



**Wimberly Lawson**  
 Wright Daves & Jones, PLLC  
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**Briefly**  
 November 2015 Volume 15, Issue 11

**CYBER LIABILITY – LIABILITY FOR CYBER CRIMES AND DATA BREACHES**



**J. Eric Harrison**



**Karen G. Crutchfield**

With the rise of the internet age, most companies today use computers, laptops, Wi-Fi, or smartphones in their day-to-day business operations. The prevalence of businesses shifting to electronic operations, particularly with regard to data storage, explains why cyber liability law has become so relevant. According to a 2015 survey, cyber liability is one of the top five risks facing businesses this year. The same survey reported that cyber liability is the number one risk when looking into the next five years.

Cyber liability is a difficult area of law to follow because it evolves almost as rapidly as the internet itself. However, it is clear that insurance coverage for cyber liability has lagged behind, having been outpaced by businesses' use, demand, and dependence on technology. Therefore, it is crucial to understand what cyber liability encompasses, and how your business could face liability as a result of a cyber breach.

Even though the term "cyber liability" encompasses an enormous amount of information, it can be defined as the risk posed by conducting business over the internet, over other networks, or using electronic storage technology.

This risk can come in a number of different mediums or data forms. Further, the type of data exposure will directly correlate to the type of business or industry in which a company operates. The types of data that can potentially be exposed are:

- Personally identifiable information;
- Private health information;
- Credit or Debit card information;
- Financial data;
- Proprietary business information (billing records);
- Trade secrets; and
- Copyright infringements.

It is estimated that 30,000 companies are hacked every day. Due to shocking statistics like this and also a number of high profile breaches and court decisions, commentators referred to 2014 as the "year of the data breach." This leads to a common saying among cyber security professionals: "Either you have been data beached or you just do not know you have been data breached."

For more information on cyber liability and how your company can protect itself, J. Eric Harrison, Karen G. Crutchfield, Terri L. Bernal and Jeffrey M. Cranford will present *Liability for Cyber Crimes and Data Breaches* on Friday, November 6th, at 9:45 a.m. to 10:45 a.m. in the James Polk room at the Marriott Downtown Knoxville.



**Terri L. Bernal**



**Jeffrey M. Cranford**

**Friday, November 6<sup>th</sup>**

**Marriott Downtown Knoxville  
 James Polk Room**

*Liability for Cyber Crimes and Data Breaches*

9:45 am – 10:45 am

Presented by J. Eric Harrison,  
 Karen G. Crutchfield, Terri L. Bernal, and  
 Jeffrey M. Cranford

*Our Firm Wimberly Lawson Wright Daves & Jones, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville, Chattanooga and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.*



# THE IMPORTANCE OF EFFECTIVE HIRING (BACKGROUND CHECKS, PRE-EMPLOYMENT TESTING, AND DRUG TESTING, INCLUDING MEDICAL MARIJUANA AND FCRA COMPLIANCE)

The use of tests and other selection procedures can be very effective tools for determining which applicants or employees are most qualified for a particular job. However, use of these tools can violate several federal employment laws when the employer uses them in a way which suggests or is intended to discriminate based on a protected status (such as race, religion, sex, age, etc.).

While pre-employment tests and employee selection procedures come in a wide variety of forms, those most frequently considered by employers are the following:

- *Cognitive tests* to assess reasoning, memory, perceptual speed and accuracy, and skills in math and reading comprehension, as well as knowledge of a particular function or job;
- *Physical ability tests* to measure the physical ability to perform a particular task or the strength of specific muscle groups as well as strength and stamina in general;
- *Sample job tasks* to assess performance and aptitude on particular tasks related to the job;
- *Medical inquiries and physical examination*, including psychological tests, to assess physical or mental health;
- *Personality tests and integrity tests* to assess the degree to which a person has certain traits or dispositions and/or to predict the likelihood that a person will engage in certain conduct;
- *Criminal background checks* to provide information on arrests and conviction history;
- *Credit checks* to provide information on credit and financial history;
- *Performance appraisals* to reflect a supervisor's assessment of an individual's performance; and
- *English proficiency tests* to determine English fluency.

Several laws come into play when considering the use of any of these above-listed tests.

For more information and to explore the various tests and other selection procedures and how they should be administered as well as recent court decisions where these tests have come under scrutiny, Kelly A. Campbell and J. Eric Harrison will present *The Importance of Effective Hiring (Background Checks, Pre-Employment Testing, and Drug Testing, Including Medical Marijuana and FCRA Compliance)* on Thursday, November 5th, from 11:00 a.m. to 12:00 noon in William Blount North room at the Marriott Downtown Knoxville.



**Kelly A. Campbell**



**J. Eric Harrison**

**Thursday, November 5<sup>th</sup>**

**Marriott Downtown Knoxville  
William Blount North Room**

*The Importance of Effective Hiring (Background Checks, Pre-Employment Testing, and Drug Testing, Including Medical Marijuana and FCRA Compliance)*

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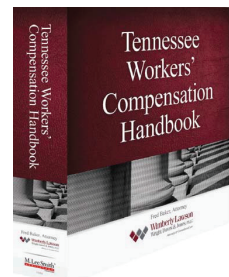
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and workers' comp claims managers

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# TOP TEN TIPS ON DEFENDING TENNESSEE WORK COMP CLAIMS UNDER THE NEW LAW



**Fredrick R. Baker**



**J. Eric Harrison**



**Andrew J. Hebar**

Tennessee's Workers' Compensation law was subject to sweeping reforms under the Workers' Compensation Reform Act of 2013, which applies to workers' comp injuries arising on or after July 1, 2014. Further changes and clarifications to the law were made by additional statutory amendments passed in 2014.

Due to the increased focus on penalties under the 2014 amendment to the Tennessee Workers' Compensation Law, timely reporting is even more important. Under the law, an employer must file a First Report of Injury with the state no later than fourteen (14) days after the reporting of the injury. Under the new regulations, failure to timely file this document could result in the assessment of a penalty from \$50.00 to \$5,000.00. As with much of the new penalty system, there is no explicit guidance from the Bureau of Workers' Compensation (the "Bureau") as to what instances will merit the low end of the scale as opposed to the high end, but employers who consistently fail to timely file First Reports can expect increasingly harsh penalties with each offense.

**Thursday, November 5<sup>th</sup>**

**Marriott Downtown Knoxville  
Alvin York Room**

*Top Ten Tips on Defending TN Work Comp Claims Under the New Law*

2:45 pm – 3:45 pm

Presented by Fredrick R. Baker, J. Eric Harrison, and Andrew J. Hebar

Timely reporting of claims is also important with regard to insurance coverage. Most policies include a provision requiring the reporting of a claim within a specific time period. The Bureau's regulations require that employers, other than self-insured employers, shall report work injuries to their insurer within one (1) business day of knowledge of the injury. Failure to timely report can jeopardize your insurance coverage.

Wage Statements are another component of the workers' compensation system that will come under increased scrutiny for injuries on or after July 1, 2014. Under the 2014 amendments and regulations, the Wage Statement is now due within three (3) business days of the scheduled Alternative Dispute Resolution. Failure to file could result in a penalty of between \$50.00 and \$5,000.00. Also, Rule 0800-02-21-.10 mandates that the Wage Statement be filled out completely. The Bureau will be looking at the number of days column to determine whether there are individual absences adding up to more than seven (7) days with corresponding deductions to the benefit rate.

Medical panels are governed in part by Rule 0800-02-01-.25 as promulgated by the Bureau. Specifically, "upon notice of any workplace injury, other than a minor injury for which no person could reasonably believe requires treatment from a physician, the employer shall immediately provide the injured employee a panel of physicians that meets the statutory requirements for treatment of the injury." A panel should list three (3) or more independent, reputable physicians, surgeons, chiropractors, or specialty practice groups.

There are many different defenses that an employer may assert in attempting to defeat compensability of a workers' compensation claim. Defenses to certain types of injuries have been specifically codified in the statute. For instance, an employee's voluntary participation in recreational, social, athletic, or exercise activities, shall not be considered a compensable injury, unless:

1. participation was required by the employer,
2. participation produced a direct benefit to the employer beyond improvement in employee health and morale,
3. participation was during employee's work hours and was part of the employee's work-related duties before the injury occurred, or
4. the injury was due to an unsafe condition during the voluntary participation (using facilities designated by, furnished by, or maintained by the employer on or off the employer's premises).

Under the Workers' Compensation Reform Act of 2013, "injury" is defined as an injury by accident, a mental injury, occupational disease, or cumulative trauma condition arising "primarily out of and in the course and scope of employment," which causes death, disablement, or the need for medical treatment of the employee. An injury is defined as "accidental" only if the injury is caused by a specific incident or set of incidents, arising primarily out of and in the course and scope of employment, and is "identifiable by time and place of occurrence." This definition specifically excludes aggravation of a pre-existing condition unless it can be shown to a reasonable degree of medical certainty that the aggravation arose "primarily" out of and in the course and scope of employment. Further, an injury arises "primarily" from work only if it has been shown by a preponderance of the

## DEPARTMENT OF LABOR'S PROPOSED NEW REGULATIONS ON EXEMPTIONS

The Fair Labor Standards Act (FLSA) provides a number of exemptions from the Act's minimum wage and overtime pay provisions, including one for bona fide executive, administrative and professional (EAP) employees. Congress created the exemption for these employees and for outside sales employees, as those terms are "defined and delimited" by the Department of Labor. The Department's regulations implementing those exemptions are codified at 29 CFR, Part 541.

For an employer to exclude an employee from minimum wage and overtime protection pursuant to the EAP exemptions, the employee generally must meet three criteria:

- (1) The employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test");
- (2) The amount of salary paid must meet a minimum specified amount (the "salary level test"); and
- (3) The employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the "duties test").

The regulations governing these tests have been updated periodically since the FLSA's enactment in 1938, most recently in 2004, when, among other revisions, the Department increased the salary level test to \$455 per week.

On March 13, 2014, President Obama signed a Presidential Memorandum directing the Department of Labor to update the regulations. The memorandum instructed the Department to look for ways to modernize and simplify the regulations while ensuring that the FLSA's intended overtime protections are fully implemented.

The Department of Labor is examining four general areas of changes, as spelled out in its Proposed Rule:

- Updating the salary level;
- Automatically updating the salary level in the future without additional rulemaking;
- Considering whether the salary basis needs to be redefined; and
- Considering whether revisions to the "duties tests" are necessary in order to ensure that these tests fully reflect the purpose of the exemption.

For more information and an in depth discussions on The Department of Labor's proposed Rule, Jerome D. Pinn and Carol R. Merchant will present the *Department of Labor's Proposed New Regulations on Exemptions* on Thursday, November 5th, at 11:00 a.m. to 12:00 noon in the Riverview room at the Marriott Downtown Knoxville.



**Jerome D.  
Pinn**



**Carol R.  
Merchant**

**Thursday, November 5<sup>th</sup>**

**Marriott Downtown Knoxville  
Riverview Room**

*Department of Labor's Proposed New  
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### **"TOP TEN TIPS ON DEFENDING TENNESSEE WORK COMP CLAIMS"**

**continued from page 3**

evidence that the employment contributed more than 50% in causing the death, disablement, or the need for medical treatment, considering all causes. Further, the opinion of the authorized treating physician is presumed correct on the issue of causation, but this presumption shall be rebutted by a "preponderance" of the evidence. The practical effect of these changes is to bring all alleged workers' compensation injuries within the heightened "primarily" standard that had previously only been applied to repetitive motion injuries after 2011.

With the Reform Act now applying to injuries which have occurred over the last year and a half, the early consensus on how the Court of Workers' Compensation has construed the law with respect to questions of compensability is that the judges in the Court of Workers' Compensation tend to be more conservative than their state court counterparts.

For more information on the Workers' Comp Reform Act of 2013, and for an in-depth discussion on key issues of interest to employers as governed by these recent changes, Fredrick R. Baker, J. Eric Harrison, and Andrew J. Hebar will present *Top Ten Tips on Defending TN Work Comp Claims Under the New Law* on Thursday, November 5th, at 2:45 p.m. to 3:45 p.m. in the Alvin York room at the Marriott Downtown Knoxville.