

Contracting Liability and the Action Over Exclusion

When multiple parties are involved, worker injuries can create complicated liability situations that are not necessarily covered under workers' compensation policies. One issue to be aware of is the action over exclusion, which can block coverage in certain circumstances. Here's what business owners need to know about action over exclusions and their liability exposures.

Understanding the Action Over Exclusion

An action over exclusion is a clause that takes away coverage for third-party-over actions.

The [International Risk Management Institute](#) (IRMI) explains that a third-party-over action occurs when an injured employee collects workers' compensation benefits from the employer and then sues a third party for contributing to the injury. At this point the liability could revert back to the employer if a contractual agreement is in place.

Let's say an employee – we'll call the employee Jamie – works for Company A. Company A has contracted with Company B to complete a project. Jamie is injured on the job and files a workers' compensation claim with Company A. Jamie then sues Company B for contributing to the injury. However, Company B has an agreement with Company A that indemnifies Company B, so this liability is passed back to Company A. Now Company A is dealing with a liability claim on top of the workers' compensation claim.

This is just one way it could play out. In another example, IRMI notes, the third party could succeed in circumventing the exclusive remedy doctrine of workers' compensation in order to enjoin the employer in the action.

Millions of Dollars May Be at Stake

Lawsuits involving injuries can get very expensive, so this is an important matter to work out proactively.

For example, according to [Block O'Toole & Murphy](#), a Brooklyn construction worker was awarded \$11 million after falling through an unsecured temporary cover and suffering serious injuries. The owner, the general contractor, the steel subcontractor and the worker's employer were each responsible for paying a seven-figure sum in the settlement.

Planning for Worst-Case Scenarios

Employers might assume that they're covered because they have coverage through workers' compensation insurance. This seems reasonable until you realize that a worker's right to sue a third party can create liability loopholes for contractors. It is important to consider how worst-case scenarios could play out. Otherwise, business owners could end up on the hook for significant liability costs that aren't adequately covered.

Here are some key issues to consider when assessing your coverage and liability:

- **What indemnification agreements are in place?** When you sign contracts to work with other companies, these contracts may include clauses that transfer risk and indemnify one party. Consider how these clauses could play out in various scenarios, specifically scenarios involving action over claims.
- **What are the exclusions in your commercial general liability insurance policies?** Exclusions for liability stemming from third-party over actions have become increasingly common in recent years, so be on the lookout for this policy language. Make sure you understand the implications of any exclusion.
- **What local laws impact liability?** For example, in New York, the Scaffold Law (New York Labor Law 240) creates strict liability terms for workplace injuries involving falls from heights. Laws like this can increase your liability and the chance of an action over claim.
- **How are various types of workers covered?** Consider coverage for employees, independent contractors, subcontractors, leased workers and temporary workers. Coverage gaps can occur when certain types of workers are excluded.
- **How do the four issues above impact each other?** Are there loopholes or coverage gaps that could result in problems down the road? Could the business owner be on the hook for the negligence of another entity? Does the business owner have coverage with sufficient limits in place?

In the construction industry, projects often involve multiple parties and multiple insurance policies. As the action over exclusion shows, insurance coverage and liability issues can get complicated for contractors. If you need help securing appropriate coverage, reach out to your Socius contact.



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