

# Managing Risk

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Liability

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## Blogs and Liability

The informal give-and-take that makes blogs an effective way to communicate with customers and others can also make them dangerous.

**T**echnorati, a blog tracking service, says more 175,000 new blogs start every day, joining the 66.6 million already in existence. Corporations are joining the blogosphere too, creating blogs to give customers and prospects an informal, on-line forum for discussing company products or services.

Blogs, or web logs, can give marketers valuable insights into what customers think and want. But they can create the same concerns as other informal means of communication—that someone might be a little bit too honest in their opinions, or share information they shouldn't. And with a blog, those opinions or information become accessible instantly to millions of Internet users.

### Blogs and liability

Corporate blogs can create

the following liability exposures:

**Defamation:** Defamation, or false communications that injure someone's reputation or good name intentionally, can be criminal as well as civil.

You do have defenses against defamation claims. Truth is a complete defense, so even if something in your blog injures a competitor's reputation, for example, you cannot be liable for defamation if it is true or substantially true.

The Supreme Court has found that Internet speech is protected free speech, when it expresses an individual's personal opinions. Including a statement on your blog that contents are the opinions of posters might lessen your exposure, as well as using qualifying language such as "may." But calling something opinion does not make it so, and a statement may be defamatory

if it implies a false assertion of fact. True opinions cannot be proved or disproved.

What happens when third parties post defamatory material to your blog? In late 2006, the Supreme Court of California ruled that the federal Communications Decency Act of 1996 limits recovery to the "original source of the statement," or the third party who posted the material. Still, if you find defamatory material on your blog, you should remove it immediately and print a retraction.

**Discrimination/harassment:** Statements on your blog can expose your company to discrimination or harassment claims. For example, off-color jokes and sexist or racist statements have no place on a corporate blog. Remove them immediately and issue an apology.

**Privacy violations:** Printing

## This Just In

**P**DAs pose repetitive motion injury risk.

Employers could face workers' compensation claims related to injuries from personal digital assistants (PDAs), according to a report published in November 2006 by *USA Today*. The American Physical Therapy Association and other occupational organizations are warning that improper use and overuse of PDAs can lead to hand throbbing, tendonitis and swelling, a condition known as Black-Berry Thumb. Alan Hedge, an ergonomics professor at Cornell University, said full-blown symptoms can be severe.

Employers can train people how to correctly hold and use the handheld devices and encourage employees to write brief e-mails, he notes.





# Don't Forget Your Fire Extinguishers

Fire extinguishers are an often forgotten part of a loss control program. To make sure they work in an emergency, they need regular inspection and maintenance.

**I**n 2005, approximately 115,000 fires occurred in nonresidential structures, causing 50 deaths and 1,500 injuries, and more than \$2 billion in property damage.

These statistics only give part of the picture of fire's devastation. In addition to direct property damage, businesses can suffer indirect damage from fire, including lost productivity, lost income and loss of market share. Experts estimate these costs at some \$10 billion per year.

Sprinkler systems can help prevent widespread structural damage, so insurers usually discount premiums for businesses protected by sprinklers. Most sprinkler systems work by activating once they sense the heat of a fire. But sprinklers aren't effective for all situations. Sprinklers might not activate soon enough to prevent extensive smoke damage; they can also damage your building contents—particularly electronics. And if you rent your premises, installing sprinklers might be impractical or impossible.

That's why every business, even ones with sprinklers, needs at least one fire extinguisher per floor. A fire extinguisher can stop a small fire from becoming a large one; however, one type of extinguisher will not work on all types of fires. For best results, match the type of extinguisher to the type of combustibles in the area:

**Class "A"**—Ordinary combustibles (wood, paper, cloth, rubber, etc.)

**Class "B"**—Flammable liquids (fuel oil, gasoline, cooking grease, solvents, etc.)

**Class "C"**—Energized electrical equipment (wiring, fuse boxes, electric motors, etc.)

**Class "D"**—Combustible metals (magnesium, sodium, zirconium, etc.)



## Inspections and maintenance

In time of crisis, a non-working hydrant is worse than none at all. Every organization needs a procedure for inspecting and maintaining its extinguishers to keep them in working order.

- 1 Assign someone the job of inspecting all the company's fire extinguishers. If you don't have a dedicated safety department, this could be someone with maintenance or operations duties.
- 2 Check each extinguisher for the following at least once a month, more often if a fire extinguisher is located outdoors or exposed to extreme heat, cold, dust or dirt:
  - \* Location. Is the extinguisher accessible and not blocked?
  - \* Does it have adequate pressure? On extinguishers with gauges, the needle should be in the green zone – not too high and not too low.
  - \* Are the pin and tamper seal intact?
  - \* Are instructions for use of the extinguisher posted in a visible location nearby?
  - \* Is it in good condition? A dented, rusted or dirty extinguisher might not work properly. Either clean and test or replace it.
  - \* Shake dry extinguishers to prevent settling, if the manufacturer recommends doing so.
- 3 Create a checklist of items to examine during the inspection. Have your inspector complete a checklist for each fire

## Safety first

**O**SHA, the federal Occupational Safety and Health Administration, and state safety agencies have specific requirements for fire extinguishers at places of employment. Keep in mind, however, that OSHA and state safety agencies exist to protect employees, not property. These agencies generally don't require low-hazard employers to have fire extinguishers if they have a written fire safety policy that requires the immediate and total evacuation of employees from the workplace.

However, local building codes might require fire extinguishers on hand. Under OSHA regulations, a business can have fire extinguishers, but still require employees to evacuate once a fire alarm sounds.

If your emergency action plan designates certain employees to use portable fire extinguishers, they will need proper training. Make sure they understand the priorities when fire occurs:

- 1 Activate the building's alarm system or call 9-1-1.
- 2 Help evacuate others as necessary.
- 3 Keep safety in mind. Try to fight a fire only if it is small and containable, if you're safe from smoke and you have an escape route.

For more information on fire extinguisher and other safety rules that might apply to your business, contact OSHA or your local safety agency. ■



protected information, such as an individual's photo without permission (unless they're a public figure) or other private information, such as personal health or financial information, can lead to violation of privacy lawsuits. Remove it immediately and, if appropriate, notify the individuals involved.

**Copyright infringement:** A September 2006 article in *Risk Management Magazine* said, "Attorneys note that blogs are often considered to be legally similar to newsletters under copyright laws." As with newsletters and other printed materials, a blog can violate copyrights when it reproduces articles or other copyrighted content without permission.

To protect your firm from this exposure, ensure it owns all materials, including video clips, graphics and photographs, posted on the site. If not, get permissions from the copyright holders.

What about materials posted by a third party? The owner of the copyright can sue your firm if a third party wrongfully posts copyrighted materials. You can obtain some protection by including a statement on your blog that posters agree that they have the right to post any copyrighted materials. Still, you will want to review postings to ensure use of any material that might be copyrighted falls into the "fair use" exception. The Copyright Act allows limited reproduction of copyrighted works for "fair uses," such as criticism, comment, news reporting, teaching, scholarship and research. The line between fair use and copyright violation varies with the situation; for more information, see <http://www.copyright.gov/fls/fl102.html>.

**Other intellectual property violations:** As with copyrights, ensure your blog doesn't wrongfully use trademarks owned by others or post information that might be the trade secret of a competitor or other party. Remove any offending materials immediately.

**Securities law violations:** Corporate blogs can violate securities law when:

- ✱ postings appear to solicit securities sales from people you don't have a preexisting relationship with
- ✱ they hype a company that is regis-

tering for a public offering or

- ✱ they disclose material information not available to the public to those who use it for insider trading.

Have your compliance department or attorney review any materials that might fall into these categories; in the meantime, remove them from the blog.

### Managing the risks of blogging

The following steps can further minimize the risks of corporate blogs:

**1** Require any third-party posters to register before posting, including their name and email address.

**2** Appoint someone to regularly review new content for appropriateness and legality.

**3** Develop a blogging policy that spells out what employees can and cannot include in corporate blogs. Warn them not to reveal trade secrets, personal information on fellow employees or clients or financial information that could violate securities law.

**4** Include disclaimers on your blog, including that opinions are those of the posters and not necessarily the corporation; that links to external sources are provided solely as a courtesy to visitors and not an endorsement or guarantee of their contents; and that the company owns the copyrights to any postings and can use them in marketing materials or for other purposes. An attorney can help you develop disclaimers tailored to your company's exposures.

**5** Archive blogs, in case a problem arises.

**6** Make sure you have adequate liability insurance. The standard general liability covers businesses, except publishing businesses, from claims of libel and slander and invasion of privacy. As long as you aren't making money from your blog, your liability coverage might apply in these cases. However, a specialized Internet liability policy can provide more comprehensive coverage. For more information on these nonstandard policies, please call us. ■

extinguisher each time he or she does an inspection.

- 4** Conduct regular maintenance on all extinguishers. At least once a year, every fire extinguisher needs to be tested. This should be done by a professional.

For information on premium discounts for having fire extinguishers, sprinklers and other fire protections, please call us. ■

able accommodations, the employer must reassign the employee to a vacant position for which he or she is qualified, barring any undue hardship.

If you have questions on accommodating a disabled employee, the Job Accommodation Network, or JAN, may be able to help. Sponsored by the federal government, JAN provides information on how employers across the country have accommodated employees with disabilities. Their toll-free number is 1-800-526-7234, or visit their Web site at <http://janweb.icdi.wvu.edu>.

For more information on managing disability leave under workers' compensation, please contact us. ■

## What types of disabilities does the ADA cover?

The ADA defines a disability as:

- ✓ a mental or physical impairment that "substantially limits one or more of the major life activities." These "major life activities" include the basic activities that the average person can perform with little or no difficulty, including caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.
- ✓ a record of a substantially limiting impairment.
- ✓ being regarded as having a substantially limiting impairment. ■



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# When Laws Overlap: ADA and Workers' Comp

Many employers don't realize the Americans with Disabilities Act applies to employees who become injured on the job.

**T**he Americans with Disabilities Act (ADA) prohibits employment discrimination against disabled individuals. Many employers don't realize that this includes existing employees who become disabled on the job. Penalties for violating the ADA can include back pay, promotion, reasonable accommodation, attorneys' fees, expert witness fees and court costs. Compensatory and punitive damages also may be available where the Equal Employment Opportunity Commission finds intentional discrimination.

## How does ADA apply to workers' compensation claimants?

The ADA applies to any employer that has 15 or more employees for 20 weeks or more during the current or preceding year. When workers meet the ADA's definition of disability, regardless of the cause, employers

must make "reasonable accommodations" to enable them to continue working. However, if an employee is unable to perform the "essential functions" of the job, even with "reasonable accommodations," the ADA does not apply.

Injured or disabled employees who need accommodations must notify their employer that they need an adjustment or change at work for a reason related to a medical condition. To request accommodation, an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation."

## What exactly are "reasonable accommodations"?

No hard-and-fast rules guide employers in this area. Instead, the ADA considers accommodations to be reasonable unless they impose an "undue hardship" on the employer. Undue hardship includes significant difficulty or expense, disruption or fundamental alteration of the business's nature.

## ADA and leave

Before the enactment of the ADA, employers with maximum leave-of-absence pol-

icies would send a disabled employee a notice of termination when he or she had used all available leave. Under the ADA, the employer must send employees on leave a certified mail notice, at least 30 days before the end of the leave, that explains the reasonable accommodation requirement. A reasonable accommodation under the ADA may mean extending the leave period. However, an employer does not have to provide more leave than it would provide to other employees in a similar situation.

Employers should allow an employee with a disability to exhaust accrued paid leave first and then provide unpaid leave. For example, if employees get 10 days of paid leave, and an employee with a disability needs 15 days of leave, the employer should allow the individual to use 10 days of paid leave and 5 days of unpaid leave.

As for the employee's position, the ADA requires an employer to hold it open while the employee is on leave and to return the individual to the same position, unless doing so would cause undue hardship. If the employee can no longer perform the essential functions of the position, even with reason-

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## Website Discrimination

Does your website discriminate? Target's does, ruled a federal judge in the Northern District of California, who said that federal and state antidiscrimination laws apply to retailers' websites.

The National Federation of the Blind filed a class action suit against Target in February 2006. The named plaintiff said Target's website was incompatible with software that allowed him to use the Internet for shopping by reading aloud alternate text in place of graphics.

Although the California court ruled in favor of the plaintiffs, courts in other districts have ruled that laws requiring businesses to accommodate the disabled apply to physical locations only. Organizations doing business online will want to watch legal developments in this area; however, to avoid alienating potential customers, check your website for accessibility. ■

## Top Ten Occupations for Injuries/Illnesses

1. Laborers (non-construction)
2. Truck Drivers (heavy)
3. Nursing Aides/Orderlies
4. Construction Laborers
5. Truck Drivers (light)
6. Retail Salespersons
7. Janitors and Cleaners
8. Carpenters
9. Maintenance/Repair Workers (general)
10. Stock Clerks/Order Fillers ■