Risk management for manufacturers: Achieving results through smart insurance and employee relations practices

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To borrow from Amelia Earhart, "preparation is two-thirds of any venture." Carefully assessing potential risks — and ensuring that appropriate insurance and personnel and other policies and practices are in place — are among the most important measures a company can take to mitigate against some of the greatest legal risks manufactures face. Yet, time and again we see companies taking shortcuts with this preparation, only to end up in costly, protracted litigation.

This article pools our collective experiences to tell you what manufacturing companies can do now to put into place appropriate protections and guard against legal problems before they arise.

Does the company's insurance program meet its needs?

An obvious starting point in any discussion of effective risk management is insurance. And while most manufacturers purchase several lines of insurance, it is our experience that a number of manufacturers do not regularly reevaluate their insurance needs. We recommend that companies regularly review their existing program, with an eye toward the past (to assess the most prevalent source of claims) and toward the future (to assess potential future exposures based on planned growth, new product lines, and legal developments). A periodic insurance audit should result in a more effective renewal process and insurance program more carefully tailored to the company's needs.

When beginning an insurance audit, consider the following types of questions and issues, as a starting point for effective discussion with insurance brokers, counsel, or both. These points go beyond the general (and more usual) consideration of the adequacy of policy limits, policy language, trigger issues, exclusions, products completed issues, and batch clause issues.

1. Claims history and risk assessment. The company should review its recent claims history, including claims based on employee relations issues. Identify the areas of greatest legal risk, which will aid in the evaluation of areas of exposure that might have been overlooked during previous insurance renewals.

2. Current and future operations. What are the contours of manufacturing operations? Does the company intend to expand and, if so, where and how? If plans include acquiring stock or assets of another business, due diligence should go beyond the usual products liability questions — it should include insurance and indemnity. The company should consider how any indemnity arrangements will work, and whether they will be enforceable as a practical matter after the purchase (e.g., are there dollars to back them up). The company should obtain a copy of the target's insurance policies that may respond to any claim — and keep them so that it may tender new claims. Last, the company also should consider whether and how the policies being renewed will offer coverage for a newly acquired business.

3. Outsourcing issues. The insurance implications of doing business abroad can be complex. To the extent the company is manufacturing its products in any other country or otherwise outsourcing, evaluate whether a policy written in the United States will provide coverage abroad, and whether the law of the jurisdiction(s) in which the company is doing business imposes any additional insurance requirements (many do). The penalties for failing to comply with some countries' requirements can be quite severe.

4. Named insureds. Who are the intended insureds under each policy? If the company has subsidiaries, are they intended to be covered under the policies, or do they have their own coverage? Does the company use the services of independent contractors? If so, consider whether they should be covered under EPL, D&O and/or CGL policies (the answer is not necessarily "yes"). Do vendor or other contracts require the company to provide insurance coverage? If so, the manufacturer should ensure that its "Additional Insured" endorsements are correct and that the policy otherwise satisfies its obligations to those third parties. By the same token, if any of the manufacturer's contracts require another company to provide insurance, the manufacturer should obtain copies of the relevant policies — with endorsements — with every policy period.

5. Duty to defend and retentions. Most general liability policies require the insurer to defend the company against lawsuits. Manufacturers in certain sectors that face repeated litigation in which litigants claim high-dollar value catastrophic personal injuries or assert high-dollar value property damage claims might prefer to control the defense. An insurer might be willing to permit the insured to control the defense, subject to certain conditions such as defense counsel or a third-party administrator periodically updating an assigned claims adjuster on the status of all litigation, and/or a

large self-insured retention for each occurrence.

Thoughtful consideration of these types of questions should guide an effective evaluation of the entire insurance program, and help determine whether it meets the company's existing and anticipated needs during the next policy period.

Other proactive risk mitigation — products liability

In addition to taking steps to button up insurance coverage issues, manufacturers can be proactive in other ways to mitigate the risks posed by the creative plaintiffs' bar. We offer a few suggestions for consideration, which are part and parcel of the exposure evaluation described above.

1. Evaluate and assess exposure. Just as proper insurance is a useful tool in protecting the company's bottom line when faced with products liability litigation, so too is an evaluation of exposure to that litigation in the first instance. Conducted proactively — that is, before a lawsuit is filed — such an evaluation can help identify the scope of exposure. More importantly, it can help a company identify where changes can be made to decrease exposure.

Areas of inquiry should include: (a) product design and testing (including design drawings, design changes, testing documents and interviews by counsel of key personnel involved in both); (b) product certifications (i.e., U.L. and others) and the implications thereof; and (c) for existing products, prior incident reports (including informally reported incidents, previous litigation regarding the same product, discussions during risk management or similar committee meetings, etc.).

It is easy to see that the results of any such evaluation and assessment would be a discovery gold mine in the event of litigation. Care should be taken in selecting who will conduct the evaluation, how they will do so, and how and to whom the results will be communicated, to preserve the attorney-client privilege.

2. Instructions and Warnings. Manufacturers should consider having a risk manager as well as legal counsel review all instruction manuals, labels, warnings, warranties and the like, and revise them to ensure that they comply with the law of the relevant jurisdictions. Should anything be printed in another language? It also is important to periodically re-review warnings to take into account whether the warnings are adequate in light of subsequent developments since the product's initial release. If the product is distributed and/or used in other countries, the company needs to consider whether a warning written for the U.S. market is sufficient for those other markets (and, again, whether it should be written in another language for those markets).

3. Actively — even aggressively — participate in claims investigations. One of the worst things a manufacturer can do from a risk management standpoint is to gain a reputation for "rolling over" and quickly settling claims. Although it takes time, manufacturers can shed themselves of that reputation, which may well make them a less frequent target of the plaintiffs' bar. Shedding that reputation can directly impact the bottom line, both in terms of reducing resources directed to defending litigation, dollars spent on retentions or deductibles under insurance policies, and in terms of policy premium dollars. If a manufacturer receives notice of an investigation of an incident — whether it is a scene investigation or a lab exam — evaluate the likely exposure and decide how actively to participate. Over time, becoming a regular presence at investigations (and later, aggressively defending rather than settling lawsuits) may go a long way to convincing the plaintiffs' bar that the manufacturer will no longer so readily settle claims, and ultimately, prompting them to turn elsewhere.

These are only a few suggestions to evaluate and mitigate exposure to a products liability claim. One of the keys to effective risk management is to recognize that products liability need not, and should not, be a reactive business. Instead, companies can work with their counsel to evaluate and minimize litigation risks posed by existing products, and as they prepare to bring new products to market.

Good, proactive employee relations practices = Lower risk of litigation

Just as smart insurance and products liability practices are essential in effective risk management by manufacturers, so are good, proactive employee relations practices. Often overlooked, such practices can play the deciding role in helping to prevent or, at a minimum, helping a company successfully and efficiently defend against, a legal claim from a rogue employee that otherwise might be a source of tremendous financial, operational and public relations stressors on a company. From the employee relations perspective, effective risk management must include a thoughtful audit of a company's personnel policies and relevant training history, and a working plan for effective implementation and enforcement going forward.

The easiest place to start an employment audit is by reviewing current employee-related policies. In that respect, a good employee handbook is a must. Though the content of the handbook will differ depending on the culture, needs and locale(s) of a business, every handbook should contain the following "Top-5" policies, and risk managers should ensure they are drafted to comply with applicable law:

1. At-will employment. An employee handbook should convey the general policy of at-will employment, reflecting that either the employer or the employee may terminate the employment relationship at any time, for any lawful reason, with or without notice. While an at-will employment policy has long been the staple of any employee handbook, the National Labor Relations Board ("NLRB") recently put this policy to the test, questioning whether it might be interpreted as interfering with employees' rights to discuss and attempt to change their work conditions, including through joining a union.

Regardless of whether the company is unionized, a poorly worded at-will policy may draw unwanted attention from the NLRB. Thus, it is important to review the company's at-will policy with fresh eyes to ensure it serves its purpose in a legally compliant manner. On a related note, an employee handbook also should contain: (i) a prominent disclaimer that it is not intended and should not be interpreted as creating a contract of employment for any set

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term; and (ii) well-worded disciplinary policies giving management the flexibility to take appropriate corrective action, if, when and as appropriate on a case-by-case basis, without being held to a progressive discipline procedure.

2. Equal employment opportunity/non-discrimination. These policies also are a "must-have" for any employee handbook. Just as it is relatively easy to write these policies correctly, it also is easy to get them wrong, including by failing to include the appropriate protected categories or a mandatory complaint procedure to report any related complaints and concerns.

3. Anti-harassment. A harassment lawsuit, particularly a sexual harassment lawsuit, can involve protracted litigation and greatly damage a company's reputation. An updated, compliant anti-harassment policy should help prevent harassment from occurring in and, to the extent such conduct does occur, to mitigate its harmful effects through mandatory internal reporting, investigation and remedial action procedures. In federal litigation, maintaining and consistently enforcing a well-written anti-harassment policy can make all the difference between whether the company will be held liable for the alleged conduct, or whether the suit will be dismissed before it gets to a trial.

4. Wage and Hour. Often neglected or boiler-plated in an employee handbook, these policies are essential in establishing and enforcing effective, legal time management and pay practices, and in providing a defense to companies in lawsuits over the payment of wages and benefits. As such claims are frequent contenders for class actions targeting manufacturers given the nature of their business, it is imperative to ensure that the company's wage and hour policies — including policies as to employee classification, recording of time, overtime, and paid time off — are in good working order.

5. Communications systems and social media. In the last two decades, rapidly evolving technologies have entirely transformed how businesses, and their employees, operate and communicate. Yet — incredibly — many companies continue to rely on archaic systems communications policies that focus more on telephones and facsimiles than computer systems and related email, texts and Internet and social media posts and activities that have come to define modern communication. It is essential to have updated communications systems and, often, social media policies in place to effectively communicate to employees what they can and cannot do, and what they should expect relative to privacy and potential disciplinary ramifications when they use company-provided computer communications systems.

It should be noted that such policies have also recently generated a great deal of unwanted attention from the NLRB, so it is important to write them in with the eye toward ensuring that will not be deemed to inappropriately interfere with or chill employees' rights to discuss their terms and conditions of work.

Of course, a good handbook is hardly worth the paper it is written on unless it is consistently and effectively enforced. Policy enforcement should begin with the company's leadership, and specifically the leadership's awareness of and commitment to upholding and enforcing personnel policies in a consistent and effective manner. That requires risk managers to communicate key handbook policies whenever new employees join the company, and also during periodic training intervals thereafter. Though often dreaded, policy training really does not have to be, and should not be, "boring" or "tedious." If done well, it should be informative and insightful in helping management and subordinate employees to recognize and resolve workplace issues before they turn into legal problems.

Risk management through effective restrictive covenant agreements

In addition to ensuring that the business has solid employment policies and procedures in place, manufacturers should be proactive about the measures being taken to protect the company's proprietary information, products, customers and employees from the competition. Well-drafted, enforced — and enforceable — restrictive covenant agreements are essential in helping a company to achieve these important goals.

In reviewing restrictive covenants, manufacturers should keep in mind that restrictive covenant law is constantly evolving, and can vary significantly state-to-state. A restriction that is certain to be upheld in one state may be deemed a patently overbroad and unlawful in another. In Illinois, restrictive covenants have been routinely enforced so long as they have been appropriately tailored in time and scope, and based on a legitimate business interest. Just recently, however, one Illinois Appellate Court ruled that a restrictive covenant will be enforced only if supported by a minimum of two (2) years of continued employment as consideration — an offer of employment or employment lasting less than two years will not suffice. *Fifield v. Premier Dealer Services, Inc.,* No. 10-CH-9204, 2013 Ill. App. 120327 (1st Dist. June 24, 2013).

Thus, crafting an enforceable restrictive covenant is a fine art, and should be done by experienced, competent attorneys who are not only familiar with the applicable law, but who will take the time needed to understand the company's business and what protections are appropriately required to stave off harmful disclosure, solicitation and competition activities.

In conclusion

Experienced, successful risk managers at manufacturing companies know that effective risk management requires constant vigilance and proactive follow-up. Taking effective, efficient steps now to ensure that the business is protected with appropriate insurance coverage, smart products practices, and working employee relations policies and practices can make all the difference in preventing expensive, protracted and image-damaging legal claims later. ■

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