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## Good Record Keeping Minimizes Risk

“How long do I keep records?” is a question often asked by firms hoping to minimize physical and electronic storage space without violating state or federal law regarding record-keeping compliance.

Unfortunately, there is no simple answer to the question. It varies depending on where your firm is located and the type of records in question (healthcare, payroll, employment, etc.).

Records are a valuable resource for the business that keeps them, especially in instances when claims are filed or lawsuits are brought against the business. But good record keeping is hard to do, especially if you want to be able to access the records quickly when needed!



There's help available. ARMA International, an association of records and information management professionals, has resources on its website ([www.arma.org](http://www.arma.org)) that can help firms in

a variety of industries with their record keeping. ARMA International is a not-for-profit professional association specializing in managing records and information—both paper and electronic.

Liability associated with record-keeping errors is too costly to ignore. If your firm's files are mismanaged and you incur liability as a result,

it may be possible to cover a portion of the cost with adequate liability insurance. But, in this case, an ounce of prevention could well be worth a pound of cure. ■

## Making D&O Insurance Affordable

**W**idespread directors and officers (D&O) litigation is forcing more firms, even smaller nonprofits, to consider purchasing D&O liability insurance.

Like other insurance, the cost of D&O depends on the size of the company, its board and its operations. Regardless of market averages, a D&O policy may be too expensive for some firms to undertake.

Firms that are at risk of D&O litigation but can't afford insurance can look into exercising a co-insurance

condition. Co-insurance allows the insurance company to charge a lower rate for the policy in return for your firm's agreement to cover a portion of the claim cost on its own. The more cost your firm is willing to accept, the lower the premium. You might also be able to save premium dollars by agreeing to retain a portion of the cost of defense.

Could one of these cost control measures make D&O insurance affordable for your firm? To find out, give our service team a call today. ■

## Departing Employees' Theft of Proprietary Info



**T**heft of a business's proprietary information is not uncommon upon the departure of a disgruntled employee. In fact, a recent survey conducted by the Ponemon Institute and information security firm Symantec asked more than 1,900 employees who had been laid off or fired, or who left for a new job, about information security. An astonishing 59% admitted stealing company information when they left.

The ex-employees said the items they most frequently stole were e-mail lists and hard-copy files. Other common items included data transferred to CD, DVD, flash drives and other removable storage.

Proprietary information includes information such as customer lists and data, price information, product development information, grant applications, marketing plans, financial reports and plans, and HR records.

The identification and inventory of such information are imperative to firms hoping to protect it from ending up in the wrong hands. If the information is compromised and someone suffers financially, the firm can be ultimately liable for the cost. To protect your firm with adequate liability insurance coverage, call our service team today. ■

## Punitive Damages Might Be Insurable

You may have read about cases where firms in industries similar to yours were sued for negligence and the plaintiff was awarded a large judgment including punitive damages. The good news is that errors and omissions (E&O) insurance can help cover the cost of defense and judgment in lawsuits. The bad news is that most E&O policies do not cover the cost of punitive damages.

In some states, punitive damages are not allowed to be paid by an insurance company—payment is the sole responsibility of the negligent party. Other states allow E&O

providers to pay punitive damages provided they are covered by the insurance contract.

Absent a law to the contrary, it may be possible to amend your E&O policy to pay for punitive damages. The cost to amend the policy varies depending on your firm. However, the nature of punitive damages is that they are usually extremely expensive. It is worthwhile to know if at least a portion of that cost can be paid by your E&O insurance.

For more information about punitive damages in your state, call our service team today. ■

## Data Breach and the Law

Physicians, does your office have a system in place for identifying and notifying patients of a data breach in your office?

If not, it's time to get one, according to the American Recovery and Reinvestment Act of 2009, which includes language that requires any physician's office that has discovered a breach involving unsecured data to notify every affected patient by letter.

The quantity of affected patients makes a difference. The law says if more than 500 are affected, physicians must also notify local media and the Department of Health and Human Services (HHS) immediately. If fewer than 500 are affected, physicians must file an annual report with HHS.

Plans for notification should include implementation of an encryption system. Such systems can be pricey—ranging from thousands to tens of thousands of dollars. However, experts are quick to point out that the cost of a breach could be much higher. Further, state laws often exempt physicians



from required notification if the data is encrypted.

Notification of a breach may be a required step. But what happens if the breach results in actual financial damages to a patient? If the worst happens, the physician could be liable for such damages. Concerned physicians should review their professional liability insurance policy for information concerning such a risk.

For more information on covering costs associated with a data breach, call our service team today. ■

## Consent to Settle

Errors and omissions (E&O) insurance is designed to defend firms against allegations of negligence. If your firm is brought into such a suit, you, like many other firms, may be frustrated by the insurance company's settlement of the claim without defending you at trial.

Some E&O policies allow the buyer—in this case your firm—limited control over the decision to defend in court or settle.

Upon review of your policy for language determining what rights you might have, beware of language discussing the “consent to settle” provision (commonly called a

“hammer clause”). This provision states that, while you have the right to decide not to agree with the insurance company's settlement

### While you have the right to opt for trial, the insurer's liability is limited to its original settlement offer.

offer and to opt instead for trial, the insurance company's liability is automatically limited to its original settlement offer.

For example, you might reject a

negligence claim settlement for \$100,000 and proceed to trial. Your insurance company would pay for your defense, but, if the court finds you guilty of negligence and orders you to pay \$200,000 in damages, under the policy's “consent to settle” provision, your coverage would only be the \$100,000 originally offered in settlement. Your firm would be responsible for the remainder.

Before making any determinations to reject insurer settlements, consult competent legal counsel and discuss your concerns with your insurer before such an event occurs. ■

## Lilly Ledbetter Fair Pay Act

In years past, employees believing they were the victims of pay discrimination had a statute of limitations of 180 days from the date of the discrimination to file suit against the employer. In 2009, President Obama signed into law the Lilly Ledbetter Fair Pay Act. This new law restarts the 180-day statute of limitations after each discriminatory paycheck.

The idea behind the new legislation is that most employees don't realize they are earning less than their co-workers and thus have no idea pay discrimination exists. For some employers, the implications of the new law could be far reaching, so much so that the U.S. Chamber of Commerce warned lawmakers before the

bill's passage that it would “effectively abolish the statute of limitations for the vast majority of discrimination cases.”

So what effect could this new law have on your business? Consider a company that has been in existence for many years. If a female worker was denied a raise due to her gender a decade or more ago while a male co-worker performing the same job was granted a raise, the company could be liable. Even if the company attempted to remedy the error by granting equal raises going forward, if the woman continued to earn less than the man, the company could be liable for the difference as each paycheck restarts the 180-day time

frame on filing suit.

Employers concerned with becoming liable for a firm's actions from the past should take great care in identifying any gaps in salary and be sure they are justified. Employers should also keep employment records for the duration of each worker's service. Remember, with the changed statute of limitations in place, it could be possible that a key piece of evidence might be an employee review conducted many years ago.

Finally, employers should review liability insurance to be certain limits are adequate to defend an expensive discrimination lawsuit. For more information, call our service team today. ■

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your referrals.**

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## **New I-9 Form**

**E**ffective April 2009, employers must use a newly revised I-9 Employment Eligibility Verification form to determine a job applicant's immigration status. Continued usage of the old forms could result in civil penalties for employers.

The U.S. Citizenship and Immigration Service (USCIS) has the new form as well as a revised employer compliance handbook available from its website: [www.uscis.gov/portal/site/uscis](http://www.uscis.gov/portal/site/uscis)

The major risk for employers is that failure to adhere to USCIS regulations can result in hefty fines and penalties. Further, the refusal to hire an applicant with questionable documents who ultimately turns out to be authorized to work in the U.S. could land the employer in a costly discrimination suit.

To assist with the cost associated with suits alleging employment discrimination, employers should consider reviewing their employment practices liability insurance (EPLI) policy for terms and conditions of coverage. If you are an employer and do not currently have EPLI or desire assistance determining what your current policy will and will not cover, call our service team today. ■