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## Concealed Weapon Laws and the CGL - The Need For Workplace Precautions

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Many states have passed concealed weapon laws. These laws allow citizens to carry concealed weapons--guns, knives, etc. The laws may not distinguish situations where a citizen should not carry a concealed weapon, and therein lies the danger for the employer. Bodily injury or death caused by a weapon wielded by an employee on company property can leave the employer open to lawsuits based on various theories.

Areas of Concern

There are two areas of concern. First, the duty of care owed to a customer on the premises, and, second, the duty of a safe working environment owed to an employee.

An employer allowing customers on the business premises has to provide a reasonably safe place. Customers invited to enter the premises for purposes connected with the business conducted there are known as business invitees; the duty owed an invitee by the owner of the premises is to exercise reasonable care to keep the premises reasonably safe, and to warn of all concealed dangerous conditions. In a concealed weapon law state should the customer assume the sales clerk waiting on him or her is armed? Or must the store post warnings? Even if the local informed citizen could be presumed to know of such laws, what about a customer from out of state? No easy answers exist.

If an employee, carrying a concealed weapon, negligently or deliberately shoots a customer who is legitimately on the business premises, and the employer is subsequently sued for the injuries suffered by the customer, will a commercial general liability (CGL) policy afford insurance coverage to the employer?

Of course, the employer has to be found legally responsible for the injuries in order for the CGL form to pay for such injuries. But, while the employer being liable is a debatable question, two facts are certain: one, the employer will most definitely be brought into any lawsuit by the injured customer; and, two, the duty of the employer's insurer to defend the insured-employer will be triggered unless there is some clear, unquestionable exclusion in the general liability policy that would apply to the shooting occurrence.

In most instances, the only possible exclusion that might apply is the "expected or intended injury" clause, but that is a reach. Unless it can be shown that the insured-employer actually intended or expected the customer to be injured, this particular exclusion will not bar coverage.

What about the employee shot at the workplace? If an employee carrying a concealed weapon to work shoots a fellow employee, resulting in a claim being made against the employer, can the employer look to an insurance policy for coverage?

The first thing brought to mind is workers compensation. Remember that the CGL form does not apply to any obligation of the insured under a workers comp law, or to bodily injury of an employee of the insured arising out of and in the course of employment by the insured. In contrast, the workers comp policy offers the benefits required of the insured by the state workers comp law, and employers liability coverage applies to bodily injury arising out of and in the course of employment by the insured.

The key point, therefore, is whether the injury arose "out of and in the course of employment." If the shooting injury did not arise out of the employment, the general liability policy can apply to a claim against the insured-employer, but if the injury arose out of the employment, the employer can look to workers comp for coverage.

But what exactly is "out of and in the course of employment"? State workers comp laws do not define this, nor does the workers comp policy. It may fall to the courts to make this determination.

For the most, courts require some causal connection to exist between an employee's injury and his employment--the employment has to cause the injury. If this causal connection between the injury and the employment is disputed, such disputes are decided on a case-by-case basis, with the court taking several factors into consideration.

There is also the requirement under both the workers comp and the CGL that bodily injury be caused by accident. Is an intentional shooting by a fellow employee an "accident"?

As with the "expected or intended" injury exclusion in the CGL form, the term "accident" must be viewed from the standpoint of the employer. The employee may expect and intend for the bodily injury to happen, but this does not mean the employer has the same expectations or intentions.

Another cautionary note: If the employer knows that an employee has a concealed weapon in the workplace and fails to act, can the employer's standpoint still be considered an accidental one? The answer is probably yes, it can. The employer may know of the weapon, but not expect or intend the employee to shoot someone. Of course, if the employee has a history of violent behavior, it creates the impression that the employer should have known a shooting might occur. This, in turn, could lead to a claim made against the employer based on negligent employment or retention; that is, the employer has hired someone or kept someone at work whom the employer knows or should know presents an unreasonable risk of harm to others. This is a claim that could be brought against the employer by both employees and customers.

The CGL form would offer the insured-employer defense and coverage payments, if necessary, if a customer's suit is based on negligent employment. Of course, the customer would have to have sustained some bodily injury to make the CGL insuring agreement operable. And, as has been noted, it is possible the general liability insurer could deny coverage based on the expected or intended exclusion, asserting that the employer should have expected some injury based on his or her knowledge of the employee's background.

However, the assertion of an exclusion to deny coverage requires the insurer to prove that the exclusion is applicable. Until that is done, the duties to defend and pay damages remain available to the insured.

As for the injured employee suing the employer based on negligent employment or retention, the exclusive remedy provisions of workers comp laws are intended to prevent such a course of action. It is true that the exclusive remedy principle has been eroded over time, and also true that some courts have specifically rejected the exclusive remedy when faced with claims of negligent retention.

However, most courts today do not support abandoning workers comp coverage for a worker injured on the job, and replacing that coverage with lawsuits based on an employer's negligence. The rationale for workers comp is to provide the injured worker with a schedule of known benefits, in exchange for which the worker gives up the right to sue--an unknown outcome.

In any case, should a negligent employment or retention action against the employer be allowed by a court to proceed, that insured-employer can rely on employers liability insurance or the CGL form, depending on whether the injury arose out of and in the course of employment. Either coverage would give the insured-employer defense costs and liability payments, based on bodily injury being suffered by the claimant, and no applicable exclusions on the relevant policy.

Other Issues

Other issues must be considered by the insured-employer if employees carry concealed weapons to work. First, there is potential consequential bodily injury sustained by the spouse or child of an injured employee. Next, what happens if an employer learns an employee has a weapon, seizes it, and detains the employee in a room awaiting security or the police? Is this false arrest or imprisonment, since the state laws permit carrying concealed weapons? Can the employee sue the employer based on personal injury?

Consider as well an employer forbidding employees from carrying weapons to work. What if an employee is subsequently attacked and beaten at work? Can that employee then file suit claiming his ability for self-defense was impaired by the employer's action?

Also, what if the employee puts a weapon in the glove compartment of a covered auto and then uses the weapon on some other person? Would this be injury caused by an accident and resulting from the ownership or use of a covered auto? Some courts around the country have interpreted the phrase "use of a covered auto" rather liberally, and such a liberal interpretation could lead to the employer-insured's auto policy being dragged into a shooting claim.

Conclusion

Unfortunately, there is no end to the potential problems concealed weapon laws pose for employers. It is not enough for insured-employers to count on general liability and workers comp policies for insurance coverage under most circumstances. Good risk management calls for preemptive action as well.

An employer can try to get an exemption from the scope of the concealed weapon law (if one does not already exist) for the workplace, so that he has the authority to forbid weapons in the workplace. The employer can make it abundantly clear to all employees and potential employees that company policy forbids bringing weapons onto the premises. The employer can also conduct careful pre-employment screenings to make sure stable, sensible people are hired who do not try to settle disagreements with force.

Employers can live with concealed weapon laws, but they create liability exposures that the prudent employer will not ignore.

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