



ANALYSIS & COMMENT

GENETIC DISCRIMINATION REVISITED

We plan to deal with this subject in more detail in a future issue but, for the past year or so, we have encountered what seems to be an increasing incidence of claim service problems with both insurers and brokers. This usually starts with a claim denial from the insurance company adjuster for what are sometimes bizarre reasons. We can't say for certain where some of these ideas come from, but it surely wasn't from reading the policy.

In fact, when we pointed out to one adjuster the error in his reasoning for the initial claim denial, he admitted to going back to read the policy. He abandoned his first denial rationale and came up with another, almost as bizarre. Apparently, it is not enough to read the policy, you have to understand it, as well.

Unfortunately, many brokers are of little help in these situations, preferring to sit on the sidelines to avoid exposing their Errors & Omissions insurance. Even this would be preferable to the broker who tries to advance the insurance company's position.

There are a large number of informed and competent brokers and adjusters out there. But if you think your claim is being denied for the wrong reason (or no reason), enlist the active assistance of your broker or other insurance professional and vigorously pursue your case.

-- Ed.

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In November 2009, shortly after the law took effect, we reviewed the Genetic Information Nondiscrimination Act here. In that article, we described how the law was structured and what it required of employers. We touched on the subject again in September 2011 in an article on wellness plans, pointing out how these plans might run afoul of GINA. Since 2009, however, we heard practically nothing about GINA.

That was until late last year. In December 2012, the Equal Employment Opportunity Commission (EEOC) announced six national priorities in its Strategic Enforcement Plan for 2013-16, one of which was to address new and emerging issues in equal employment law, including genetic discrimination. In 2013, the EEOC launched its first three lawsuits involving violations of GINA.

The first such action involved a major distributor of decorative fabrics that violated GINA by asking for a family medical history during a post-offer medical exam. Even though this information was requested by a contract medical examiner, it was still the employer who violated the law. The employer agreed to a \$50,000 settlement decree.

In the second case, just settled last month, a nursing and rehabilitation center also asked for family medical history information in a post-offer, pre-employment medical exam. In addition, the company was alleged to have fired two women because of perceived disabilities in violation of the Americans with Disabilities Act (ADA) and either refused to hire or fired three other women because they were pregnant in violation of Title VII of the Civil Rights Act of 1964. This employer also settled with the EEOC for \$110,400 on the GINA allegations and \$259,600 on the ADA and Title VII matters.

The third lawsuit involves a seed and fertilizer supplier that again allegedly violated both the ADA and GINA. The GINA violations involved requiring illegal physical exams of applicants and asking questions about their medical conditions. These exams were a pre-condition to being considered for hire and sought disability-related information (in violation of the ADA) as well as family medical history. The suit, filed in late September 2013, asks for back pay, compensatory and punitive damages and injunctive relief. It has not yet been resolved.

While this is only three lawsuits, a pattern appears to be emerging. Improperly asking for family medical history information as a condition of employment is common to all of them. Plus, they all seem to be tied in some way to allegations of disability discrimination. The message here is to take a close look at your hiring practices and remove any requirements that seek what is considered to be genetic information.

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COMMON MUNICIPAL INSURANCE EXPOSURES

Every industry has specific exposures that are unique to it and that its members face. Municipalities are certainly no exception. Some of the more common exposures that municipalities regularly have to deal with today include:

1. Workers' Compensation. This coverage perennially presents the biggest financial exposure. It may even deserve to be first, second and third on the list since every town, village, city, county, school district, fire department or public authority complains about the cost of coverage, whether their loss experience is good, fair or poor. The high cost is, at least in New York, largely due to state fees and rising benefit levels. Even large and previously successful group self-insured municipal trusts are struggling to break even and not offering the ill-advised bargains they used to. Adding to the problem for municipalities is the fact that some employee groups, such as law enforcement officers and fire fighters, may get 100% of their salary while they are out on Workers' Compensation for line-of-duty injuries, leaving little incentive to return to work.

2. Automobile Claims. Because many municipalities have large vehicle fleets constantly on the road for police, garbage, sewer, road maintenance, etc., this becomes a major source of claims. This usually poses more of a severity problem than frequency (unless you include mailboxes ruined by snow plows), primarily due to the size disparity between municipal vehicles and private passenger vehicles. Municipalities get some protection in this area from laws protecting them from all but gross negligence for essential vehicles like snow plows and emergency vehicles, but there are usually more than enough other municipal vehicles on the road to keep this a major problem.

3. False Arrest and Use of Excess Force. This also makes for a frequency problem because there are enough individuals being arrested or detained who believe they are being unfairly accused or that the arresting officer used too much force. Fortunately, most of them are wrong and the municipality can be successfully defended, but at a significant cost.

4. Slips and Falls. These present a frequency problem, as well, particularly in snowy areas of the country like the northern and mountain states. Many municipalities have a large area to maintain and it is difficult to completely prevent falls from ice, holes in the sidewalk and tree roots under sidewalks. Municipalities are partially protected by a well-written Notice of Hazard law that holds the municipality legally responsible only if they are aware of a specific problem and didn't fix it within a reasonable amount of time.

5. Sewer Backups. Sewer backups are a frequency problem for many municipalities with older sewers and certainly many of the claims in this area are nuisance claims that can usually be closed for defense cost only, but every homeowner who has water problems feels it must be the municipality that caused the problem.

6. Road Maintenance. Here is a common exposure that is usually more a problem of severity than frequency. Common allegations include poorly placed or missing road signs, dangerous road shoulders, poor road design and the ubiquitous pothole.

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“Municipalities are partially protected by a well-written Notice of Hazard law. . . .”

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7. Discrimination and Unfair Employment Practices. Such allegations are certainly not unique to municipalities but they can be complicated by civil service seniority rules and teacher tenure.

Nothing will prevent a municipality completely from facing the above claims but carefully written procedures for each department, making sure employees understand and follow those procedures, regular safety meetings to discuss larger claims and how a similar claim can be prevented in the future, and an aggressive attitude to defend all frivolous allegations definitely help.

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WHAT'S IN A NAME

An agent or broker issues a certificate of insurance showing Travelers as the insurance company. Is that Travelers Casualty & Surety Co. or Travelers Property Casualty Co.? Or perhaps Charter Oak Fire Insurance Co.? Maybe the agent or broker uses an abbreviation you are not familiar with or even misspells the name.

It is important to know which specific company you are dealing with for a couple of reasons. First of all, you need to know whether the company is licensed in the state(s) where you have operations, and how they are licensed. An insurance company may be licensed in a certain state but only for specific coverages. It may also be licensed in a given state only for surplus lines. There are major differences between what a surplus lines carrier is permitted to do and what a fully licensed company can do.

You also need to know exactly what company you are looking at in order to verify its ratings with A.M. Best, Fitch, Moody's, etc. Is it American Equity Insurance Co. with an A.M. Best rating of A+ size XV (the largest) or American Federated Insurance Co. with an A.M. Best rating of B++ size IV? Large insurance groups such as Travelers often have the same rating assigned to all companies in the group, but that is not always the case.

The most reliable way to overcome these problems is to insist on receiving an identifying number that is given to the specific company. The two most commonly used numbers are those assigned by A.M. Best and by the National Association of Insurance Commissioners (NAIC). In fact, if you are searching for an insurance company on Best's web site, for instance, you can search by AMB number or NAIC number.

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