

Protecting Your Company

WHAT YOU NEED TO KNOW ABOUT OHIO'S EMPLOYMENT INTENTIONAL TORT LAW AND WHAT STEPS TO TAKE TO PREVENT CLAIMS THAT CAN BURDEN YOUR BUSINESS.

By Peter Strozniaik

When the Ohio legislature passed an employment intentional tort law in 2005, it was generally considered positive news for most employers. However, the bad news is that the state's employment intentional tort law is open to interpretation, raising serious concerns and creating major risks for business owners.

Although employees receive compensation for unintentional on-the-job injuries under Ohio's workers' compensation system, Ohio law permits employees to file an intentional tort lawsuit over and above any claim they make with Ohio's workers' compensation system. (Intentional tort claims involve serious workplace incidents that result in the serious injury or death of employees.)

"I think the statute enacted two years ago benefits most employers with respect to what employees need to prove for an employment intentional tort claim," says Edward Stoll, Chair of the Insurance Practice Group at Benesch. "The statute ensures that the claims brought by employees are only for those that are truly egregious, which the employment intentional tort intended to address."

Because these tort claims can create a significant liability for employers, Stoll says it's important for employers to take steps to protect themselves. To better understand that risk, it's also essential for employers to know how the current law can affect their businesses.

The 2005 employment intentional tort law was enacted after two other employment intentional tort statutes were ruled unconstitutional by the Ohio Supreme Court in the 1990s. Under the current law, an employee must prove an employer either deliberately intended to injure the employee or acted with the belief that injury to the employee was substantially certain to occur. "Substantially certain" means an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition or death.

Although it may be difficult for an employee to prove

this, the law also carves out two exceptions. The first is when an employee suffers an injury as a direct result of the deliberate removal of an equipment safety guard by an employer. The second exception is when an employer makes a deliberate misrepresentation of a toxic or hazardous substance.

When either of these two exceptions is proven in court, a rebuttable presumption is created. "This is when an employee proves the employer deliberately removed the equipment safety guard or deliberately misrepresented a toxic or hazardous substance, then the jury is allowed to presume that the employer deliberately intended to injure the employee," explains Stoll. "Then it becomes the burden of the employer to rebut the presumption, which



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could be based on certain mitigating circumstances.”

Stoll believes it is highly likely the 2005 employment intentional tort law will be challenged in the courts. Recently, for example, an Ohio Common Pleas Court case found the law was “properly enacted and constitutional.”

“I think the constitutionality of the 2005 employment intentional tort law will be challenged at some point in the Ohio Supreme Court,” surmises Stoll. “In the past, the Ohio Supreme Court said the two prior employment intentional tort laws created by the Ohio legislature were not constitutional. The question now is whether the Ohio Supreme Court will allow the current statute to stay in place.”

In the case (*Brady v. Safety Clean*) that struck down Ohio’s first employment intentional tort law in 1991, the Ohio Supreme Court ruled that an intentional tort claim is simply a perpetrator versus victim incident, which has nothing to do with the employer-employee relationship even when the incident occurs in the workplace. As a result, the court ruled it was beyond the Ohio legislature’s authority to legislate employment intentional tort claims. However, in a 2003 case (*Penn Traffic v. AIO*), the Ohio Supreme Court ruled that Ohio’s tort law does derive from an employer-employee relationship.

“If an employment intentional tort claim arises from employment and occurs during the course of employment, then it clearly appears to be within the right of the Ohio legislature to legislate employment intentional tort claims,” explains Stoll. “In light of the Penn Traffic case, the Brady ruling may no longer be an obstacle to upholding the current statute.”

In the meantime, Stoll says there are certain steps Ohio companies should take to ensure protection from these tort claims.

“Employers need to understand that they still face potential liabilities under the current employment intentional tort law, especially under its rebuttable

presumption exceptions,” Stoll says. “These employment intentional tort claims can be very significant for employers.”

To protect your company, review your general commercial liability policy to see what kind of coverage you have for employment intentional tort claims. What’s more, you should have a risk-management program that may help in your legal defense against tort claims.

Most general commercial liability policies offer “stop-gap endorsements,” which provides extra insurance coverage to protect your company. However, the terms of the stop-gap endorsements vary among insurance companies, as well as policies, says Stoll. For example, some policies may cover the cost of legal defense against a tort claim, but won’t pay for damages if awarded by a jury.

Employers need to carefully review the language in their stop-gap endorsements and look for language that excludes coverage for substantial certainty, Stoll explains.

“You will not find a policy that will provide insurance coverage for deliberate intent claims, but you can get coverage for substantially certain claims,” says Stoll. “It’s worth the time and money to have your attorney or insurance broker review those endorsements to make sure your company is covered for employment intentional tort claims.”

Another way to protect your company is to form a risk-management program. If you can’t justify the cost of hiring a full-time risk manager, you may consider hiring a consultant who can make an assessment, help you identify risks and launch a program. Some attorneys and insurance brokers also can assist you with such a program.

“A risk-management program that a company uses and follows through with can certainly put them in a better position to defend against an employment intentional tort claim,” says Stoll.