Employee theft insurance, the devil is in the details

SHERRY KARABIN
Legal News Reporter
Published: December 22, 2014

According to U.S. Department of Justice reports, nearly one-third of all employees commit some degree of theft, adding up to billions of dollars in losses for businesses each year.

While no owner wants to think that his/her employees are stealing, embezzling funds or committing fraud, companies are increasingly being forced to deal with the issue.

“It’s unclear whether employers are becoming more cognizant of the problem or whether the incidents are actually growing,” said Brouse McDowell senior associate Gabrielle T. Kelly. “Either way, businesses need to be proactive.”

Putting strict procedures and guidelines in place to prevent and deal with theft is key but that is not enough. Kelly said businesses need to arm themselves with commercial crime policies or fidelity insurance to help replenish some of the losses.

“First-party property policies don’t usually cover employee crime-related losses,” said Kelly. “Fidelity insurance provides employers with protection from losses that arise from employee dishonesty, forgery and counterfeiting.”

However, simply purchasing a policy and putting it away for safekeeping in the event of a loss is not enough, she said. “It is important to know what your policy says and what type of evidence it requires to prove a claim.”

She said most policies mandate that the holder prove three elements to obtain coverage: Loss of money, securities or property, theft or forgery by an employee as well as demonstrating that the person was acting alone or in collusion with others.

“Policyholders must satisfy all three requirements to obtain reimbursement,” she said.

“Courts have consistently held that inventory calculations and assumptions about the cause of loss are insufficient to establish coverage under a crime policy.”

For example, she said if an employee is working on his/her own and things go missing, this would not be enough evidence to get a claim paid.

“While a company doesn’t need video of the employee taking the items and doesn’t have to know all the facts surrounding a theft, it must have sufficient evidence that the only reasonable conclusion that can be drawn is that an employee committed the theft.”

She said before filing a claim, the policyholder must have considered other potential causes for the loss and eliminated them as possibilities. When courts have considered whether the company established employee theft, she said they looked at a number of factors, including whether the business accurately identified the amount or number of items that were stolen, a probable date and time of the theft, whether the workers were the only people with access to the articles, the manner of recordkeeping and the procedure for investigating the loss.

“The policyholders who are most successful in obtaining coverage for their losses specifically detail their basis for believing that an employee caused the loss,” said Kelly. “If the company’s owners cannot definitively attribute the loss to an employee, they must have as much information as possible to provide to the insurance company.

“For some companies they have no idea they are required to offer proof until they file a claim,” she said. “Reading the policy for the first time after a loss is something no business should do.”

Another potentially tricky area is forgery. Prior to the electronic age, the definition was clear, said Kelly.

“Traditionally forgery involved someone signing or stamping his/her name,” she said. “If an employee copies and pastes an electronic signature onto a check it may or may not be covered depending upon how the policy defines forgery.

“If a company files a claim of forgery because an authorized check writer used his/her powers to write an unauthorized check and the policy does not define the occurrence as forgery, the owner may not be compensated.

“This type of incident may need to be defined as embezzlement to be covered, but if a claim is submitted calling it forgery, it is almost a guarantee that the insurance company will not tell the policyholder to resubmit the claim in the manner that will trigger coverage.”

Kelly suggests companies have an insurance lawyer or in-house counsel look over the policy in advance and oversee the filing of claims if possible.

“An attorney can guide the company so that it avoids pitfalls and receives the coverage it thought it was getting.”

[Back]