

OHIO STOP GAP LIABILITY CHANGES

EFFECTIVE APRIL 6, 2005

Stop Gap Liability insurance is necessary in Ohio because the State is the only source for workers compensation insurance. The state does not provide Employers Liability coverage which is typically included on workers compensation policies in most states. This insurance provides defense and indemnity protection if an employee or family member sues an employer for an employee's job related injury. In most states, it is difficult for an employee to sue an employer for a job related injury. Workers Compensation insurance is considered the exclusive remedy for workplace injuries. State laws and court rulings uphold this intent making it difficult for an employee to sue an employer and even more unlikely they could win such a suit. Usually, an employee cannot both collect under workers compensation and sue an employer for his injury.

But not in Ohio. Historically, an injured employee could claim workers compensation benefits and easily sue an employer for intentionally causing the injury. There are two types of employment intentional torts in Ohio. The legal threshold set by the courts established that if an employee could show that an employer knew, or should have known, an injury *was substantially certain to occur* as the result of some workplace condition, the employee could sue successfully and recover indemnity for his injury. This type of allegation was also deemed insurable by the courts. Stop Gap Liability policies typically provided defense coverage and indemnity coverage for *substantially certain to occur* claims. Allegations, where it was shown an employer acted in a manner to directly intentionally cause an employee's injury, were deemed to be against public policy and therefore, not insurable. An employee could still sue and recover for his injury. There just would not be any insurance available to pay for it.

Ohio Revised Code section 2745.01 enacted by House Bill (HB) 498 went into effect April 6, 2005 and changed the landscape for employment intentional torts.

- HB 498 revises the definition of *substantially certain to occur* making it more difficult for employees to successfully sue their employers for an employment intentional tort.
- All Ohio Stop Gap Liability insurance coverage forms specifically exclude coverage for suits that meet HB 498's new tougher to meet standards which requires an employee to prove that an employer acted with *deliberate intent to cause the injury*. Intentional acts are specifically excluded from coverage under Stop Gap Liability coverage since insurance coverage for such acts is against public policy in Ohio.
- Employers may believe they no longer need Ohio Stop Gap Liability coverage as a result of this new law. This law will be challenged in the courts. Similar previous statutory changes have been challenged twice before in Ohio. Each time the Ohio Supreme Court invalidated the law as unconstitutional. Stop Gap Liability coverage should continue to provide defense costs coverage for allegations that are not specifically excluded. If the Ohio Supreme Court does

eventually overturn the new law the law will revert to what was in effect prior to HB 498. If employers did not purchase Stop Gap Liability coverage during that time there would be no coverage in place to respond to suits subsequently filed that occurred during the time HB 498 was in effect.

Continue to buy Stop Gap Liability insurance. Make sure the policy provides coverage for *substantially certain to occur* types of allegations. If this new law is eventually overturned then you will not have a gap in your coverage for claims that occurred while the law was in effect.

If the law is eventually upheld by the Ohio Supreme Court, it will reduce exposures to loss for Ohio businesses in this area. The cost for Stop Gap Liability insurance should decrease once the Ohio Supreme Court upholds the new law. You should plan on it taking two to three years for the issue to wind its way through the court system.