Keeping A Clean House

In-House Counsel
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Thankfully, the days are nearly past when coal miners come home from their shifts with lungs blackened by coal dust. But now a sophisticated employee who goes to work healthy and comes home with a headache and watering eyes may think sick building syndrome right after common cold.

The possibility of toxic tort lawsuits by employees has increased as the general public's litigiousness has grown and as media coverage of the scientific and medical communities' understanding about toxic exposures has increased. No company is safe from being dragged into a lawsuit when there is a true toxic injury. But there are concrete ways to lessen your exposure.

Experts now recognize health hazards that were previously unknown, and they know more about prevention. A prudent employer should hire health and safety consultants and legal experts to discover and warn about potential hazards, work with governmental agencies, and teach safety programs to employees. In-house counsel must make sure that safety information and the protective steps their business are taking are communicated effectively both internally and to the public.

Target Number One - The Employer

If an employee believes he or she was exposed to toxic substances while working, the first logical target is the employer. The California Labor Code generally limits an employee's claims against an employer for injuries to workers compensation benefits, except in certain circumstances. Lab C § 3602. Indeed, in California, unlike some other states, even gross negligence falls within the workers compensation exclusivity.

Although workers compensation claims do not allow damages for pain and suffering or punitive damages, they still can involve significant expense and time for the employer. Not only can there be large damages for lost wages, ongoing medical expenses (including psychological damages), and a lump sum for any permanent injury, but there can also be major costs for document gathering, medical exams, attorneys fees, insurance claims, depositions, and bad press with other employees and the public.

An employee can, however, sue an employer in court for fraudulent concealment under Labor Code section 3602 (b)(2). Although this exception to the workers compensation exclusivity is narrow and hard to prove, there are no limits on damages. This section has been interpreted to mean that for an employer to be liable, the employee must establish all three of the following conditions: (1) The employer concealed the existence of an injury (the employee thinks he has a cold when the employer knows he really has lung cancer based on a medical exam). (2) The employer concealed the connection between the injury and the employment (the employer knew the employee was working with a carcinogenic substance without proper protection). (3) The injury is aggravated

by this concealment (if the employer had told the employee what it knew, it could have prevented further injury). Johns-Manville Products Corp. v Superior Court (1980) 27 C3d 465. Although the burden on the plaintiff to prove fraudulent concealment is difficult, getting the complaint dismissed can still be costly.

As an employer, what can you do to minimize your exposure to suits from employees? It is critical to use health and safety personnel and legal counsel preventively, to evaluate potential hazards and for educational training. In addition to making sure employees know how to handle any hazardous materials appropriately, safety consultants should alert managers and the personnel department about ways to respond effectively to informal complaints and how to conduct regular inspections in coordination with Cal/OSHA. If and when a regulatory or legal claim is made: (1) conduct a thorough instigation of any injury immediately. Interview witnesses, consult an expert, and brainstorm with key people in management. Do not jump to conclusions about what happened. (2) Be cautious about sharing information with other potential litigants or witnesses for the plaintiff. (3) Make sure documents are not destroyed. (4) Listen to and address employee concerns. This may help calm employee anxiety and deter other suits.

Often initial investigations of a claim are superficial. Having timely information, whether good or bad, always puts you at an advantage and saves money in the long run. Too often defense counsel will wait until discovery deadlines are looming before spending money on what was perceived as a frivolous claim. Delay can cause valuable information to be lost and also prevent early settlement or dismissal. For example, a company that doesn't wait six months before interviewing a plaintiff's coworker or subpoenaing medical records may be able to prove the plaintiff's coughing started long before he or she was allegedly exposed to mold in the office.

If a Cal/OSHA inspection is made, a lawyer should be present during all stages, which will include reviews of training records and safety documents, as well as interviews of management, employees, and witnesses. A citation for a violation of a safety order can form the basis for a "serious and willful" claim before the Workers' Compensation Appeals Board.

Employers need to be cautious in subsequent personnel actions regarding the claimants. Serious medical conditions may entitle claimants to extended leaves of absences or modified terms and conditions of employment. A failure to accommodate claimants could expand their ability to seek damages and expose supervisors to individual liability. In addition, an employer may not discharge, threaten to discharge, or discriminate against an employee who has filed a claim, made known an intention to file for workers compensation benefits, or received an award or settlement for an industrial injury. Lab C § 132a.

Target Number Two - Manufacturers and Distributors

If an employer avoids exposure using the shield of workers compensation, a frustrated worker and his or her attorney may look to third parties for money and vindication. These third parties can include chemical or equipment manufacturers or distributors to the employer.

When you are sued as a manufacturer or supplier to a company, often you are one of dozens of defendants, and you may have supplied something seemingly harmless. To prevent or minimize your exposure: (1) Establish as soon as possible whether there is legal causation. Can the plaintiff show that (a) he or she was exposed to your particular product, and (b) this product caused the alleged injury? If not, move to have the action against you dismissed early. This can be done effectively even in cases against multiple defendants. See Bockrath v Aldrich Chem. Co. (1999) 21 C4th 71; Setliff v E. I. Du Pont de Nemours & Co. (1995) 32 CA4th 1525. (2) Decide whether the defendants should have a joint defense agreement. (3) Beware od-party subpoenas, the employer should:

(1) Decide whether it is advisable to cooperate with the plaintiff, defendants, or both. (2) Limit the scope of the subpoena if it is unreasonable. (3) Use a state-of-the-art record retrieval system. (4) Seek costs of production. (5) Remember the possibility of a fraudulent concealment claim by the plaintiff. (6) Remember that bad publicity can incite more lawsuits.

Target Number Three - Premises Owner

A claimant who cannot proceed against an employer insulated by workers compensation and the difficulties of proving a fraudulent concealment claim may target the owner of the building where an injury allegedly occurred. In some instances liability may then fall back on the employer if there is an indemnity provision in the lease. To prevent or minimize these lawsuits as a real estate holder: (1) Make clear in the lease who is responsible for the condition of the building. (2) Draft the lease to limit the landlord's duties. (3) Document what access you have to the building. (4) Perform an independent analysis of the alleged cause of the injury.

Understand Your Opponent

Trespassers, surrounding residents, consumers, lessees, contractors, individual plaintiffs, and class action plaintiffs are all potential claimants of toxic injuries. The audience to whom you communicate regarding hazards and precautions must be broad.

Plaintiffs no longer limit their claims to negligence or premises liability. Toxic tort injuries now give rise to claims for battery, fraudulent concealment, strict liability, ultrahazardous activity, or inadequate warning. It is important to understand your opponent to create a defense. Is this plaintiff simply making up a claim? Is the plaintiff really injured and justifiably seeking rectification? Or does the plaintiff actually believe he or she was injured, but the evidence indicates otherwise? This evaluative process will help develop your defense strategy. Before choosing a course of action, you should take some important steps: (1) Establish the alleged source of the injury and whether or not you are responsible for it. The plaintiff's claims may range from a specific substance to the air or drinking water. (2) Determine whether or not the party was actually exposed to any harmful substance. Your evaluation may include making an inventory of materials brought into the workplace, obtaining a description of a specific production process, uncovering any unknown uses or substances, and analyzing these substances and their by-products. (3) Evaluate the level or dose of the exposure. The dose must be sufficient to cause any claimed health effects. (4) Consider the known health effects of the exposure, in combination with other risk factors in sustaining the alleged injury.

This approach may establish that the alleged harmful substances were not even present, or that, even if the products were used, they could not have caused the plaintiff's alleged injuries. You may find that the plaintiff could have avoided the injury by following basic warnings. Potential targets of toxic tort litigation must be prepared to respond to every sneeze in the workplace to minimize the claims of hazardous exposure.

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Practice Areas

Litigation