
How High is Up?

Deciding how much liability to insure is like asking; “How high is up?” Here are guidelines for what not to do in making this crucial determination.

Is there a minimum, safe level of liability limits contractors should buy? That’s like asking, “How high is up?” Nevertheless, most contractors feel the need to establish some benchmarks in determining the amount of liability limits to buy.

One technique is to study general trends in damage awards and set liability limits thereby. However, past awards may not be predictive of future cases, since judges and juries are notoriously unpredictable.

Another technique is to ascertain the largest judgment ever rendered—or likely to be rendered—against a contractor, and then set liability limits at that level. But unfortunately, contractors may not be able to obtain or afford liability limits to cover such a “super award.”

Still another approach is to examine the contractor’s balance sheet. A large contractor with considerable wealth presumably has more to lose, and therefore needs higher liability limits. However, the reverse is not true, that smaller or less capitalized firms suffer smaller losses. Liability losses resulting from damage awards are no respecter of a contractor’s wealth.

Bather than establishing liability limits based on a contractor’s balance, income statements can be used for the same purpose. However, pegging minimum liability limits to annual revenues is only a rough guideline, and may lend false comfort.

The most common approach is simply to buy the liability limits the contractor can afford, or with which it feels most comfortable. Unfortunately, the next verdict and judgment could

easily exceed the liability limits purchased by several times over.

For example, some courts have held punitive damages are insurable, while others have not. Moreover, insurers have generally resisted insuring such damages. If in a contractor’s area of operations, recovery of punitive damages is permitted and is insurable, the firm should markedly increase its liability limits.

Appropriate liability limits also vary with the type of operations conducted by the contractor, and the potential for damages those operations can cause. Even in the wall and ceiling industry, operations can range from small residential remodeling jobs to exterior cladding of high-rise commercial buildings.

So how does a contractor ascertain proper liability limits if the foregoing techniques are fraught with such uncertainty? There is no acceptable, simple method. Contractors must evaluate the legal climate, the types of potential exposures, liability limits for the contracting operation being insured, and premium the contractor can afford. Then there must be constant monitoring and review of recent verdicts against contractors that may suggest possible limit increases.

Suggesting a minimum, reasonable liability limit for contractors is a dangerous exercise. However, most contractors should have no less than a \$5 million limit of combined primary and excess liability insurance. Smaller contractors may balk at this limit, but that does not change the need for that amount of protection.

If a contractor employs a minor

and that person is injured in the course of employment, workers’ compensation coverage will respond as it would if the injured person was an adult. The minor will receive whatever benefits are available to injured workers as specified in the workers’ compensation statute of the state where the injury occurred, which has jurisdiction over the minor employee.

This presents no particular problem *if* the minor is legally employed. But if the minor is illegally employed, the contractor may have serious problems. Illegal employment may occur through a number of circumstances, such as the minor not having the appropriate work certificate prescribed by law, or working at occupations that are prohibited to minors. For example, state statutes may establish a minimum age at which a person is permitted to operate certain machinery.

Several states do not extend workers’ compensation benefits to illegally employed minors. Other states permit the illegally employed minor to accept compensation. The minor may be permitted to sue the contractoremployer at common law. This can include lawsuits against the employer by the minor and by the parents of the illegally employed minor. Workers’ compensation insurance, under its employers’ liability section, does not respond to these various lawsuits because of an exclusion in the policy relating to employees injured while employed in violation of the law. This exclusion does say that the violation must have occurred with the “actual knowledge” of the employer.

If your jurisdiction grants access to

workers' compensation benefits by illegally employed minors, you may find that they are entitled to benefits *beyond* the normal compensation. This is a form of a penalty. The penalty may be 50 percent, 200 percent, or 300 percent increase in benefits. Generally, this increase in benefits is not payable by the workers' compensation insurer because the workers' compensation insurance policy excludes punitive or exemplary damages. In this case, it does not matter whether the employer had "actual knowledge" of the minor status of the injured employee. This leaves the contractoremployer without defenses and at the mercy of those deceiving minors seeking employment.

The moral of this story is obvious. Contractors should not employ minors illegally. Death or serious injury to such persons can have disastrous financial consequences to contractors. Employ-

How do you ascertain limits? There is no simple method.

ment should occur only when satisfactory proof of age has been presented.

This is a complex, legal issue. I recommend that you consult your legal counsel with respect to the illegally employed minor statutes in your state(s) of operation. Your insurance representative can be helpful in advising you on the workers' compensation coverage and the compensation statute in the states where you conduct your business.



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