Public Entity Claim Trends

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Agenda

1. Sexual abuse/harassment
2. Law enforcement liability
3. Athletic and recreational activities
4. Defending brain injuries
5. Cyber
6. Verdicts/settlements increase

A) Sexual Harassment: It is unlawful to harass a person (an applicant or employee) because of that person's sex. Harassment can include “sexual harassment” or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature. Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person’s sex. For example, it is illegal to harass a woman by making offensive comments about women in general. Both victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex. Although the law doesn’t prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision. The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

B) Sexual Abuse/Assault: Generally is any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent.

C) Policy/Procedure

- Have a clear mission (e.g. a commitment to a safe, respectful learning environment).
- Have clear policy statements (e.g. prohibit all forms of sexual misconduct).
- Policies should prohibit any retaliation against reporters, witnesses, investigators, etc.
- Clearly define prohibited behavior through examples.
- Policies must comply with federal, state, & local laws.
- Provide for confidential, anonymous reporting procedures.
- Clearly explain complaint resolution process.
- An unenforced policy is worse than no policy at all!
D) Sexual Harassment and Abuse values are also on the rise:

- EPL claims frequency is likely to increase.
- Courts having difficulty answering the question of whether Title VII prohibits sexual orientation discrimination as a form of sex discrimination. The EEOC says yes, but the courts are split.
- *Epic Systems Corp. v.* requiring as a condition of employment a workers waiver of rights to participate in class action lawsuits by entering into a mandatory arbitration clause in their employment agreement.
- Some states are seeking to place limits on confidentiality agreements of harassment settlements.
- Anonymous chat apps that let employees discuss workplace issues anonymously. One example is Blind.
- Likely to see an increase in policy language requiring insureds to choose defense counsel from a panel firm list.

Sexual abuse/harassment trends (cont.)

- Defense costs and fees are skyrocketing.
- $45.4 million. F.M. v. County of Los Angeles- Social workers don't properly follow through after they find a known child molester living in child's room.
- $25 million. Stephen W. v. Westerly School of Long Beach- Student is abused by director of private school's after-school program.
- $93 Million- Penn State with average claim being $2.9 million
- $2.2 Million. Kristen Anderson v. State of Iowa (Iowa Senate Republican Caucus)- fired in retaliation for complaining about sexual harassment and a hostile work environment.
- A jury in Georgia has awarded $1 billion to a young black woman who was raped by an armed security guard (employee of a non-public entity) when she was 14.
Law enforcement liability

Media - Traditional Media and Social Media - Race continues to be a major factor to consider. Excessive force cases where race is a potential factor receive far more media attention.

- The need for speed and immediate responses
- Little fact checking
- Sensationalize
- Release information
- Reporting of verdicts
- Manipulation of videos

Law enforcement-cases

1. Lozman v. City of Riviera Beach
2. Sause v. Bauer
3. District of Columbia v. Wesby:
   - Chicago's $31 million settlement with the Englewood Four, who spent 15 years in prison for a 1994 rape and murder.
   - $15 million verdict against the Baltimore Police Department and two detectives in favor of a man who was exonerated after nearly 20 years of incarceration;
   - $28 million against Gage County, Nebraska, and its sheriffs to the Beatrice Six, who were incarcerated for about 20 years before being exonerated based on DNA.
   - Ninth Circuit affirmed an excessive force verdicts of $740,000 in compensatory damages and $210,000 in punitive damages in favor of five prisoners severely injured during the course of a cell extraction at the L.A. County Jail The district judge later awarded plaintiffs $5,378,174.66 in attorney’s fees.
   - $600,000 against Cook County for being accidentally locked in cell for 32 hours.
9/29/2018

Athletic and recreational activities

Traumatic Brain Injuries:

- According to Mayo Clinic, traumatic brain injury usually results from a violent blow or jolt to the head or body. An object penetrating the skull, such as a bullet or shattered piece of skull, also can cause traumatic brain injury.
- Mild traumatic brain injury may cause temporary dysfunction of brain cells. More serious traumatic brain injury can result in bruising, torn tissues, bleeding and other physical damage to the brain that can result in long-term complications or death.
- CTE is a progressive disease of the brain of individuals with a history of repetitive brain trauma that is linked to depression and dementia that until only recently was only able to be diagnosed after death. Some with a history of concussions show symptom of CTE and some do not. UCLA discovered an apparent correlation between an accumulation of tau protein in brain cells and CTE.
- Blood test may eliminate need for CAT/MRI is minor injuries.

Athletics: Statistics

- NY, NJ, MD, IL and CA introduced legislation to ban tackle football entirely for players under 12. CA and IL withdrew the bills. The bills in NY and MD did not pass.
- 2% decline this year, 6.6% in the past decade, in number of players at the high school level.\(^1\) according to the National Federation of State High School Associations.
- NFL approach v. NHL approach
- Judge Brody in the NFL $1 billion Concussion Settlement found there was "sufficient evidence of probable fraud to warrant serious concern." The NFL estimates 23% of the claims submitted were fraudulent.
- Brain injuries are most heavily reported in football, hockey and soccer.
- University of Pittsburg study found there are 300,000 concussions/year while playing a contact sport.\(^2\) Some medical professions are recommending no contact sports for those under 14.

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1) National Federation of State High School Associations
2) University of Pittsburgh

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Athletics: Defending catastrophic injuries and brain injuries:

- Liability defenses
- Waivers: Work with members to they use good waivers that explain the risks of a particular activity or program in detail. So the member can show that the releasing party was informed about the specific risks and should be responsible for his or her own conduct which will be beneficial even if the entire waiver does survive judicial scrutiny.
- Thorough investigation including obtaining all prior medical records, EMS records, psychological/psychiatric/mental health records, pharmacy records, neuro-psych testing (methodology behind it), school records, criminal history, drug/alcohol history, disability records, work records, social media checks, possible neurology and MRI/CAT scan checks, interview of friends and family, facts of accident.
- Review histories given at scene, to EMS, to ER, to treating doctors, etc.
- Develop and baseline- What was claimant function like prior to claim.
- Determine experts who may be needed: auto reconstructionist, neurologist, neuro-psych, radiologist, life-care planner, etc.

Defending brain injuries

- Absent an active bleed, brain injuries do not get worse.
- Develop a story: Where is plaintiff’s weaknesses? Depression, alcohol/drug abuse, malingering, etc.
- Counter Reptile Theory
- Lifecare Plans outlining reasonable economics losses

Coverage Concerns:
- What is the trigger?: “exposure”, “manifestation”, “injury-in-fact”, or “continuous”
- Number of occurrences
- Does the policy exclude participant exclusions? Concussion exclusion?
Cyber

According to Mathew Newfield of Unisys Corp., 121.6 million new malware programs were discovered in 2017. That is more than 231 new malware samples per minute. Use of artificial intelligence to help combat hackers to sort through malware files searching for common characteristics to help identify new attacks.

Attacks on Governments, Schools, Universities, etc.:

- Infrastructure attacks
- Hack of Homeland Security staff and witnesses led to over 240,000 people impacted.
- India’s National ID database hacked potentially leaking data on nearly all citizens.
- Data breach of a federally funded active shooter training center exposed data of US law enforcement and some agencies alleged inability to respond to an active shooter.

Verdicts/settlements increase

- Reptile Theory: The fundamental concept is that the reptile brain is conditioned to favor safety and survival. Plaintiff counsel uses tactics to activate jurors’ survival instincts in hopes that they will make decisions based on instinct/fear rather than logic and reasoning. The Jury has the power to protect the community. The jury should award compensatory damages to punish the defendant and deter others. According to Keenan and Ball, it has accounted for $8 billion in verdicts/settlements.
- Juries appear less offended by requests for multi-million dollar verdicts. Possible causes: plaintiff attorney advertising, media coverage of settlements/verdicts, lotteries, CEO compensation, athlete contracts, etc.
Verdicts/settlements increase (cont.)

- Increased values are likely to continue unless the legislature decides to tackle the issue given increasing medical costs, distrust of government and business, media coverage, increased percentage of litigation, emboldened plaintiff attorneys etc.
- $289 million in Monsanto Verdict.
- $1 billion awarded to a young black woman in Georgia who was raped by an armed security guard (employee of a non-public entity) when she was 14.
- $4.69 billion awarded to 22 women for illness from talc-based products against Johnson & Johnson.

Questions
Thank You

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