

# Insurance Buyers' News



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Property

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## When Lightning Strikes

Lightning kills more people in the U.S. each year than any other natural disaster other than floods. A Carnegie-Mellon study found that lightning affected 33 percent of US businesses at some point. So what can you do to protect your people and property from lightning?

**T**he National Weather Service says lightning kills an average of 49 people per year in the U.S. It also causes significant property damage, causing power outages, sparking fires and damaging electronics.

Insurance industry sources estimate that between 3 and 7 percent of all property/casualty claims are related to lightning strikes in any given year. Between 2007 and 2011, lightning caused an average of 22,600 fires per year, according to an analysis by the National Fire Protection Asso-



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## This Just In

**T**he Equal Employment Opportunity Commission (EEOC) has sued Cushman & Wakefield, a commercial real estate company, for disability discrimination for failing to provide reasonable accommodation to an employee with breast cancer.

Toi Patterson had worked for Cushman & Wakefield for nine years when she requested leave under the Family and Medical Leave Act (FMLA) for breast cancer treatments.

Prior to the expiration of her FMLA leave, Patterson requested to return to work on a part-time schedule as a reasonable accommodation for her disability and advised she might need additional unpaid leave after her surgery.

EEOC charges that Cushman &

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ciation. Most of these fires occurred outdoors, but 7 percent occurred in non-residential structures. These fires caused an average of \$108 million in direct property damage each year.

When you consider lightning's power, the damage it causes comes as no surprise. Lightning travels more than 90,000 miles per second and exceeds 50,000 degrees F. A single bolt of lightning has an average of 20,000 amps of electricity—enough to power a lightbulb for three months. When this incredible force hits earth, it can cause one of the following types of damage:

- 1 Impact, fire, singeing or melting:** When lightning hits an object or building directly, the force can break or damage the object. For example, lightning is the single leading cause of damage to church steeples. Since a lightning bolt is narrow, however, the actual point of impact often suffers little noticeable damage.
- Lightning's intense heat causes many other problems for property owners. Lightning is the single leading cause of fires in lumberyards. When lightning hits a combustible surface, such as a shake roof, it can spark a fire.
- 2 Electrical injection:** When lightning hits a building, the building's wiring (electrical, telephone or data) can pick up part of the current. This extra current can damage electrical and equipment connected to the system.
- 3 Power surges:** Lightning can also enter a building indirectly, through wiring, cables or plumbing or when it hits surrounding ground. In rural areas in particular, lightning can travel through wires for long distances.

According to Dr. Ronald B. Standler, a physicist who studies lightning and consults on lightning safety, "The electromagnetic fields from the current in a lightning stroke can induce currents and voltage in wire and cables inside a building. Such surge currents are typically less intense than direct injection of current, but can easily vaporize integrated circuits in computers, modems, electronic control circuits, etc."

### Risk Management

You cannot prevent lightning from striking, but you can take steps to minimize the damage it can cause.

- 1** Ensure your building complies with updated building codes, which require installation of air terminals (or lightning rods), wires and plumbing to be grounded and other measures designed to divert the force of lightning strikes.
- 2** Where possible, use dedicated circuits for computers, building monitoring systems and other delicate electronics so they do not have to share circuits with power-hungry devices, such as air conditioners.
- 3** Protect computers and electronics by plugging these devices into surge protectors instead of directly into the power socket.
- 4** Check surge protectors at least once a year. Most have a signal light that indicates the unit is working.
- 5** During a thunderstorm, turn off computers and unplug the power cord. Unplug your modem, network or cable connection to prevent a surge from entering your computer through these wires.

### *This Just In*

**Wakefield failed to allow Patterson to work part-time and refused to discuss or provide any other reasonable accommodation to allow her to remain employed. Cushman & Wakefield instead fired Patterson because of her disability, according to the lawsuit.**

**The Americans with Disabilities Act (ADA) requires employers to provide reasonable accommodations for employees with a disability unless the employer can show that doing so would be an undue hardship. Failure to do so constitutes disability discrimination.**

**The ADA applies to employers with 15 or more employees. For more information, please contact us.**



### Insurance Considerations

Even the basic commercial property policy includes coverage for lightning damage. If a lightning bolt hit your building and caused a fire, your policy would cover the claim. However, standard commercial property policies provide lower limits for computers and electronic equipment and do not cover electronic data losses. You can buy a coverage extension that will provide up to \$2,500 in coverage—but most businesses will need additional coverage. For more information on insuring computers and data, please contact us. ■

# What to Do When You Get a “Reservation of Rights” Letter

Your organization has just been sued, and you've notified your liability insurer as required by the policy. You think all's taken care of...when you receive a reservation of rights letter from the insurer. What does this mean, and what should you do?

**P**ractical Risk Management defines a reservation of rights as “an insurer’s notification to an insured that coverage for a claim may not apply. This allows for an investigation by the insurer without waiving its right to later deny coverage.”

When the insurer sends you a reservation of rights letter, it is telling you that it has doubts whether your policy covers some or all of the claims. In a liability lawsuit, the plaintiff often makes several claims. The policy might cover some and exclude others. When a claim is first filed, the insurer might not know whether coverage applies with the facts at hand.

When you buy a liability policy, your insurer agrees to pay for your legal defense costs in addition to any damages you might be legally obliged to pay. Most states recognize this “duty to defend” as fairly broad under a commercial general liability policy. If there is a possibility that coverage might apply, the insurer must provide your legal defense.

When an insurer receives a claim that might be covered only partially by its policy or not at all, it can do one of the following:

**1** Refuse the duty to defend. If the insurer does this and the court later finds that coverage applied, the insurer must reimburse



your defense costs, along with settlement costs over which it had no control.

**2** Investigate the claim and begin your legal defense. Insurers like to avoid this due to the principle of *estoppel*, which bars an individual from “denying or alleging a certain fact...because of that individual’s previous

conduct, allegation, or denial” to the detriment of another. (*Black’s Law Dictionary*) In other words, if your insurer begins investigating or defending your claim, this could lead you to assume it will cover your claim.

**3** File a declaratory action, in which the insurer asks the court to determine whether it is

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obligated to defend the claim. An insurer will seldom do this when it first receives notice of a claim.

- 4 Send the insured, by certified mail, a reservation of rights letter and proceed with its investigation. This allows the insurer to gather more facts before deciding whether to deny coverage, while preserving its right to do so. Thus, your insurer might defend your liability claim but later deny indemnification (or paying settlements or judgments) if its defense is unsuccessful.

If you receive a reservation of rights letter, you will want to protect your coverage rights by doing the following:

- 1 Read the reservation of rights letter and the policy to which it applies carefully.
- 2 Respond to your insurer, saying that you disagree. The experts with the *John Liner Review* recommend asking the insurer to commit to coverage before it begins its investigation.
- 3 Arrange for your own counsel.

Some reservation of rights letters will state the insurer reserves the right to recoup defense costs if the insurer does not owe a defense. Depending on the facts of the case and the jurisdiction, you could indeed be obligated to reimburse your insurer for defense costs if it was later determined coverage did not apply.

In a straightforward claim, you have no cause to worry. A reputable insurer will provide a quality defense. It's the gray areas, where coverage might or might not apply, that can cause conflicts. For this reason, we recommend thoroughly reviewing your liability coverage on a regular basis. A review can point out gaps in coverage, outdated forms and language, and other problems. For more information, please contact us. ■

Attorneys Veronica M. Bates and Renee C. Callantine caution that different rules apply, depending on location. "In many jurisdictions, the reservation of rights may allow the insurer to withdraw from the defense when there is no potential for coverage under the policy. The ROR letters allow insurers to decline indemnifying the insured for any portion of a judgment not covered under the policy."

The liability policy also either explicitly or implicitly obligates you to cooperate with the insurer in its conduct of your defense. This allows the insurer to direct your legal defense, including giving it the right to settle. But investigations can also give it facts needed to deny you coverage. For these reasons, a reservation of rights letter indicates a conflict between you and your insurer.

## The Liability Coverages Every Business Needs

There are insurance coverages that all businesses need, some that all business should consider, and some that you need only if you have special risk exposures.

### Need to Have

**Home-based business insurance.** The standard homeowners insurance policy excludes liability arising from "business pursuits." If you have a home-based business, you can buy a rider to add business liability coverage to your homeowners policy, but coverage is limited. With the possible exception of daycare operators, most successful businesspeople will need one or more policies designed especially for businesses.

**Commercial general liability (CGL) insurance** will pay your legal costs, along with any judgments or settlements, when you are legally obligated to pay another party due to accident, injuries and claims of negligence. Most policies also provide medical expenses coverage that will pay up to \$5,000 or \$10,000 toward medical expenses of a third party injured on your premises, regardless of fault.

The CGL covers you for liability arising from:

- ✱ Bodily injury, or physical harm to a person that occurs on your business premises or by your employee while driving for business.



- ✱ Property damage you (or an employee) cause to property owned by someone else.
- ✱ Personal injury, or damage to another's rights or reputation. This includes slander, libel, invasion of privacy, false arrest and wrongful eviction.
- ✱ Advertising injury, or copyright infringement and misappropriation of another's idea in your advertising.

The CGL has some significant exclusions, including:

- ✱ Employees. It will not cover your employees' claims for bodily injury or employment practices. Workers' compensation covers employees' bodily injury and lost-time claims; employment practices liability insurance (EPLI) covers claims involving employment practices, such as wrongful termination, discrimination, etc.
- ✱ Contractual liability, or liability you accept by agreement that would not exist otherwise.
- ✱ Liquor liability – for businesses that sell, serve, make or distribute liquor.
- ✱ Slander, libel, copyright infringement or misappropriation of another's idea – for businesses in the media industry.
- ✱ Pollution
- ✱ Damage to your work due to faulty workmanship
- ✱ Product recall
- ✱ Electronic data

As with most insurance policies, the general liability policy also excludes coverage for claims resulting from war, criminal or intentional acts.

**Umbrella or excess liability insurance** provides coverage once a claim exhausts the limits of your other, or "underlying," liability policies. For example, if an employee causes a multiple-injury auto accident, your umbrella or excess policy would begin to pay after claims exceed your commercial auto policy's liability limits. Umbrella coverage differs from excess coverage in that it can also "step down" to cover some losses not covered by the underlying policies. However, most umbrella policies exclude coverage for employment practices, professional liability and product recall—all of which can be covered by specialized policies.

**Commercial auto insurance** covers your business for auto-related liability. Personal auto policies exclude commercial use of the vehicle, leaving a serious coverage gap if you or an employee are involved in an injury or property damage accident while driving for work. Commercial auto insurance can cover vehicles on an individual or fleet basis. We strongly recommend buying uninsured and underinsured motorists coverage, coverage for borrowed or rented autos, and coverage for employees using their own cars for work.

**Business owners' policies (BOPs)** combine business liability and property coverages into a standard package, typically including property, general liability, vehicles and business interruption. BOPs can simplify insurance buying and can save you money versus buying separate policies from different carriers. However, if your business has unique risks, this one-size-fits-all coverage might not be your best choice.

**Workers' compensation insurance.** All states except New Jersey, South Dakota and Texas require businesses with employees to carry workers' compensation insurance or self-insure. The insurance covers all lost time and medical benefits the employer is obligated to pay by state law.

Employers who lack insurance face civil fines, and some states impose criminal penalties as well. In states that don't require insurance, employers will probably want it anyway, since without insurance, employees can sue in court for injuries. With insurance, the "workers' compensation bargain" means employees give up their right to sue their employer in exchange for the promise of receiving state-mandated benefits.

### Nice to Have and Specialized Policies

"Nice to have" policies are those that all businesses should at least consider purchasing. Employment practices liability (EPLI), which protects you from lawsuits such as wrongful termination, discrimination and sexual harassment, falls into this category. Specialized policies are those that only certain types of businesses need, such as professional or service businesses, corporations (whether private or public) and manufacturers and contractors.

We'll discuss some of these coverages in our next issue. In the meantime, if you have questions, please contact us. ■

# What's a “Reasonable Accommodation”?

**T**he Americans with Disabilities Act (ADA) and amendments apply to employers with 15 or more employees. These employers cannot discriminate against individuals with disabilities in hiring, promoting, retaining and other aspects of employment. The ADA requires affected employers to provide a “reasonable accommodation” to allow these individuals to perform their job duties. Employers do not have to provide accommodations if doing so would be an undue hardship.

A reasonable accommodation is any change in the workplace or the way things are customarily done that provides an equal employment opportunity to an individual with a disability. While there are some things that are not considered reasonable accommodations (e.g., removal of an essential job function or personal use items such as a hearing aid that is needed on and off the job), reasonable accommodations can cover most things that enable an individual to apply for a job, perform a job, or have equal access to the workplace and employee benefits.

An employer's obligation to provide accommodations begins at the very start of the employment process. Employers with 15 or more employees must ensure applicants with disabilities can apply for jobs. This makes employers that recruit at locations that are physically inaccessible open to possible discrimination charges. In addition, employers that have online applications should also provide alternative means for people with disabilities to apply, unless they can show that doing so would create undue hardship.

Employers must also provide accommodations when an employee



needs accommodation to perform the essential functions of the job, to gain access to the workplace or to enjoy “equal access to the benefits and privileges of employment,” such as trainings and office-sponsored events.

Providing accommodations is often not as difficult as you might think. Accommodations vary with the situation and can include specialized equipment, facility modifications, adjustments to work schedules or job duties, as well as a whole range of other creative solutions.

Employers concerned about accommodations can contact the Job Accommodation Network ([askjan.org](http://askjan.org)). This service of the U.S. Department of Labor provides free consulting services for employers of all sizes. ■

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