

Make Your Insurance Policies List and Check It Twice



As the holidays rapidly approach, it is a perfect time for retailers to review their insurance policies and understand the extent of their coverage. Seasonal hires, new products and revisions in services may expose retailers to uncovered risks.

In this article, we highlight 10 insurance policy provisions retailers should investigate immediately so that an unexpected claim denial from the insurance company “grinch” doesn’t ruin your holiday season. We also discuss how retailers can protect themselves by starting the new year with a comprehensive insurance policy audit, performed by counsel, including the steps counsel take in an audit to help your company determine if you have any significant coverage gaps.

10 Policy Provisions to Review to Avoid an Insurance Company “Grinch”

- **Holiday Help.** The holidays are a busy season for retailers, with many companies hiring temporary or seasonal workers, opening pop-up locations and renting temporary storage spaces or warehouses. Retailers should ensure that all of their insurance policies provide full coverage for these temporary workers and locations.
- **Cyber Monday.** Your property insurance policy may protect against lost income in the event your distribution center is damaged by a physical event, such as a heavy winter snowstorm. But are you protected from lost income if your website crashes on Cyber Monday because of a computer virus or malicious hacking attack? Cyber-risk policies can provide protection against such losses if the proper coverage is purchased.
- **Naughty and Nice Data Privacy.** Collecting and analyzing data about your customers and their shopping behaviors is often the best way to stay one step ahead of your competitors. But are you protected in the event a customer or regulator claims your collection of data is somehow improper? Many off-the-shelf cyber-risk policies exclude wrongful collection of data, but savvy retailers can get such exclusions removed.
- **Elves on Strike.** If Santa doesn’t properly pay his elves, they might just go on strike. But if you don’t properly pay your workers, you will likely end up in court. Does your employment practices liability policy provide coverage for wage-and-hour litigation? Some insurers have started to offer coverage for defense costs against such claims.

- **Third-Party Discrimination.** Your company should have employment practices liability coverage to protect against employment discrimination claims. But are you protected from similar claims brought by your customers? Coverage for discrimination claims, including under the Americans with Disabilities Act, is typically available as a valuable add-on to your company's current insurance policies.
- **Social-Engineering Schemes.** Your crime policy should apply to employee embezzlement or theft and robbery of the cash register or store safe. But some policies may not cover you if one of your employees was fooled into transferring company funds because they received what they thought to be a legitimate request from a company executive to approve such a transaction. Such social-engineering schemes are becoming widespread, and companies should ensure that their crime insurance will cover this risk.
- **Must-Have Gifts.** Imagine if a company that supplies this year's "must-have gift" has a fire at its main warehouse, leaving your stores with empty shelves. Have you purchased contingent business interruption coverage to protect against the lost income?
- **Gifts to Vendors.** Many vendors will likely require you to add them as "additional insureds" under your company's insurance policies. But did you know that, absent specific policy language, vendors may be able to access (and use up) all of your policy limits, even if their contract only required much less?
- **Holiday Threats.** We all hope to remain safe this holiday season, but you may have purchased terrorism coverage just in case. Did you check your cyber-risk policy for a terrorism exclusion? Hacking attacks by foreign agents could be considered "cyber-terrorism" and thus excluded from coverage. Retailers should ensure that such exclusions are narrowed or removed from their policies.
- **Cookies and (Rotten) Milk.** If a product you sold turns out to be not so good, your liability insurance policy should protect you from claims of resulting injury or damage. But does your insurance cover the costs of conducting a recall and repairing or replacing the faulty product?

The New Year Is an Ideal Time for Comprehensive Insurance Policy Audits

An insurance policy audit conducted by experienced coverage counsel is a preventative tool retailers use to identify potential gaps in coverage, along with potential issues and exclusions in their policies that may lead to coverage litigation if not addressed. A properly performed audit will educate retailers on the strengths and weaknesses in their insurance portfolios and arm retailers with the information needed to negotiate broader coverage and eliminate exclusions and gaps at renewal, potentially saving companies millions of dollars in uncovered claims or coverage litigation.

The goal of an insurance audit is to evaluate the current insurance program, determine whether the program meets a given company's needs and identify any potential gaps in coverage. Typically, policy language is negotiated and agreed upon at the time of renewal. However, insurance companies are eager to keep retailers' business and will often agree to revise coverage in the middle of an existing policy if coverage gaps are located. In addition, every year insurance policies and standard forms change, new exclusions are added to existing policies and new

insurance products are introduced into the market. Knowing what coverage your business has and what is available is critical. Below are steps counsel take when performing insurance policy audits.

Step one: Interview in-house counsel, the risk management team and key executives

Before analyzing any policies, a meeting with in-house counsel, members of the risk management team and key executives should be held to discuss historical and current liabilities and potential exposures, business needs and overall corporate strategy. As the holidays approach, any new products, services or risks should be discussed and evaluated. At a minimum, all of the items below should be addressed.

- Any current or potential liability for ongoing and anticipated projects
- An assessment of current privacy policies and an understanding of the collection, storage and use of any confidential information
- A review of all professional services offered by the company, subsidiaries, affiliates and portfolio companies
- Any anticipated corporate transactions and potential corporate and D&O liability exposures
- The extent to which the company provides additional insured status to other entities, the extent to which the company requires other entities to list the company as an additional insured and the scope of any such agreements

Step two: Analyze each insurance policy individually and then how it works with other policies in the company's insurance portfolio

A counsel-conducted analysis significantly differs from and complements a broker's policy analysis. For example, multiple issues, such as the number of occurrences, trigger and allocation, batch clauses and exhaustion language, may significantly affect any ultimate insurance recovery and require a level of legal sophistication in an analysis of their potential impacts. While no one can predict with any certainty insurance companies' future interpretations of policy language, courts have addressed many phrases and words in certain jurisdictions, and a legal policy audit will minimize some of the disputes coverage counsel often see.

All lines of coverage should be reviewed, including but not limited to liability policies, first-party property policies, business interruption policies, directors' and officers' policies, errors and omissions policies, cyber-risk policies, employment practices policies, transportation and auto policies, fiduciary policies, fidelity and crime policies, and any specialty policies (e.g. products, IP, pollution). The review should include an analysis of all of the following provisions through a legal lens:

- Coverage provisions, including definitions, extensions, exclusions, endorsements, notice and discovery provisions, defense costs, duty to cooperate and right to settle claims and state variations
- Choice of law and dispute resolution provisions

- Deductibles, self-insured retentions and retrospective premium provisions in light of the company's business needs, overall objectives and strategy
- Trigger and discovery provisions and the company's policies for providing notice to insurers
- Underwriting requirements and disclosures provided to insurers regarding anticipated acquisitions and other corporate transactions
- Analysis of how the primary, umbrella and excess policies fit together in a single line of coverage
- Analysis of how the insurance portfolio interacts together as a whole

Each retailer will have different areas within their insurance policies that will impact insurance recovery. Identification of these specific issues will assist the retailer in describing any future claim in ways that will maximize its protection under the insurance program.

Step three: Compile a list of gaps in coverage and policy revisions to discuss with your broker

The last step in an audit is the compilation of a list of all identified gaps in coverage and policy revisions that should be requested at the next renewal or earlier if significant gaps were identified. Often, companies request coverage counsel to prepare a memorandum that can be shared with the board that contains examples of how the policy works and, when applicable, doesn't work. In this way, the board can assess and understand the current coverage protecting the company and the potential need for any additional coverage or risk mitigation measures that should be taken. Since the attorney-client privilege may not extend to your company's broker, we do not recommend sharing legal coverage audits with your broker. Instead, we recommend counsel create a checklist of items requested to be revised, devoid of any privileged information, for your broker.

No retailer wants an insurance company "grinch" to deny what the retailer thought was a covered claim. Reviewing the 10 policy issues we identified and having a comprehensive insurance audit performed will allow in-house counsel to rest easy, knowing that their businesses' insurance coverage will protect them and that holiday profits will not be diminished by denied insurance claims.

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