Pennsylvania. In November, Michigan and North Dakota will hold referendums on marijuana, and Missouri and Utah voters will decide whether to expand medical marijuana laws in their states.

## Still Illegal under Federal Law

Marijuana may be raising safety concerns, but it's unlikely that this will have any impact on its growth in popularity. Still, under federal law, Marijuana remains an illegal controlled substance.

For the most part, however, the federal government has taken a hands-off approach to state legalization. So as a practical matter, in those states where it's legal or becoming legal, there is no impediment to its use.

## Practical Limitations on Testing for Marijuana Use

Even if there may be increased concerns about safety issues related to marijuana use, there are practical and legal limitations for employers who adopt a no drug tolerance policy. While someone may test positive while on the job, that result may simply be evidence that the employee used marijuana several weeks ago and has not in any way been impaired while at work.

The problem is it's difficult to determine if someone is under the influence of marijuana. Unlike alcohol, the amount present in a person's body doesn't consistently relate to impairment. The primary psychoactive component of cannabis is THC, or Tetrahydrocannabinol. However, even if a driver tests positive for THC it doesn't mean the driver was impaired at the time of the crash. Habitual users of marijuana may have positive blood tests for THC days or weeks after using the drug.

### *This Just In*

**To make matters worse for potential defendants, claims such as these are probably uninsurable, so they could become quite costly. It is no longer enough to simply avoid a data breach; firms and clients must become proactive and deliberate about network and data security.**

**Even though there is no absolutely sure-fire way to protect digital data and computer systems, the Insurance Information Institute recommends businesses take steps to limit their cyber liability risk by:**

- ✳ **Installing, maintaining and updating security software and hardware.**
- ✳ **Contracting with an IT security services vendor.**
- ✳ **Using cloud computing services.**
- ✳ **Developing, following and publicly posting a data privacy policy.**
- ✳ **Regularly backing up data at a secure offsite location.**
- ✳ **Obtaining appropriate cyber liability insurance**

**Please contact us to discuss your cyber liability exposures and needs.**

Nevertheless, according to Harkey, "Despite the difficulty of isolating the specific effects of marijuana impairment on crash risk, the evidence is growing that legalizing its use increases crashes." ■

# Do You Need Professional Liability Insurance?

Unless you're an attorney, doctor or accountant, it may not be obvious to you that you may need professional liability insurance.

**F**orty percent of businesses believe they may have professional liability risks but have not purchased insurance for it, according to a recent survey of small business owners by The Hanover Insurance Company.

Over the past twenty years there have been many changes in the ways businesses interact with customers and they may be surprised to discover they now have a gap in their liability coverage. Many businesses don't realize that their general liability does not cover professional liability (PL) exposures.

In addition to lawyers, doctors and accountants, many businesses now need PL insurance. You don't have to consider yourself a "professional" to need coverage for negligent acts. If you give advice and recommendations, if you create programs or products for your customers or if you provide a service, you need liability protection.

Take, for instance, an ice sculptor. A socially prominent couple contracts with an ice sculptor to provide a figure of two swans for their very expensive wedding. When the sculpture is unveiled, the bride gasps—the swans look like ducks. She claims this mistake ruined her wedding and threatens to sue, not just for the cost of the sculpture, but for the cost of the entire reception.

## Defense Costs

One of the most important reasons to carry professional liability (also referred to often as errors and omissions) insurance coverage is for defense costs. Even if the ice sculptor can prove that the client signed off on the design before it was unveiled, and it did indeed look like swans, the cost to defend the lawsuit could put a small organization out of business.



You can find the most extreme examples of costly lawsuits in the medical field, where 65 percent of claims are withdrawn before trial and 90 percent of claims that go to trial are denied, according to the Physicians Insurance Association of America. Nonetheless, it costs an average of \$120,000 to defend frivolous cases.

## Tailored Coverage

Whether you buy a PL or E&O policy, it usually will be tailored to the specific needs of your business classification. For instance, a policy for real estate brokers typically includes coverage for failure to advise clients on the existence of fungus, asbestos or bacteria. Policies for accountants might provide coverage for acting as a trustee or administrator of an estate. Some policies also cover inadvertent transmission of computer viruses and corruption of customers' data.

Examples of other professionals who need protection include:

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- \* Real estate agents
- \* Data processors
- \* Pest control services
- \* Appraisers

Many insurance companies offer group policies to members of trade associations. In other cases, insurance companies form buying pools that professionals can “join.” Miscellaneous professional liability coverage is also available for a variety of businesses such as translators, meeting planners, publishers, and collection agencies. If you need coverage, we can advise you on the best approach.

Sole proprietors may choose to protect their personal assets by forming a limited liability company, but their corporate assets are still at risk unless they buy E&O coverage.

### Claims-Made Policy

It is important to understand that most PL and E&O policies are written as “claims-made,” which means the policy only covers claims filed during the policy period. A few companies offer occurrence-based policies, which cover any qualifying claim arising from an incident that occurred during the policy period — no matter when filed. If you switch from a claims-made to an occurrence policy, you have to make sure you don’t create a gap in coverage.

In specific situations, a claims-made policy may allow an extended period for reporting claims: when an insured dies, retires or becomes permanently disabled. This is an important feature, because new claims can be filed years after the policy period. To qualify as a retiree, the insured usually has to be at least 55 years old, and he/she has had to maintain coverage with the same insurance company for several years — something to plan for if retirement is in your near future.

If you have any concerns about the liability coverages for your business, please give us a call. ■

# What’s a “Reservation of Rights” Letter?

## And what should you do if you get one?

**Y**our organization has just been sued, and you’ve notified your liability insurer as required by the policy. You think all’s taken care of...when you receive a reservation of rights letter from the insurer. What does this mean, and what should you do?

*Practical Risk Management* defines a reservation of rights as “an insurer’s notification to an insured that coverage for a claim may not apply. This allows for an investigation by the insurer without waiving its right to later deny coverage.”

When the insurer sends you a reservation of rights letter, it is telling you that it has doubts whether your policy covers some or all of the claims. In a liability lawsuit, the plaintiff often makes several claims. The policy might cover some and exclude others. When a claim is first filed, the insurer might not know whether coverage applies with the facts at hand.

When you buy a liability policy, your insurer agrees to pay for your legal defense costs in addition to any damages you might be legally obliged to pay. Most states recognize this

“duty to defend” as fairly broad under a commercial general liability policy. If there is a possibility that coverage might apply, the insurer must provide your legal defense.

When an insurer receives a claim that might be covered only partially by its policy or not at all, it can do one of the following:

- 1** Refuse the duty to defend. If the insurer does this and the court later finds that coverage applied, the insurer must reimburse your defense costs, along with settlement costs over which it had no control.
- 2** Investigate the claim and begin your legal defense. Insurers like to avoid this due to the principle of *estoppel*, which bars an individual from “denying or alleging a certain fact...because of that individual’s previous conduct, allegation, or denial” to the detriment of another. (*Black’s Law Dictionary*) In other words, if your insurer begins investigating or defending your claim, this could lead you to assume it will cover your claim.

- 3** File a declaratory action, in which the insurer asks the court to determine whether it is obligated to defend the claim. An insurer will seldom do this when it first receives notice of a claim.
- 4** Send the insured, by certified mail, a reservation of rights letter and proceed with its investigation. This allows the insurer to gather more facts before deciding whether to deny coverage, while preserving its right to do so. Thus, your insurer might defend your liability claim but later deny indemnification (or paying settlements or judgments) if its defense is unsuccessful.

Attorneys Veronica M. Bates and Renee C. Callantine caution that different rules apply, depending on location. "In many jurisdictions, the reservation of rights may allow the insurer to withdraw from the defense when there is no potential for coverage under the policy. The ROR letters allow insurers to decline indemnifying the insured for any portion of a judgment not covered under the policy."

The liability policy also either explicitly or implicitly obligates you to cooperate with the insurer in its conduct of your defense. This allows the insurer to direct your legal defense, including giving it the right to settle. But investigations can also give it facts needed to deny you coverage. For these reasons, a reservation of rights letter indicates a conflict between you and your insurer.

Here's what to do if you receive a reservation of rights letter: Protect your coverage rights by doing the following:



- 1** Read the reservation of rights letter and the policy to which it applies carefully.
- 2** Respond to your insurer, saying that you disagree. The experts with the *John Limer Review* recommend asking the insurer to commit to coverage before it begins its investigation.
- 3** Arrange for your own counsel.

Some reservation of rights letters will state the insurer reserves the right to recoup defense costs if the insurer does not owe a defense. Depending on the facts of the case and the jurisdiction, you could indeed be ob-

ligated to reimburse your insurer for defense costs if it was later determined coverage did not apply.

In a straightforward claim, you have no cause to worry. A reputable insurer will provide a quality defense. It's the gray areas, where coverage might or might not apply, that can cause conflicts. For this reason, we recommend thoroughly reviewing your liability coverage on a regular basis. A review can point out gaps in coverage, outdated forms and language, and other problems. For more information, please contact us. ■

# What's a "Reasonable Accommodation"?

An employer's obligation to provide accommodations begins at the very start of the employment process.

**T**he Americans with Disabilities Act (ADA) and amendments apply to employers with 15 or more employees. These employers cannot discriminate against individuals with disabilities in hiring, promoting, retaining and other aspects of employment. The ADA requires affected employers to provide a "reasonable accommodation" to allow these individuals to perform their job duties. Employers do not have to provide accommodations if doing so would be an undue hardship.

A reasonable accommodation is any change in the workplace or the way things are customarily done that provides an equal employment opportunity to an individual with a disability. While there are some things that are not considered reasonable accommodations (e.g., removal of an essential job function or personal use items such as a hearing aid that is needed on and off the job), reasonable accommodations can cover most things that enable an individual to apply for a job, perform a job, or have equal access to the workplace and employee benefits.

An employer's obligation to provide accommodations begins at the very start of the employment process. Employers with 15 or more employees must ensure applicants with disabilities can apply for jobs. This makes employers that recruit at locations that are physically inaccessible open to possible discrimination charges. In addition, employers that have online applications should also provide alternative means for people with disabilities to apply, unless they can show that doing so would create undue hardship.

Employers must also provide accommodations when an employ-



ee needs accommodation to perform the essential functions of the job, to gain access to the workplace or to enjoy "equal access to the benefits and privileges of employment," such as trainings and office-sponsored events.

Providing accommodations is often not as difficult as you might think. Accommodations vary with the situation and can include specialized equipment, facility modifications, adjustments to work schedules or job duties, as well as a whole range of other creative solutions.

Employers concerned about accommodations can contact the Job Accommodation Network ([askjan.org](http://askjan.org)). This service of the U.S. Department of Labor provides free consulting services for employers of all sizes. ■

