Marsh

Q4 2024 FINPRO Management Liability

Need to Know

Every quarter, our management liability team shares noteworthy trends and emerging issues to help US-based companies make decisions to manage their risks. In this issue, we look ahead to the directors and officers (D&O) liability, employment practices/wage and hour liability, fiduciary liability, and kidnap, ransom, and extortion risks that organizations are expected to face in 2025.

Organizations today are navigating a rapidly changing risk landscape that poses various challenges for senior leaders. Emerging technologies, regulatory shifts, and evolving trends are introducing new risks and intensifying existing ones, necessitating proactive governance and risk management strategies.

The increased use of generative AI, for instance, presents potential complications especially when used for hiring purposes and to analyze client data. And as cybersecurity threats grow, regulators are demanding enhanced transparency regarding the protection of sensitive information, requiring companies to strengthen their defenses and take steps to mitigate cyber threats.

Further, today's shifting regulatory environment requires action to ensure compliance, while increased scrutiny on matters related to the Employee Retirement Income Security Act (ERISA) necessitate that fiduciaries engage in best practices and maintain transparency in their operations.

Directors and officers liability

Understanding today's increasingly complex AI and cyber, regulatory, climate change, and shareholder activism risks is crucial for effective governance and risk management by corporate leaders.

1. The rise of AI

Artificial intelligence, especially generative AI, presents significant opportunities for efficiency and innovation, but it also introduces new risks. As more companies integrate AI tools in their decision-making processes, there are increasing concerns about privacy, data security, accountability, and biases in algorithms that could lead to liabilities for directors and officers. For example, if an AI system is suspected of leading to discriminatory hiring practices or mishandles customer or client data, directors and officers may face scrutiny and legal challenges. Public companies should consider increasing board oversight and enhancing their corporate disclosures regarding AI. As the integration of artificial intelligence into business operations accelerates, directors and officers must proactively address the associated risks and ensure rigorous oversight of AI.

2. Evolving regulatory environment

The regulatory landscape is undergoing significant changes. In the summer of 2024, the US Supreme Court abolished the Chevron doctrine, which mandated that courts defer to a regulator's reasonable interpretation of federal law. This shift is resulting in heightened scrutiny of agency regulations and an increased likelihood of legal challenges.

While anticipated changes in leadership at the SEC and the Federal Trade Commission could lead to new regulatory priorities, these and other agencies are expected to continue to investigate and bring enforcement actions. Regulators' pushes for transparency and accountability will likely require companies to adopt more rigorous compliance measures, particularly in areas such as financial reporting, cybersecurity, and environmental impact.

3. Climate strategies

Environmental compliance and sustainability practices continue to pose significant risks for directors and officers as the regulatory environment continues to evolve.

In March 2024, the SEC mandated climate-related disclosures, but later stayed the rules due to legal challenges and then disbanded its climate and ESG task force. Several regulatory bodies are advancing their own climate regulations, necessitating that companies address climate risks on their terms. California recently implemented the Climate Corporate Data Accountability Act and the Climate-Related Financial Risk Act, which require companies to disclose climate-related financial risks and their strategies for addressing these risks.

Additionally, many public companies continue to pursue sustainability measures in their own self-interest. More public companies are utilizing carbon credits as part of their strategies to mitigate their carbon footprints. In this regard, the remarkable growth experienced by the voluntary carbon-offset market is promising, but presents its own set of risks, such as concerns over the volatility, quality, and integrity of carbon credits, potentially resulting in ineffective emissions reductions. There are also reputational risks for organizations that may be criticized for overreliance on carbon credits instead of making meaningful emissions reductions.

Ultimately, embracing sustainability measures may be crucial for public companies to meet shareholder expectations and navigate the changing landscape of environmental regulations.

4. Cybersecurity threats

As businesses continue to become increasingly digital, the threat of cyberattacks looms larger than ever. Shareholders and regulators, including the SEC, are demanding greater transparency regarding how companies protect sensitive information and respond to cyber incidents. In 2023, the SEC adopted rules requiring companies to disclose material cybersecurity incidents they experience and to disclose on an annual basis material information regarding their cybersecurity risk management, strategy, and governance.

In 2024, the SEC brought several enforcement actions against companies based on misleading corporate disclosures after a cybersecurity incident. Notably, these actions were based on events that occurred prior to the adoption of the SEC's new cyber disclosure rules. Given this context, it is essential for companies to prioritize strong cybersecurity practices and maintain transparent communication to reduce potential liabilities.

5. Shareholder activism

Shareholder activism is on the rise. Activist shareholders are not only pushing for better financial performance, but are also advocating for changes in corporate policies and practices that align with their values on social, environmental, and governance issues. This trend can lead to increased scrutiny of corporate decisions and practices, resulting in expensive proxy fights. In some cases, activist campaigns can lead to shareholder litigation if shareholders feel their concerns are not adequately addressed.

To minimize the risks of shareholder activism, directors and officers should enhance communication and engagement with shareholders and foster a strong corporate culture that emphasizes ethical behavior and stakeholder engagement.

MITIGATION STRATEGIES

To effectively address these D&O risks in 2025, companies should consider implementing the following mitigation strategies:

- **Enhance corporate governance.** You should seek to strengthen your corporate governance by promoting transparency in decision-making and cultivating a robust culture of compliance across the organization.
- **Ensure robust corporate disclosures.** You should consider embracing transparent disclosure practices, which encompass regular audits, management training on regulatory requirements, and the establishment of clear channels for reporting and addressing compliance issues.
- **Update cyber incident response plans.** If you are a public company, it is important to update your incident response strategies to incorporate the requirement for filing 8K reports with the SEC after a material cyber incident.
- **Evaluate D&O insurance limits.** Work with your Marsh advisor to determine whether your D&O limits are adequate for growing risks and any corporate growth. Among other issues, consider whether your company has started providing new services or products, whether you are operating in new geographic areas, and whether your industry is facing new legal or regulatory challenges.
- **Review your D&O coverage.** In addition to D&O limits, it is just as critical to ensure that the scope of your D&O coverage is appropriate. For example, confirm that there is coverage for your CISO, Chief AI officer, or another C-level official with a similar title.
- **Consider broadening your D&O coverage.** Insurers are starting to offer solutions to cover shareholder activism and proxy fights. Similarly, there are more options for D&O coverage for investigations of the corporate entity. Explore these new coverage opportunities with your Marsh advisor.
- **Be prepared for D&O underwriter questions.** Presenting a proactive approach to key risks, along with evidence of strong governance practices and compliance with regulatory changes, can help you build confidence with D&O underwriters and potentially secure more favorable terms.

Consult with your Marsh advisor to address these trends and strategies.

Employment practices liability

As new regulations and court decisions shape the future of work, employers need to be aware of potential challenges and take action to mitigate their risks.

1. The game-changing impact of AI in employment

The integration of AI, particularly generative AI, is transforming hiring and recruitment processes. AI tools can streamline recruitment by automating resume screening, analyzing candidate data, and conducting initial interviews through chatbots. While these technologies can enhance efficiency and reduce bias in theory, they also pose risks of discrimination and fairness if algorithms are not carefully designed and monitored.

In response, AI legislation and regulations are rapidly evolving at the global, federal, state, and local levels, with agencies like the Equal Employment Opportunity Commission (EEOC) emphasizing compliance. Colorado has enacted the first comprehensive state-level AI regulations, effective February 1, 2026, followed by Illinois, which will implement its own AI regulation on January 1, 2026.

As litigation regarding AI in hiring escalates, employers could face legal challenges, particularly claims that AI tools disproportionately disadvantage certain demographic groups under Title VII of the Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act.

To navigate this evolving environment, employers should prioritize transparency, ethical use of AI, human oversight, and employee training to ensure fair hiring practices and mitigate legal risks.

2. The future of pay transparency laws

State and municipal pay transparency laws are emerging as a crucial mechanism to combat wage disparities. These regulations typically require employers to disclose salary ranges in job postings and, in some cases, provide detailed descriptions of benefits and additional compensation. Several states and municipalities have already implemented such laws with others expected to follow suit in 2025.

Enforcement of these laws has led to a rise in lawsuits, particularly in Washington, where settlements have amounted to millions of dollars, underscoring the implications of non-compliance. While some employers have sought to dismiss these lawsuits by questioning plaintiffs' standing, courts have responded inconsistently. The Washington Department of Labor and Industries is working to clarify the definitions of "employee" and "applicants," which could influence future litigation.

As more jurisdictions adopt pay transparency regulations, expectations for equitable compensation practices will likely intensify. The absence of comprehensive federal laws means employers must navigate a complex patchwork of state requirements, complicating compliance efforts.

With international pay transparency obligations, primarily focused on gender equality, also on the rise, organizations should consider training their managers and HR professionals on these evolving mandates. To mitigate risks and ensure consistency, companies may benefit from adopting a global approach to pay transparency across all regions.

3. The US Supreme Court's influence on employment law

The landscape of workplace discrimination and harassment is shifting due to pivotal US Supreme Court rulings:

Loper Bright Enterprises v. Raimondo. The Court overturned the ***Chevron*** doctrine, which required judges to defer to agency interpretations of statutes. This could impact regulations from agencies like the EEOC and the Department of Labor (DOL). For example, a Texas court recently vacated the DOL's minimum salary requirement under the Fair Labor Standards Act (FLSA), using the new standard established in ***Loper***.

SEC v. Jarkesy. The court barred the use of administrative law judges (ALJs) in certain Securities and Exchange Commission (SEC) matters. This development has influenced a DOL case, with the judge blocking the use of ALJs in a discrimination case against a government contractor.

Muldrow v City of St. Louis. The decision clarified that employees challenging job transfers under Title VII need only demonstrate "some" harm rather than "significant" harm, potentially impacting broader discrimination cases. The Ninth Circuit has already reversed a summary judgment in a discrimination lawsuit based on this precedent.

The Supreme Court's upcoming decision in ***Ames v. Ohio Department of Youth Services*** will address pleading standards for workplace discrimination suits by majority group members, potentially easing the path for reverse discrimination claims under Title VII.

4. The Pregnant Workers Fairness Act

The Pregnant Workers Fairness Act (PWFA), which took effect on June 27, 2023, requires employers to provide reasonable accommodations for employees related to pregnancy, childbirth, or related medical conditions. Employers must engage in an interactive process to identify suitable accommodations, ensuring that affected workers can perform their jobs without facing discrimination or undue hardship to the employer.

Since the EEOC released its final rule and guidance in April 2024, it has ramped up investigations and lawsuits against employers that violate the PWFA, particularly those denying accommodations or retaliating against employees.

Litigation is on the rise. While it's unclear whether the next administration may amend the act's protections, employers should take action to mitigate potential risks, including updating their policies, establishing a dedicated process for pregnancy-related accommodations, and training managers and HR professionals.

5. Diversity, equity, and inclusion

Since the US Supreme Court's decision regarding affirmative action in college admissions processes, the landscape surrounding diversity, equity, and inclusion (DEI) in the workplace continues to evolve. The Court's ruling has sparked a wave of lawsuits against employers, with plaintiffs including employees, think tanks, and shareholders challenging various aspects of DEI efforts or programs. These challenges encompass issues such as public announcements of numerical DEI goals, reverse discrimination claims, practices favoring the promotion of minorities and women, and alleged removal of white males to improve diversity.

Considering the potential of increased scrutiny of diversity initiatives, employers should regularly review and update DEI policies, ensuring that they align with legal requirements.

MITIGATION STRATEGIES

In addition to the mitigation strategies outlined above, in 2025 companies should also:

- **Evaluate EPL insurance limits.** Work with your insurance advisor to determine whether your EPL limits are adequate for growing risks and any corporate growth. Some considerations include whether you are operating in new geographic areas, have expanded operations and employees in high-risk states — such as California, New York, New Jersey, and Washington — and if your industry is facing new legal or regulatory challenges.
- **Review your EPL coverage.** Assess whether the scope of your EPL coverage is appropriate, confirming it includes protection against political affiliation discrimination and has no coverage limitations for AI-related claims.
- **Consider expanding your coverage.** Explore standalone wage and hour coverage, as EPL policies typically exclude claims related to violations of the FLSA and similar state wage laws.
- **Prepare for EPL underwriter questions.** Demonstrate a proactive approach to key risks and strong governance practices and compliance with regulatory changes, which can help build confidence with EPL underwriters and potentially secure more favorable terms.

Consult with your Marsh advisor to address these trends and strategies.

Fiduciary Liability

Plaintiffs continue to be creative in finding new theories for liability under the Employee Retirement Income Security Act (ERISA) and organizations may face a number of challenges in 2025.

1. Use of plan forfeitures

Lawsuits have been filed against 25 401(k) plan sponsors questioning whether their handling of forfeited funds violated federal law. These lawsuits allege that employers used forfeited funds to reduce their required contributions rather than to alleviate administrative expenses borne by plan participants, in violation of ERISA, which requires fiduciaries to act in the best interests of plan participants.

The current legal landscape underscores the importance that fiduciaries discuss forfeitures best practices with their ERISA counsel, especially since fiduciary insurers may inquire about the plan's handling of forfeited funds during renewal meetings.

2. Healthcare plan fees

Employees are increasingly scrutinizing their employers' health plans, demanding clarity on how costs are determined and whether they are fair and reasonable. Recent legal developments have led to lawsuits challenging companies' health plan management, particularly regarding cost transparency and health services fees.

In one significant case, the US Court of Appeals for the Third Circuit upheld the dismissal of claims against a large insurer accused by former employees of breaching fiduciary duty by redirecting drug rebates for its own benefit instead of lowering participant contributions. The court, however, rejected the sponsor's argument that beneficiaries of ERISA-regulated defined-benefit plans only suffer injury if they do not receive promised benefits, allowing plaintiffs to amend their claims.

As legal challenges gain traction, companies are being pushed to reevaluate their health plan structures and associated financial implications for employees.

Despite the recent favorable result for defendants, fiduciary insurers continue to express concerns about potential defense costs in similar cases. Amidst uncertainty about individual courts' focus, there are still no specific underwriting questions to assess insureds' evaluation processes. Insureds should be prepared to discuss their evaluation processes for healthcare vendors and costs and demonstrate that a committee regularly reviews health and welfare plans, similarly to retirement plans.

3. Cybersecurity

As cyberattacks become more sophisticated, employers' actions to protect benefit participants' data are under increased scrutiny. Recent cases have shown that breaches — especially regarding fiduciary duties to safeguard personal and financial data — can lead to significant legal repercussions under ERISA. Plaintiffs have argued that inadequate cybersecurity measures constitute a breach of fiduciary responsibilities, prompting reassessment of what qualifies as reasonable security practices.

Considering the lack of precedent in these types of cases, expect fiduciary insurance underwriters to ask more questions about cyber controls, especially regarding the vetting of vendors entrusted with participant data and funds. Plan sponsors will need to continue to assess the interplay of their crime, cyber, and fiduciary policies.

4. Pension risk transfer liability

Many plan sponsors are looking to reduce their pension-related liabilities by transferring them to an insurer through annuity contracts.

But some derisking efforts have encountered challenges, with some participants filing lawsuits against large employers, questioning the evaluation of transfers, and alleging a lack of sufficient diligence by plan sponsors in evaluating the credit worthiness of insurers, potentially jeopardizing the benefits in the event of insurer default. Plaintiffs are asking for sponsor organizations to provide security for the assets and return any profits. In November, the ERISA Industry Committee filed an amicus brief in favor of the plan sponsor in one large case.

Despite the lawsuits, firms continue to pursue pension risk transfers.

Since none of the cases allege denial of benefits, it is unclear whether they will hold up in court, even when represented by prominent ERISA law firms.

Note that the DOL's Bulletin 95-1 outlines fiduciaries' responsibilities in pension risk transfers, advising the selection of "the safest annuity available." Legal experts have argued that this guidance, issued in 1995, needs a refresh.

Underwriters' questions have mainly focused on defined contribution plans, which were the most likely to have claims. But increased litigation could lead to underwriters starting to evaluate the potential of pension transfer liabilities.

5. Tobacco surcharge

At least a dozen class action lawsuits have been filed against organizations sponsoring self-funded health plans with premium surcharges for tobacco use or vaccination status. Plaintiffs argued these surcharges violate the Health Insurance Portability and Accountability Act's non-discrimination requirement, despite HIPAA's exception for outcome-based wellness programs.

While the non-discrimination requirement prohibits group health plans from charging higher premiums based on an employee's health status, employers can offer incentives through wellness programs.

The class action plaintiffs — current and former employees who paid the surcharges — claim that the plans lack reasonable alternative standards, and any alternatives were not communicated in all plan materials. They also claim that collecting surcharges breaches fiduciary duty, and are seeking declaratory and injunctive relief, reimbursement of surcharges, disgorgement of profits, and payment of a portion of attorneys' fees. While no court has ruled on the allegations yet, some cases have already settled.

While fiduciary policies continue responding to claims unrelated to retirement plans, these novel lawsuits may lead to hesitancy from insurers to lower premium rates. Plan sponsors should be aware of litigation risks for wellness plans and prepare to answer plan-related questions from fiduciary insurance underwriters.

MITIGATION STRATEGIES

To manage the risks related to the evolving legal and regulatory landscape in 2025, it's important for insureds to:

- **Prepare for increased underwriter scrutiny.** Expect underwriters to ask more questions at renewal and be prepared to share detailed information about your mitigation strategies.
- **Engage with fiduciary insurers.** Take time to discuss your risk management strategies and demonstrate compliance with evolving legal standards, especially in light of increased litigation.
- **Stay informed about developments.** Keep abreast of ongoing ERISA and health plan management regulatory legal and developments and adapt your policies and practices accordingly.

Consult with your Marsh advisor to address these trends and strategies.

Kidnap, ransom, and extortion

Amidst significant political and geopolitical uncertainty that are expected to continue into 2025, organizations should seek to identify evolving risks and mitigate their potential impact on key individuals within the organization.

1. Uncertainty surrounds the US ahead of administration change

Proposed actions by the incoming Trump administration could lead to changes to the US's economic and geopolitical policies.

President-elect Trump's historic pro-business stance may result in significant changes to the regulatory agenda for businesses. This could create both opportunities and risks that may lead to challenges for multinational companies that view the US investment climate as increasingly complex.

Uncertainty in a politically charged environment may lead to more threats against organizations. Global specialist risk consultancy firm Control Risks reported responding to 47 threat/extortion cases in the US in 2023, up from 23 in 2022. Rather than being accompanied by a ransom or extortion demand, these are typically threats to inflict bodily harm, wrongfully detain someone, damage or contaminate property, or reveal confidential information. Given the open-ended nature of many threats, they often lead to business interruption as well as expenses to investigate the credibility of the threat, which may be recoverable under a KRE policy, subject to terms and conditions.

2. The race to AI and digital threats

Between 2022 and 2023 there was a 36% increase in integrity-type attacks impacting internal AI databases and systems, using poisoning and manipulation tactics.

It is expected that attacks on AI systems will grow significantly in 2024 and 2025 and businesses need to consider both threats directed at, and risks stemming from, new AI-driven capabilities throughout these systems' lifecycle. Takeover of AI systems can enable both physical attacks against a wide range of assets and locations and can also facilitate non-violent but disruptive threats, like harassing communications and hoax bomb threats.

It's important to note that most kidnap, ransom, and extortion insurance policies exclude coverage for cyber extortion. However, cyber extortion instances could significantly impact organizations, interrupting business and leading to loss of earnings, potentially leading to increased underwriting scrutiny and corrective actions made to coverage offerings.

3. Geopolitical uncertainty

Shifting geopolitical dynamics can significantly impact organizations. It is prudent for companies to pay close attention to developments in the following regions:

- **The Middle East:** The continued collapse of red lines has been driving escalating conflict between Israel and Iran. The fall of Iran's ally Syria could further complicate these tensions. Any escalation between these countries or other parties in the region could shock the global economy and disrupt global stability.
- **Europe:** The ongoing conflict between Ukraine and Russia creates a substantial risk to businesses. It is believed that muted responses to the conflict have desensitized risk awareness, increased risk tolerance, and may even incentivize escalation.
- **Asia:** Despite the relatively low risk of a major conflict in Asia in 2025, there is increased unpredictability in the region, compared to a few years ago. Military exercises in certain regions of Asia have become more frequent and the risk of conflict ensuing as a result of an accident or miscalculation is certainly rising.

Geopolitical situational awareness is important for organizations to manage their shifting risks. This often requires an ongoing review of the geopolitical landscape and regular tabletop exercises to test out even the most unlikely of scenarios.

Given the global nature of KRE insurance policies and the evacuation/travel component of coverage, underwriters are expected to continue to closely examine past and expected future travel plans for companies and their risk management strategies.

4. Workplace violence and executive assaults

In the wake of recent events of targeted violence against key executives and political leaders, many organizations are prioritizing the safety of their executives as well as their employees. In addition to beefing up physical security during travel and removing personal information, such as biographies and pictures from corporate websites, companies should consider reviewing their existing insurance program to determine whether KRE and other policies would cover all eventualities and resulting expenses.

MITIGATION STRATEGIES

To manage these risks in 2025, organizations should consider the following mitigation strategies:

- **Stay abreast of current events and security threats.** Evaluating the current risk landscape can help you mitigate risks and protect key individuals within your organization.
- **Evaluate the breadth of your KRE insurance offering.** Work with your broker or insurance advisor to determine whether your individual exposures are addressed through current coverage enhancements and that limit levels are adequate.
- **Engage with your current KRE insurer.** Many KRE insurance programs offer reimbursement for preventative trainings during the first year of the policy period. Aside from the financial incentive, these trainings can help you learn how to better protect your organization, executives, and employees.

Consult with your Marsh advisor to address these trends and strategies.

About Marsh

Marsh, a business of Marsh McLennan (NYSE: MMC), is the world's top insurance broker and risk advisor. Marsh McLennan is a global leader in risk, strategy and people, advising clients in 130 countries across four businesses: Marsh, Guy Carpenter, Mercer and Oliver Wyman. With annual revenue of $23 billion and more than 85,000 colleagues, Marsh McLennan helps build the confidence to thrive through the power of perspective. For more information, visit marsh.com, or follow on LinkedIn and X.

1166 Avenue of the Americas, New York 10036