

The Limitations of Employers Liability Coverage

Workers' compensation has long been considered a grand bargain between business and labor, allowing employees to collect statutory benefits while capping employers' liability in most workplace injury cases. But the second part of a workers' compensation policy can also play a critical role in such claims. Still, employers must be aware of existing limitations to this coverage and state-specific laws.

Two Types of Coverage

Under a standard workers' compensation and employers liability (WC/EL) policy developed by the National Council on Compensation Insurance (NCCI) and used by many insurers, an employer's exposure to a work-related injury or illness is covered in two ways:

- Part One of the policy, dealing with workers' compensation, covers an employer's statutory liability under a state's workers' compensation laws. Generally, when an employee sustains an injury during the course of employment, the claim is handled through the applicable workers' compensation system, which is governed by state law. These laws specify the benefits — including medical expenses, disability payments, and lost wages — that an employee is entitled to recover without having to prove any wrongdoing by an employer. Under most states' workers' compensation laws, benefits are the sole remedy available to injured employees, and therefore, employees are barred from asserting tort claims against employers. This is known as the exclusive remedy doctrine.



- Part Two of the policy deals with an employer’s liability for employee injuries that fall outside of workers’ compensation law and provides insurance for claims brought in the civil court system. Employees can at times circumvent the workers’ compensation system and file civil lawsuits against employers — for example, in cases involving intentional injuries, violations of employment laws, and claims handled in bad faith. The EL part of the policy applies to “bodily injury by accident or bodily injury by disease.” While the policy does not define “accident,” it does contain an exclusion for “bodily injury intentionally caused or aggravated” by the insured.

Employees’ Burden of Proving Intentional Injury

In order to bypass the exclusive remedy doctrine and maintain a suit against an employer, an injured worker may assert an allegation of intentional injury. But not all jurisdictions allow this exception — and in many states, when relying on the intentional tort exception to the workers’ compensation bar, an employee must allege and prove a deliberate intent to injure.



Montana, New York, Ohio, Vermont, and West Virginia are among the states that have adopted the deliberate intent to injure standard. Most jurisdictions that require proving a specific intent to injure by an employer acknowledge the necessity to maintain the workers’ compensation system. These jurisdictions therefore impose a heavy burden of proof upon employees. Proving an injury occurred as a result of a deliberate act of an employer and that an employer specifically intended the injury is, in many cases, a difficult obstacle to overcome.

However, a few other states, including Connecticut, Louisiana, New Jersey, North Carolina, and Texas, only require a showing that an employer’s actions were substantially certain to result in injury. These jurisdictions have broadened the scope of employer intentional tort by implementing the substantial certainty test. This effectively expands the intentional tort exception to acts which an employer knows are substantially certain to cause injury, even if the resulting injury is not intended. Those states that have adopted the substantial certainty test interpret the scope of the exception differently. For example, Texas allows for damages in wrongful death cases brought against employers where gross negligence is proven.

Coverage Complications Abound

Many employers assume that an EL policy provides coverage for any claim outside of the workers' compensation system. But the varying laws and court opinions regarding the intentional tort exception to the workers' compensation bar can complicate matters. In fact, given the standard policy exclusion for "injury intentionally caused or aggravated" by the insured, such a policy may not provide coverage for EL claims that are based on the alleged intentional acts of an employer. This issue has been litigated in many jurisdictions, with varying results.



In jurisdictions that require an employee to prove a subjective intent to injure, insurers often deny coverage in circumstances where an employee alleges an intentional tort. When an employer's intentional act is the sole basis of an employee's suit, insurers often refuse to defend such actions. Insurers argue that there is no duty to defend or indemnify where a complaint effectively alleges intentional injuries in order to circumvent the exclusive remedy doctrine, as this falls within the scope of the intentional injury exclusion in the policy. Since any recovery in a civil action by an employee must be based upon a finding of intent to cause injury, insurers assert this would therefore be excluded from coverage under the policy. And because coverage is usually governed by the allegations of the complaint, courts will often uphold an insurer's declination even if an employer ultimately proves that it did not subjectively intend to cause the employee's injury.

Some courts have agreed with this argument and found that the exclusion for acts committed with the deliberate intent to injure an employee bars coverage for employer intentional torts. Those courts do not require an insurer to defend and indemnify an employer even if the injured employee were ultimately to prevail in the suit against the employer.

In jurisdictions where the substantially certain standard is applied, the majority of courts have held that the intentional injury exclusion does not preclude coverage when an employee alleges the employer acted knowing that injury was substantially certain to occur. In states where an EL claim can be pursued based on the lower substantially certain to occur standard, courts tend to find a distinction between the scope of the intentional injury policy exclusion and the intentional act exception to the workers' compensation bar. The policy exclusion only applies to injuries that result from a subjective intent to injure, and not the type of acts alleged under the substantially certain theory of recovery. In those states, the exclusion is narrower than the intentional tort exception under the workers' compensation scheme; it lacks express language that excludes conduct substantially certain to result in an injury. Therefore, in those states, an insurer must provide coverage for claims alleging an employer's conduct created a substantial certainty of injury to an employee.

Understanding State Laws

Given the differing state laws and standards among courts when it comes to exceptions to workers' compensation law and application of the EL policy exclusion, employers should be aware of the potential that their EL policies may not provide coverage for claims of intentional injury. As with all other policies, it is essential to analyze the language and applicable law to determine whether coverage exists for an employer against employee claims outside of the workers' compensation system. This is especially important since the EL part of the policy may not provide coverage if the claim is based on a deliberate intent to injure. Although courts have found coverage under the EL policy in cases where an employee suit is based upon an allegation that the injury was substantially certain to occur, insurers may still deny coverage for such claims in those jurisdictions where the EL claim is based on a deliberate intent to injure.

Since laws, and court interpretations of those laws, differ between states, employers should consult with their legal counsel to determine the governing law in the applicable jurisdiction and take measures accordingly. As legislation and case law continues to evolve, it is essential to stay informed of any shifts in the law as well as the coverage positions asserted by insurers. Doing so can arm an employer with strong defenses in the event of a coverage denial.

Finally, it is imperative for employers to remain diligent in securing and maintaining the safety of their workplaces, making all the necessary changes to ensure that their employees remain safe. Employee safety should never be sacrificed for the sake of improving cost efficiency. Instead, employers should invest in workplace health and safety programs that aim to prevent work-related injuries, which will also likely reduce or eliminate intentional tort claims.

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