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EFFECTIVE LOSS CONTROL TECHNIQUES
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TRANSFORM THE AMERICAN WORKPLACE

JACK S. McCALMON*

INTRODUCTION

A particular scene from *Indiana Jones and The Last Crusade* comes to mind when I think of loss control and employment practices insurance. In the scene, Harrison Ford must cross a bottomless chasm before obtaining the Holy Grail and saving Sean Connery, who portrays his father in the film. From the viewpoint of Ford's character, Indiana Jones, there is no obvious way across the chasm. Any attempt to cross the chasm means certain death. Running out of time, he takes a leap of faith . . . onto a camouflaged bridge, finds the Holy Grail, overcomes the bad guys, and saves his father's life.

Employment practices loss control similarly requires a leap of faith. In a few short years, those underwriters who take the loss control leap will profit and those who remain behind will find themselves facing greater frequency of claims, higher verdicts, increased legal fees, and eventually, displacement from the market. As weaker carriers drop out of the employment practices market, the market will harden, premiums will rise, and profit margins will grow. The loss control leap of faith will separate the successful insurers from the insurers who rush into the market and fail to select and control their risks appropriately. Employment practices coverage is a unique risk that presents substantial challenges to insurers. Traditional underwriting methods and claims control will not prevent loss. The "old school" methods of underwriting risk and managing claims will, in the end, fail for several reasons:

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- Employment practices liability insurance underwrites the behavior of each employee of the organization underwritten (institutionalized wrongdoing is a notable exception). In other words, underwriters bet that their insureds' employees will interact with each other and third parties legally. To an underwriter's detriment, human behavior does not follow these patterns. Individual and industrial demographics provide little insight. A bad hire, an aggressive delivery person, or a middle manager going through a mid-life crisis can instantly transform a good risk—an insured with no claims history, a smart human resources department, and low turnover—into an underwriter's worst nightmare.
- The availability and assessment of scientific evidence is a powerful claims management tool. It is a barrier to lawsuits and a quantifier of damage. It undermines emotional testimony by placing evidence into a rational context. Because a claimant cannot, for example, scientifically prove that someone is a racist or a sexist, and because few claimants have direct evidence of such facts, most employment practices claims are founded upon circumstantial evidence. Circumstantial evidence is typically woven together with emotion and when used properly, is a powerful and unpredictable tool for a claimant. Consequently, circumstantial evidence is the nemesis of all claims managers.
- Unlike workers' compensation insurance, which to some degree underwrites human behavior, employment practices liability insurance has no set fee or damage limitations. This translates into unpredictable verdicts and costs. Moreover, employment practices coverage does not have and may never have a recognizable industry settlement standard (e.g., a multiple of the cost of medical bills).
- Trial attorneys love employment claims because jurors understand the relationship between the employer and employee. Every potential juror knows or can identify with the fear of losing a job or being treated unfairly. Moreover, employment claims are unburdened by technical evidence that so often complicates and drains emotion from a trial. Consequently, juries in an employment case are more likely to award punitive and emotional distress damages than juries deciding other causes of action.
- In today's world, an employee who is terminated or has faced a negative employment event is likely to contemplate retribution, because employment claims are inexpensive to bring, due to the lack of scientific evidence and relatively low discovery costs. If

insurance coverage becomes widespread for these risks, the number of claims will rise dramatically in spite of good underwriting.

- Try as they might, underwriters will find it more difficult in the next few years to categorize employment claims. No one region, state, or industry monopolizes discrimination, harassment, or poor management practice coverage. For example, some underwriters eliminate entire states from coverage, believing, rightly so, that verdicts and frequency rates are higher in certain states. However, once trial lawyers in other states reach higher levels of competence and awareness of employment matters, claims frequency and favorable verdicts in low risk states will rise.

I. THE GUIDING PRINCIPLE OF EFFECTIVE LOSS CONTROL AND UNDERWRITING

The difference between effective and ineffective loss control and underwriting is explained by one simple principle: Happy employees sue their employers less often than unhappy employees. Clear away the legalistic language of most employee claims and you will find an unhappy employee—someone dissatisfied with other employees, his or her supervisor, upper management, or even with life in general. Every employee has employment expectations. If an organization—public, private, non-profit, large, or small—identifies and addresses the four major expectations of their employees it will have happier employees and fewer losses than organizations that ignore these expectations.

Expectation Number 1: Money. Employees expect an income and benefit level comparable with others of similar position, location, and background. When financial compensation does not meet expectations, employees usually leave or become disgruntled with their employer.

Expectation Number 2: Job Satisfaction. Money alone does not make an employee happy. Employees expect personal satisfaction from a job—a mental or physical challenge, working with things or people of interest, or a job that permits the opportunity to do other things (e.g., travel, time with children). Job satisfaction differs for every employee. Inevitably, when a job fails to satisfy, an employee leaves or the employee becomes disenchanted with the job and everything that relates to it—including management.

Expectation Number 3: Job Security and Safety. Employees expect a safe work environment. Today's safe and secure work envi-

ronment means more than safety from physical harm. It means safety from harassment, discrimination, retaliation, theft, and other types of workplace wrongdoing. Job security—the need to keep a job—may be less of a concern before an employee reaches the age of 40, at which point a career change becomes more difficult. Employers that fail to provide a secure and safe work environment are prime candidates for employment practices lawsuits. Class action employment lawsuits often stem from an employer that has ignored its duty to provide a safe and secure workplace.

Expectation Number 4: Respect. Employees demand and deserve respect; and there are certain types of respect they want immediately. First, respect for being a person: someone with wants, needs, dreams, and fears. Second, respect in terms of fair treatment regardless of immutable characteristics such as race, sex, or age. Third, the respect one shows by being cordial. Employees prefer a formal and predictable environment fostered through the enforcement of written and unwritten rules. As time with an organization elapses, employees demand another form of respect: acknowledgment for good work and loyalty. When an employee believes that he or she is not respected, more often than not that employee will begin to believe that the disrespect stems from some wrongful or illegal reason.

Consider an example of how the respect rule works in the real world. John is an African-American employee. The organization at which he works provides John with a locker. Someone is stealing items of little value from John's locker. John approaches his supervisor and asks his supervisor to prevent the thefts. John's supervisor is under much stress and replies, "John, I don't have the time to play cops and robbers. Upper management is talking layoffs. I have to concentrate on what is at hand. I can't worry about a personal matter like your locker. You're on your own." Six weeks later, John is part of a layoff. Because the supervisor failed to address the theft, is John more or less likely to sue for wrongful termination? Obviously John is more likely to sue because he is unhappy. The theft of his personal belongings makes him unhappy. His unhappiness escalates when his manager fails to address the theft. John will more likely than not perceive the manager's failure to act as a lack of respect. From that, John may draw this conclusion: if he were white, the supervisor would have addressed his needs. The circumstances make it easy for John to seek legal advice after the layoff. His attorney could claim that the motivating factor

for John's layoff and his manager's failure to stop the theft was because John was African-American.

II. IDENTIFYING ORGANIZATIONS WITH UNHAPPY EMPLOYEES

From the outside, it is impossible to tell with certainty whether an organization has happy or unhappy employees. Appearances are sometimes misleading—leaving good risks without insurance and bad risks with insurance. The following are red flags that suggest that an organization's employees are unhappy.

A. *Abnormal Layoffs, Cutbacks, and Terminations for Cause*

Most lawsuits stem from terminations. An employee who is terminated is an unhappy individual who has nothing to lose from suing an employer. In the mind of a terminated employee, he or she has a marred reputation. A lawsuit provides the prospect of vindication—a soothing balm for hurt pride. Consider the following observations: When asked, most employees boil their termination down to a respect or security issue. Rarely do you hear a terminated employee say, "My organization terminated me both properly and fairly," or, "My job failed to meet my personal level of satisfaction and, in due course, I became disgruntled which led to my termination." More likely you are going to hear: "I was terminated, but wrongfully terminated, and I've got an attorney to prove it."...

Layoffs, if not performed properly, can also create tremendous exposure. A poorly executed reduction-in-work-force plan can lead to a class action lawsuit. Here is a fictitious example of an acquisition with a subsequent layoff gone awry: A growing bank purchases a rural bank for the purposes of establishing a branch office. Because the rural bank is going to be a branch, the services of the president and his vice-presidents are no longer needed. These officers are dismissed following the acquisition. Fifty is the average age of the officers of the rural bank. None of the officers are presented with an enticing severance agreement or new job opportunities with the acquiring bank. The officers view this as a lack of respect. Prospects for finding a similar position with a different bank are slim at their age. Feeling pushed into a corner, they form a class and sue under the Age Discrimination in Employment Act.

Turnover percentage is also important, but the percentage of terminations that are "for cause" is a far better indicator of risk. For example, most fast food restaurants have high turnover, but

high turnover does not necessarily mean bad turnover. Fast food employees generally leave for positive reasons—like an upward career move or to return to school. So, while a fast food establishment may have high turnover, the better indicator of risk is *why* employees are leaving. When underwriting a risk, a provider should discover the percentage of turnover that was *for cause*. Acquisition-minded organizations should be examined closely.

It is important to review a prospect's past acquisition documents and determine when liability was transferred to the prospect. Organizations that contractually bind the seller with liability for past acts are better risks than buyers that assume all risk. For growing prospects, all past acquisitions should be reviewed, in addition to examining how employees of the prospect were managed after the acquisition. A prospect that uses enticing severance agreements is a much better risk than a prospect that does not. In addition, the insurer should check whether the employees of the purchased organization were assimilated into the prospect organization. If so, it should track how long the prospect employed the assimilated employees. It is also possible to review past layoffs to determine if the prospect had a reduction-in-work-force plan that studied the impact of its layoff on protected class employees. Usually better risks take the time and effort to formulate such plans. It is also advisable to review the financial history of the prospect because if layoffs and cutbacks are potentially a part of the prospect's future, that prospect is a far greater risk than one that is financially sound.

An employer should also review the history of cutbacks. Denied or discontinued employee benefits may be a reflection of an employer in financial trouble. Were the cutbacks across-the-board or made upon a select group of employees? Across-the-board cuts have less exposure than cutbacks that single out a group or certain employees. For example: ABC organization wants to eliminate its janitorial department. If the janitorial department is comprised primarily of minority employees, ABC runs a greater risk of a discrimination claim than if the department's workforce is diverse.

B. *Entitlement Organizations*

An entitlement organization is an organization that has little or no fluidity within the ranks of its employees. In these companies, positions are generally maintained for extended periods of time, performance criteria are easy to meet, terminations are rare, and promotions are primarily made from within the ranks. On the sur-

face, entitlement organizations are great prospects, but pose hidden risks. Entitlement organizations employ entitlement-minded employees. All employees, no matter where they work, fear negative employment events. However, entitlement-minded employees often react more litigiously to negative employment events than non-entitlement employees for several reasons. In an entitlement organization, good positions take longer to reach and income is slow to grow, but benefits—especially retirement plans—keep employees tethered to their employer. With every year of employment, an entitlement-minded employee grows more connected to the organization. But, because the position lacks fluidity, high accountability, and challenge, the job becomes mundane and many employees become disgruntled. Should entitlement-minded employees ever lose their jobs or be subjected to severe discipline, they are more likely to question the decision, resent the decision-maker, and seek legal advice. Moreover, because the skills of an entitlement-minded employee are limited or too specialized, it is far more difficult to find a comparable position—increasing the odds for a high damage claim.

Terminations for cause (e.g., failure to perform or failure to follow policies and procedures) should be investigated by insurers to uncover an entitlement organization or one with unhappy employees. A moderate number of terminations for cause are a sign of a healthy organization. Most employers inevitably terminate a certain percentage of employees each year that fail to meet expectations. An employer with zero terminations for cause is an employer that either has superior hiring policies coupled with a happy and stable workplace, or is an entitlement organization. The frequency with which counseling and discipline forms are used are equally as informative. Managers who routinely utilize evaluations, commendations, warnings, reprimands, and exit interviews are reflective of an employer that communicates with its employees. Effective communication means teamwork—an attribute that undermines entitlement. Moreover, the employee usually knows beforehand why he or she is being terminated, thereby providing an employment record that backs the termination decision and creates a reason not to file a claim.

C. *Diversity*

Workplace diversity is a sign of a healthy workplace. It demonstrates acceptance and acclimation of different cultures into an

organization. Diverse organizations, because they are more accepting of differences, are better positioned to manage employee conflict and economic setbacks. Diverse organizations also do not have the problem of tokenism. Token employees are employees that are few in number when compared to the majority (five percent or less) and are of a different race, color, gender, or other characteristic from the majority. For example, a lone female firefighter in a 30-employee workforce is a token female. Tokens are groundbreaking hires recruited to diversity a workforce. Tokens often feel isolated and ostracized by fellow employees who fear change. Tokens frequently believe that their employer is failing to address their security needs. Unfortunately, the result can be litigation from the same employees hired to create diversity. An organization with racial and gender balance throughout all departments is a diverse organization. An insurer should look for employers that have already gone through the diversification process and avoid employers without diversity. The insurer should beware of organizations that have a high percentage of their protected class employees segregated into a few departments.

D. *Abnormally High Workers' Compensation Rates*

Workers' compensation problems are, of course, employee problems. High workers' compensation costs are indicative of two things: an organization struggling to provide a safe and secure workplace and/or an organization with unhappy employees who have sought to receive less pay and stay at home rather than report to work for full pay. Here is an example of how workers' compensation is indicative of more severe wrongdoing: Susan believes she is being sexually harassed. Susan breaks her arm during the course of employment. Is Susan going to return to work sooner or later than an employee who is not being sexually harassed? Sexual harassment has made Susan a malingerer and a potential claimant. In Susan's mind, her workplace is unsafe and unpleasant, but she needs income. Temporary total disability solves her problem. As such, the insurer should review workers' compensation rates. How does the risk compare to similar industries? If costs are high, the insurer should find out why. Claim frequency is a more reliable indicator of an unhappy workplace than a single extraordinary injury, thus frequency for soft tissue injuries (the workers' compensation claim of choice for unhappy employees) and malingering should be considered.

E. *Outdated Policies and Procedures*

Prospects that do not have policies and procedures are either unsophisticated or unresponsive to employment practices risk. With loss control, unsophisticated employers can become sophisticated. Unresponsive prospects are poor risks. Policies and procedures should be reviewed. One should ask why a prospect does not have policies and procedures and determine whether it is because the prospect does not care. If it does not care, the prospect poses an enormous risk.

F. *No Job Description*

Job descriptions provide a solid defense against Americans with Disabilities Act and workers' compensation retaliation claims. Without job descriptions, what is required physically or mentally to perform a function is subject to interpretation, thereby inviting litigation. For an easy and affordable method of reading potential litigation, an employer should regularly update written job descriptions.

III. CONTROLLING LOSS THROUGH SMART EMPLOYMENT PRACTICES

Looks are deceiving and problems are sometimes hard to find. Consequently, although effective underwriting is important, it cannot prevent claims. Employee claims are, by nature, unpredictable and unmanageable. If prevention in employment practices insurance translates into profitability, then profitability depends upon good loss control. Good loss control can transform an unhappy work environment into a happy one. Good loss control can also take a happy work environment and make it happier. However, used alone, no single loss control method can transform an unhappy environment into a happy workplace. Loss prevention demands a coordinated effort utilizing several loss control methods.

A. *Types of Loss Control*

There are several types of loss control: audits, training, and reporting lines, to name a few. Each takes a different form. Before choosing a loss control program, an employer should know how to evaluate the service or product it is about to buy. The following are the different forms of loss control:

- Proactive versus Reactive: Loss control is either proactive or re-

active. Proactive loss control prevents claims. Reactive loss control manages claims. Obviously, claims prevention is preferred over claims management.

- **Active versus Inactive:** Loss control is either active or inactive. Active loss control works 24 hours a day, seven days a week to prevent loss; therefore, it is valuable loss control. Inactive loss control works only when activated and is therefore limited.
- **Interactive Media versus Passive Media:** Loss control can use different media for preventing claims. Media determines impact. A medium that requires audience interaction can change behavior, making it a preferred form of loss control. Passive media lacks audience interaction and is less effective.

B. *Rating Loss Control*

Every loss control product and service is different and each has its strengths and weaknesses. Below are the most important areas one must review before choosing a loss control product or service:

- **Implementation:** Whenever something new or different is introduced into a work environment, it faces obstacles to implementation. The fewer the obstacles, the more impact the loss control product or service will have.
- **Underwriting/Renewal:** Many loss control products and services provide insight to underwriters for underwriting or renewing a policy. Loss control that uncovers problems before a prospect is written or renewed impacts the bottom line.
- **Loss Control:** Certain loss control products and services prevent loss and litigation better than others. Products or services that prevent claims by changing behavior are highly preferable.
- **Employee Perception:** Certain loss control products and services meet employee expectations better than others. Products and services that address employee expectations in the areas of security and respect rate the best.
- **Litigation:** Certain loss control products and services can affect the outcome of litigation by increasing the employee's chances for summary judgment or quick settlement. Products and services that install or solidify legal defenses (e.g., *Meritor*,¹ reasonable

1. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

response defense) are excellent tools in the hands of effective defense counsel.

- **Jury:** Certain loss control products and services have more jury appeal than others. Juries like products and services that protect employees from wrongdoing.
- **Marketing:** Loss control is a value-added service. Certain loss control products and services have more marketing impact than others, thus creating value. There are several types of commonly used loss control products and services. These include audits, training, reporting mechanisms, and claims administration.

C. *Loss Control Techniques*

The following section details various loss control techniques available to employers. For a more detailed rating of their effectiveness, see the chart entitled *Ratings for Loss Control Methods*, appended to this Article.

1. Audits

Audits and insurance are old partners. Employment practices liability insurance is no different. For underwriting purposes, audits are important because they uncover problems. However, audits provide only a snapshot. A risk can pass an audit today and become a problem tomorrow with one bad hire or policy change. An additional negative factor is that people generally do not like auditors or the process of being audited. Human resource personnel, internal counsel, and outside counsel often characterize audits as unnecessarily intrusive.

a. *Policy and procedures audits*

Policy and procedure audits consist of the review of an organization's written policies and procedures. The purpose of the audit is to determine whether an organization has policies and procedures that comply with federal and state laws. Policy and procedure audits are an excellent underwriting and renewal tool. However, the time and expense involved with new policies and procedures are obstacles to implementation. Well-written and enforced policies and procedures meet the safety and security needs of employees. Jury value is slightly above average since policy and procedure audits are rarely shared with juries. Still, neutral policies and procedures are viewed more favorably by juries than *no* policies or procedures. Litigation value is high because well-written policies

and procedures provided for solid defenses as long as the rules are followed to the letter.

b. Compliance audits

Compliance audits determine whether an organization complies with federal and state employment laws. More expansive audits determine whether an organization enforces its own policies and procedures. Obstacles to implementation are high and marketing value is low. Compliance audits scrutinize the work performance of human resource departments and internal counsel, creating friction. Nevertheless, compliance audits are important for litigation. A non-compliant defendant is susceptible to punitive and other extraordinary damages.

c. Employee relations audits

Employee relations audits investigate how an employer communicates with its employees. In such an audit, employee files are reviewed for proper documentation. In-depth employee relations audits also examine management interviews. Employee relations audits determine whether an employer properly documents employee discipline, making them extremely effective for purposes of loss control and employee perceptions. Litigation and jury ratings are high because a documented employment file is a defensible employment file and a neutral factor for a jury to consider. Obstacles to implementation do exist, although not to the degree that exists in a compliance audit.

2. Training

Training is the most expansive loss control category, primarily because of the variety of subjects available. Subject matter is important, but the medium that delivers the training is equally significant, since it determines impact. Video, text, computer graphics, and audio recordings are examples of different types of media. Mixed-media training has the greatest impact. Training via a single medium has the least impact.

a. Group seminars

Seminar training is where organizations send employees to one location at a particular time to listen to one or more speakers address workplace issues. The goals of group seminars are to provide information and to derive a marketing benefit for the sponsoring

carrier. Scheduling problems make implementation of seminars difficult. Furthermore, many seminars are competing for limited training time. Successful seminar training depends on speaker quality. Information retention from group training is low and has an insignificant impact on loss control. Litigation, jury, and employee perception values are negligible.

b. Live training

Live training places a trainer with a captive audience. Employers appreciate training, so there is an instant marketing benefit. However, marketing success ultimately depends upon the quality of the trainer. Live training lacks planned interaction (although it may have audience participation) and has little loss control or underwriting/renewal value. Live training also does little to change behavior and information retention erodes with time, providing little benefit to employee perception. Moreover, it is nearly impossible to prove that knowledge was gained from live training. Lost productivity and resulting overtime pay are the primary costs associated with conducting live training. Time and expense aside, there are typically few barriers to live training. Finally, jury value is above average since juries expect employers to train.

c. Video training

Video training, satellite training, live "on-line" training, and pre-recorded training via compact disc are common in the workplace. Trainers, or actors acting as trainers, use a television or computer screen to convey a message. Video training is an inactive and passive medium, which diminishes its loss control and underwriting values. It is also difficult to prove that knowledge was gained or information retained. Time involved to organize a training session is an implementation obstacle. The marketing value of video is less than other forms of training. Litigation, jury, and employee perception values are the same as with live training.

d. Text training

Text training trains through the written word. Training manuals and training newsletters, in hard copy or online, are examples of text training. Text training is an interactive form of training because the audience is required to participate through reading and answering test questions, thereby benefitting employees. However, knowledge gained is hard to measure unless testing is incorporated.

Barriers to implementation are few since employees, under most systems, can train at their own pace. Marketing value from text training is good, but not as well received as live training. Litigation value rises if the employer can prove "knowledge gained." Showing knowledge gained also impresses juries.

e. Computer-based training

Computer-based training utilizes software to train employees. The effectiveness of computer-based training depends primarily on content. Computer-based training that utilizes a strict video format will have little training impact. Computer-based training that combines different media (e.g., text and video) has more impact. But there are two primary barriers to implementation: 1) inconsistent usage of hardware and software, and 2) fear of technology by end users. Marketing, litigation, and jury values are similar to other forms of training.

f. Web-based training

Web-based training uses the Internet to convey a training message to employees. There are two types of Internet training. Synchronous training requires a classroom setting and is similar to live training, but with a computer (see computer training). Synchronous training allows users to train anywhere and at any time—even at home. Synchronous training can utilize video, audio, and text for complete interaction with the audience, creating greater training impact and knowledge retention, as well as improving employee confidence. Live interaction with a trainer is also possible, which, for some, improves training impact. Synchronous training can track trainee completion and can quantify the knowledge gained. These two aspects of web-based training make it an extremely powerful underwriting and renewal tool and make its litigation and jury ratings higher than other forms of training. Importantly, content changes to a synchronous training regimen can be performed instantly when new laws or issues dictate the need for change, without waiting for the next publishing cycle—an inherent burden for printed training materials. All forms of web-based training face implementation barriers resulting primarily from insufficient technology available to end users. But, as the use of the Internet grows, barriers to implementation will decrease. The cost of web-based training is drastically less than live training,

thus eliminating one important barrier. Marketing value is also extremely high.

3. Reporting Mechanisms

Reporting mechanisms allow employees to report problems internally to their employer through traditional reporting lines, or externally to their employer via a third party utilizing a toll free number. In the beginning, most reporting mechanisms were created to prevent theft and fraud. Today, reporting mechanisms are advertised to prevent other forms of wrongdoing (e.g., sexual harassment, discrimination, and violence) through early detection. Two recent United States Supreme Court cases, *Burlington Industries, Inc. v. Ellerth*² and *Faragher v. City of Boca Raton*,³ indicate that outside reporting mechanisms can provide an affirmative defense to hostile environment sexual harassment claims. Many government agencies recommend third-party reporting lines for preventing violence. Reporting mechanisms are the only forms of loss control that are 100 percent active—meaning they are *always* working to the benefit of the employer and employee, 24 hours a day, seven days a week. Like any type of powerful tool, if used properly, reporting mechanisms can *greatly* benefit the insured and underwriter. In fact, reporting mechanisms that are external to the organization, not answered by a live person, accompanied by crisis management training, and that allow anonymity, are the best loss control money can buy.

Certain types of reporting mechanisms, however, that do not take necessary precautions or utilize proper procedures can actually increase exposure. For instance, if a caller is interrogated during a call, employees and juries will view this reporting mechanism as unfriendly. Additionally, a live person at the receiving end of the call may not meet the security expectations of employees. Reporting mechanisms that provide no report management training may also increase exposure. Thus, while gathering information is important, organizations must also know *how to respond* to information once received. Finally, reporting mechanisms that do not allow for anonymity provide little security for employees, and little loss control value, since they are rarely used.

2. 118 S. Ct. 2257 (1998).

3. 118 S. Ct. 2275 (1998).

a. Internal reporting mechanisms

Internal reporting mechanisms are systems where the insured receives the employee's call internally through a toll-free phone number. The call goes to a particular department or person for review. This type of reporting mechanism provides little loss control value and may actually increase exposure if the organization does not respond reasonably to the information. If performed properly, however, litigation value is better than average. Still, juries, like employees, treat internal lines as suspect. Although barriers to implementation are few, marketing value is suspect since the insured performs the work, even when a carrier provides the direction.

b. External reporting mechanisms answered by a third party

These services use a third-party toll-free phone number. The loss control value of third-party answering services is suspect because most interrogate the caller. Some services even offer cash rewards for information. Such tactics are viewed as unfriendly "rat lines" and may backfire during trial. Jury and employee perception values are low. Although many lines promote anonymity, questioning at the end of the line is too often focused on discovering the name of the caller. If call management training is not provided, litigation exposure increases. Despite these faults, there are fewer barriers to implementation than average and marketing value is good.

c. External reporting mechanisms monitored by a third party

These services use a toll-free phone number received by a computer or other form of automated answering device. The caller is not questioned, but allowed to provide facts as he or she sees fit; however, the call is monitored. Usually, employees are educated prior to implementation on how to use the service. On-line steps for use of the service are sometimes provided. Monitored third-party services that also provide call management training provide excellent loss control and underwriting/renewal value. Litigation value is very high, creating a strong affirmative defense. Jury value is also very high since no caller interrogation is permitted. Monitored third-party reporting mechanisms provide security for employees by creating a positive employee perception of the employer. Implementation barriers are few and marketing value is high.

4. Claims Administration

Claims administration is reactive loss control. Its ultimate goal is to limit damages. Claims administration, while necessary, is the least effective form of loss control. In employment practices, damages and fee exposure are higher than most other coverages since the more time that elapses before a claim is resolved, the greater the exposure to the carrier. Without a doubt, the key to successful claims administration is a quick and cost-effective resolution of a claim.

a. Toll-free advice lines

Toll-free lines to law firms or loss control consultants are a common loss control mechanism. Managers call the line and consult with experts on how to manage employee problems. Avoiding a claim through good advice is good loss control. Underwriting and renewal value will depend on the information provided to the carrier. Unfortunately, the more information provided to the carrier, the more the service appears as monitoring instead of a value-added service. Litigation value is high since good services always take into consideration how their advice can determine the outcome of litigation. Jury value is non-existent if attorney-client or work product privilege is invoked. Implementation barriers are high. External and internal counsel often view such services as litigation loss leaders for the law firm providing the advice, and thus a conflict of interest exists.

Arguments do exist that providing legal advice on a national level is a violation of the rules preventing the practice of law without a license. For example, if an attorney is licensed in Texas, but gives advice to an Arizona insured, many argue that the attorney is practicing law in Arizona without a license. Ethical improprieties are avoided if no legal advice is provided. A final implementation barrier is human resources. Human resource managers often find it intrusive and insulting when outside experts give advice directly to their managers and supervisors.

b. Investigations

Investigations uncover the facts of a claim to determine if a claim is true or false and, if true, to assess harm. Investigations are a proven means of evaluating claims in their infancy before litigation costs begin to rise. Implementation barriers will vary depending on the insured. Many organizations will appreciate outside

assistance but others may want to conduct an investigation internally. Investigations do provide loss control value and may assist with renewal. Litigation value is very high, allowing for the reasonable response defense. Jury value will depend on how well the investigation was conducted. Employees appreciate the security a prompt and professional investigation provides. Marketing value will vary with the insured.

c. Mediation

Mediation is an effective form of dispute resolution. More than 97 percent of employer-employee disputes can be resolved through a half-day mediation session. Obviously, the quicker a claim is mediated, the better. Mediation differs from arbitration. Arbitration is rare in employment cases, but quite common in labor disputes. Arbitration has formalized procedures and an arbitrator who often is empowered to make binding decisions. Claimants appreciate the captive audience mediation provides, and the ability to design their own solutions. However, the financial stake claimant attorneys have in their clients' claims is an obstacle to settlement. Implementation obstacles also exist, especially if an organization tends to view employee claims from an emotional rather than from a rational business perspective. While the loss control value of mediation is high, the underwriting/renewal rating is relatively low. Litigation value is high because the defense can evaluate the claimant, his or her attorney, and how the facts will play in front of a neutral party. Jury value is negligible because mediation discussions are kept from the jury. The marketing value of mediation is average.

d. Litigation

When all else fails, litigate. Litigation is costly, but often necessary. Like all forms of loss control, success is not guaranteed. Success depends on the law, the facts, and the quality of representation. Litigation and jury values also depend primarily on the law, facts, and quality of representation. Barriers to implementation are nonexistent unless the insured wants different counsel. Loss control and litigation are diametrically opposed, although quick resolution through summary judgment or quick settlement has some loss control value. Litigation does shed light on underwriting and renewal considerations. Employee perception value is low because litigation often divides the workplace. Marketing value is also low

because litigation is generally only sought following the exhaustion of all other considerations.

D. A Model Loss Control Program

The Employment Risk Management Authority (“ERMA”) of California is a pooling authority that underwrites employment practices for California public entities. Public entities of any kind are a high risk. However, California public entities are an extremely high risk. Add to this the fact that ERMA is performing no underwriting for the first year, and one may question how this new pool expects to survive. The answer is loss control. ERMA requires select managers from each covered party to complete web-based training for several major areas of exposure, within a set number of days immediately following the initiation of coverage. The training will cover sexual harassment, discrimination, violence, unsafe acts, workers’ compensation fraud, retaliatory discharge, the Americans with Disabilities Act, the Family and Medical Leave Act, and theft. Certain employees will also have to complete a crisis management training course on how to manage employee claims. Once training is complete, ERMA will install a monitored toll-free service for the employees of each covered party. Employee reports are made to the crisis management team, which is trained to manage such reports. Three prominent California law firms will be available to the crisis management team for advice on how to manage claims. A toll-free hotline to the same law firms is also available to each covered party on all employment matters. ERMA’s own loss control staff will conduct yearly live training, with the covered parties using workbooks and video to augment the web-based training. Additionally, the three California law firms mentioned earlier will conduct periodic group seminars across the state focusing on topics of concern. ERMA’s loss control staff will also conduct periodic audits to ensure compliance with their program as well as with state and federal laws. ERMA’s claims staff will be trained in investigation techniques and will closely monitor all claims. The total loss control cost is approximately \$12 per employee per year, but because of its loss control measures, ERMA’s premium is lower than its competitors’ premiums.

CONCLUSION

The most effective loss control strategies consist of more than one program or service. The chart in the Appendix uses a grading

scale to rate various loss control techniques for their effectiveness. An employer should choose programs and services that are strong in ratings not only because loss control provides a marketing benefit, but in the end, prevention of employment practices claims by those who take the loss control leap of faith will spell the difference between success and failure.

APPENDIX
RATINGS FOR LOSS CONTROL METHODS

	Types, Forms & Media			Ratings							
	Proactive/ Reactive	Active/ Inactive	Interactive/ passive	Implemen- tation	Underwriting/ Renewal	Loss Control	Employee Perception	Litigation	Jury	Marketing	Overall
AUDITS											
Policies and Procedures	Proactive	Inactive	Passive	C	A	C+	B	B+	C+	C	B-
Compliance	Proactive	Inactive	Passive	D-	A	C+	B-	B+	B-	D	C+
Employee Relations	Proactive	Inactive	Passive	C	A	B+	A-	A	B+	C	B+
TRAINING											
Group Seminar	Proactive	Inactive	Passive	C	D	D	C-	C-	D+	A	C-
Live	Proactive	Inactive	Passive	B	C-	B-	C+	B	C+	A+	B-
Video	Proactive	Inactive	Passive	C	D	D-	C+	B	C+	B	C
Text	Proactive	Inactive	Interactive	B+	C	A-	B+	B+	B-	A	B+
Computer-Based	Proactive	Inactive	Passive/ Interactive	B	C	A-	B+	B+	B-	A	B
Asynchronous Web-Based	Proactive	Inactive	Interactive	B	A+	A+	A	A	B+	A+	A
REPORTING MECHANISMS											
Internal Reporting	Proactive	Active	Interactive	A	C	C	C	B-	C	C	C+
External Reporting Mechanisms Answered by a Third Party	Proactive	Active	Interactive	B+	B	D	D	C+	D	A	C+
External Reporting Mechanisms Monitored by a Third Party	Proactive	Active	Interactive	B+	A+	A+	A-	A+	A-	A	A
CLAIMS ADMINISTRATION											
1-800 Advice Lines	Proactive/ Reactive	Inactive	Interactive	C	B+	A	C-	A	D+	C	B-
Investigations	Reactive	Inactive	Interactive	B	B	B+	B+	A+	B	C	B
Mediation	Reactive	Inactive	Interactive	C	C	A-	C	A+	C	C	B-
Litigation	Reactive	Inactive	Interactive	A	A	D	D+	C	C	D+	C+

