



**McDermott
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TOP FIVE THINGS ALL IN-HOUSE LAWYERS NEED TO KNOW ABOUT TAX

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AGENDA

- Key things to know about potential changes to the tax law/issues to consider with a remote workforce
- Risk management – insurance renewals in a hardening market/opportunities for a captive insurer
- Doing business in Chicago and the unexpected tax challenges
- How to get money back from the government for Consolidated Omnibus Budget Reconciliation Act (COBRA)-related costs
- What you already know that the tax department needs to know (and vice versa)



KEY THINGS TO KNOW ABOUT POTENTIAL CHANGES TO THE TAX LAW

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- Currently looking to corporate and international tax changes to finance entire infrastructure spending package
- Democrats have very narrow lead in House and Senate
- Increase in corporate tax rate: Likely to be **between 28% and 25%**
- International tax rule changes generally focus on increased tax rates, and benefits granted based on creation of new jobs in the U.S.
 - Increase rate on income earned by foreign subsidiaries of US companies and eliminate tax subsidy for US corporations earning income from sales and services to foreign customers.
 - Eliminate alternative tax on US parented corporations making large deductible payments to foreign companies (“BEAT” rules); only apply this rule to foreign parented groups.

KEY THINGS TO KNOW ABOUT POTENTIAL CHANGES TO THE TAX LAW

- **Increase Tax on Income of Foreign Subsidiaries of US Parents:**
 - **Currently:** Foreign corporate earnings taxed at around **12.5%** rate (and potentially lower depending on foreign taxes paid on such earnings)
 - **Proposed change:** Increase rate to **21%** (?); reduce ability to use foreign taxes to offset US taxes; eliminate benefit for foreign based assets.
 - **Effect:** Higher tax on offshore earnings would make US companies attractive targets

KEY THINGS TO KNOW ABOUT POTENTIAL CHANGES TO THE TAX LAW

- Eliminate/Reduce Subsidy for US Corporations Earning Income from Selling Products or Services Outside the US:
 - **Currently:** US corporations that earn income from selling products to non-US customers or licensing intangible property to non-US persons or providing services to non-US persons are taxed at a lower rate (around 13%)
 - **Proposed Change:** Eliminate rule and increase benefit for R&D deductions or change the rules by increasing US tax rate and making benefit depending on US based R&D related activities. Both focus on increase of US based R&D activities.
 - **Effect:** Negatively impacting companies that own their intangible property in the U.S. and exploit it outside the U.S. (but have R&D performed outside the U.S.)

ISSUES TO CONSIDER WITH A REMOTE WORKFORCE

- Local Country Taxable Presence / “Permanent Establishment” (“PE) Issues”

- If a US company has employees located in an other countries (e.g., Country A) France or Brazil for example), the US company may ITSELF be subject to tax in Country A.
- If US company has a taxable presence/PE in Country A, US company will be subject to US tax in Country A on some of its income (the income attributable to the activities of the employee in Country A) and will have to file a tax return in Country A. If the company is a partnership all of the partners may have to file tax returns in Country A.

- Local Country Employment Tax Issues

- Employees located abroad may become subject to local country employment taxes (both income and social security) in Country A and employer may be obligated to comply with withholding such taxes
- Assuming a US company employs an individual in Country A and Country A is a Treaty Country no Country A tax should be imposed on individual employee if:
 - The individual was present in Country A for less than 183 days in a 12 month period
 - Individual was paid by a US company and no Country A company reimbursed US company
 - US company did not have taxable presence or “permanent establishment” as a result of having employee in Country A.



RISK MANAGEMENT: INSURANCE RENEWALS/ OPPORTUNITIES FOR A CAPTIVE INSURER

RISK MANAGEMENT

INSURANCE RENEWALS IN A HARDENING MARKET

- What are we seeing in 2020 / 2021 renewals?
 - Pricing is up across most lines and classes
 - Moderate conditions may be emerging
 - Expect ongoing pressure on limits and retentions
- Why did the market harden?
 - Industry leaders point to a necessary market correction due to years of underpricing combined with an uncertain risk environment
 - Pandemic, environmental factors, litigation
- Lessons learned?
 - Cash and liquidity constraints
 - Gaps and exclusions in coverage

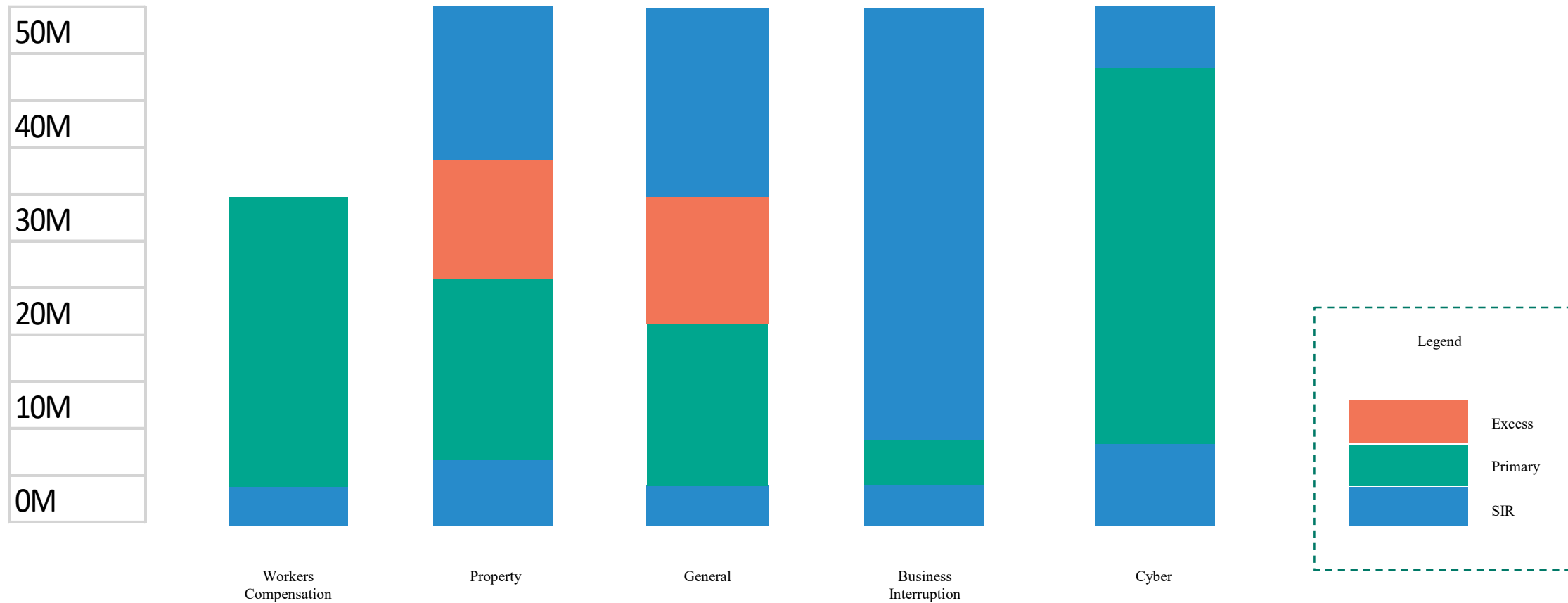
RISK MANAGEMENT

INSURANCE RENEWALS IN A HARDENING MARKET

- What can you do?
 - Undertake a risk management coverage review
 - Review all of your policies – identify gaps and understand exclusions
 - Revisit captive insurance
 - Can a captive fill a gap in coverage?
 - Can a captive write a policy customized to your business?
 - Can you reduce costs / improve loss experience by centralizing risk management?
 - Can you reduce insurance costs by accessing the reinsurance market with a captive
- What are we seeing?
 - Increased use of captives
 - Up by 283% in areas such as supply chain and business interruption

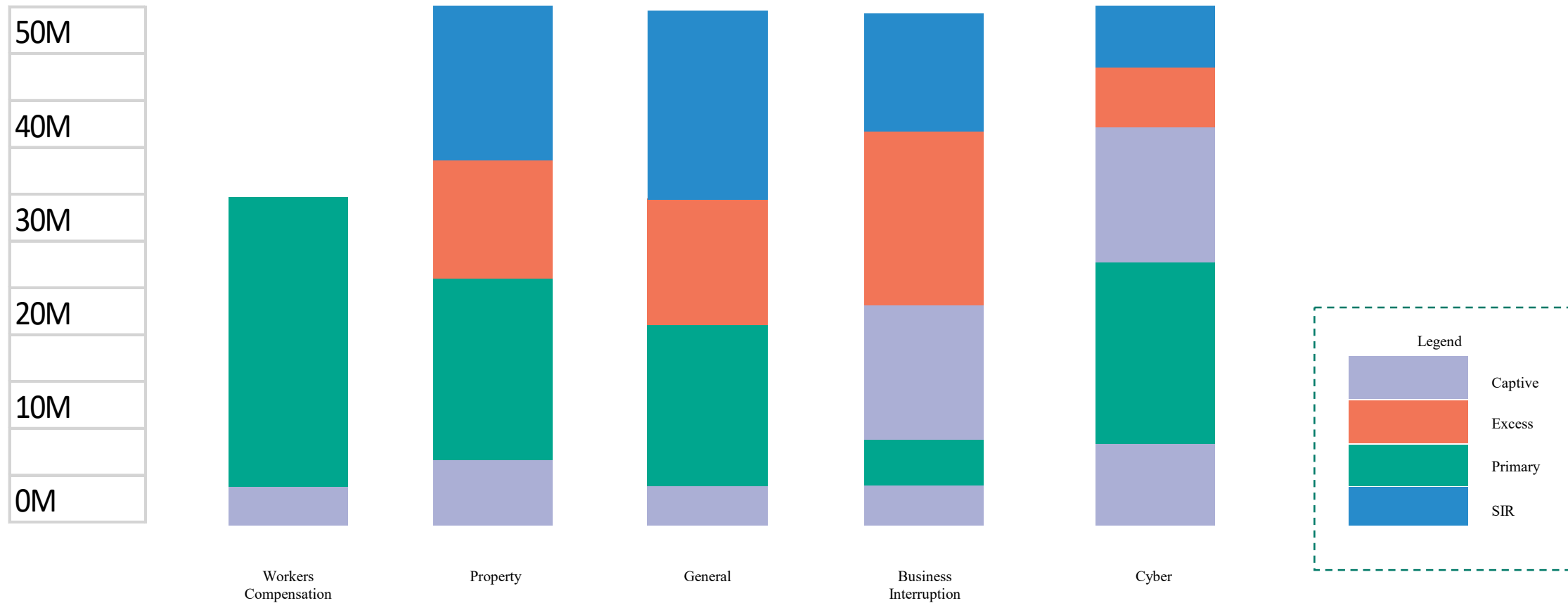
RISK MANAGEMENT

OPPORTUNITIES FOR A CAPTIVE INSURER



RISK MANAGEMENT

OPPORTUNITIES FOR A CAPTIVE INSURER



RISK MANAGEMENT

OPPORTUNITIES FOR A CAPTIVE INSURER

- What is a captive insurance company?
 - Licensed insurer
 - Insure/reinsures risks of owner, affiliated parties, certain unrelated parties
- What risks can a captive cover?
 - Traditional property and casualty lines
 - Medical stop loss
 - Employee Benefits (sometimes requires DOL approval)
 - Life and annuity lines
 - TRIA
- What risks cannot be direct written by a captive?
 - Cannot direct write lines requiring local license, e.g., workers compensation, automotive

RISK MANAGEMENT

OPPORTUNITIES FOR A CAPTIVE INSURER

- Regulatory Framework
 - Regulated by department of insurance
- Tax Framework
 - Taxed as a corporation under Subchapter L
 - Common law principles
 - What is insurance for federal tax purposes?
 - State taxes
- What resources will be needed?
 - Internal – legal, risk management, treasury, tax
 - External – local counsel, actuary, auditor, captive manager

RISK MANAGEMENT

OPPORTUNITIES FOR A CAPTIVE INSURER

- So, should you have a captive?
 - Risk management should drive this decision – can a captive drive a better risk management result? Can a captive reduce costs?
 - Other considerations:
 - Ongoing resource requirements
 - Compliance considerations
 - Access to cash
 - Investment constraints
 - Tax complexity



DOING BUSINESS IN CHICAGO AND THE UNEXPECTED TAX CHALLENGES

DOING BUSINESS IN CHICAGO AND THE UNEXPECTED TAX CHALLENGES

- City of Chicago Personal Property Lease Tax
 - 9% of receipts or charges for leases
 - Includes a “nonpossessory computer lease”
 - Historically, applied to terminal-based, direct connection system. *See Meites v. City of Chicago*, 184 Ill. App. 3d (1st Dist. 1989)
 - Expanded to tax any information subscription service
 - Lower 7.25% rate for charges for the non-possessory lease of a computer to input, modify, or retrieve data supplied by the customer

DOING BUSINESS IN CHICAGO AND THE UNEXPECTED TAX CHALLENGES

- City of Chicago Personal Property Lease Tax Exemptions
 - Charge predominantly for information:
 - “Under rules to be prescribed by the department, the nonpossessory lease of a computer in which the customer’s use or control of the provider’s computer is de minimus and the related charge is predominantly for information transferred to the customer rather than for the customer’s use or control of the computer, such as the nonpossessory lease of a computer to receive either current price quotations or other information having a fleeting or transitory character.”
 - City contends this exemption is only applicable to “real-time” information
 - Predominant use outside of Chicago:
 - “The use in the city of personal property leased or rented outside the city if the property is primarily used (more than 50 percent) outside the city.”

DOING BUSINESS IN CHICAGO AND THE UNEXPECTED TAX CHALLENGES

- City of Chicago Amusement Tax
 - 9% tax on amusements
 - Applies to charges paid for the privilege to witness, view or participate in amusements delivered electronically
 - Does not apply to permanent downloads
 - Tax applies if billing address is within the City of Chicago
 - *Labell et al. v. City of Chicago et al*, 2019 IL App (1st) 181379

DOING BUSINESS IN CHICAGO AND THE UNEXPECTED TAX CHALLENGES

- Cook County Parking Tax
 - 6% of the charge or fee paid for parking for a 24-hour period or less
 - 9% of the charge or fee paid for parking for a weekly or monthly period
 - New enforcement measures against commercial office buildings for free parking provided to their tenants
 - Continued enforcement measures to collect parking tax on private lot parking

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HOW TO GET MONEY BACK FROM THE GOVERNMENT FOR COBRA-RELATED COSTS

COBRA SUBSIDIES 2.0

AMERICAN RESCUE PLAN ACT

- Applies to *all employers who sponsor health plans* and have more than 20 employees
- Both insured and self-funded
- Mandatory notice
- Mandatory “fronting” of premiums
- ARPA does not extend total COBRA timeframes (e.g. still only 18 months of COBRA)
- The excise tax for COBRA violations “could be as much as \$100 per qualified beneficiary” (to a family maximum of \$200) for each day that the violation continues.

TWO PARTS TO ARPA

- COBRA Subsidies
 - From April 1st - September 30th
- 2nd and 3rd quarters
- Front 100% of premiums for individuals who were “involuntarily terminated” and on COBRA for 2nd and 3rd quarters
- Get refund from government when filing Form 941 (July/Oct 2021)
- Second “Bite at the Apple”
- Go back to 11/1/2019
- Find individuals who did not elect COBRA or terminated COBRA early who were involuntarily terminated
- Offer them another chance to elect COBRA
- Get refund from government for subsidies for 2nd and 3rd quarters


QUESTIONS

What are employers asking?

- M&A context – How to get employment info for involuntarily terminated
- Resignations that were actual terminations
- Severance plans with employer subsidies already built in
- Revisions to Model Notices released last month
- Who gets these COBRA notices?
- Penalties for noncompliance

Tools for your clients

- Explanation of how to apply for credit (pending new Form 941)
- Explanation of ARPA in general (including penalties for non-compliance)
- Cost of additional administration from COBRA vendors and riders to agreements to administer



WHAT YOU ALREADY KNOW THAT THE TAX DEPARTMENT NEEDS TO KNOW (AND VICE VERSA)

WHAT YOU ALREADY KNOW THAT THE TAX DEPARTMENT NEEDS TO KNOW (AND VICE VERSA)

- Why your tax department needs you
 - Privilege – what it is, what it's not, and how to protect it
 - “Business Purpose”
 - Litigation support
 - Legal support and sanity check for tax restructuring initiatives
- Why you need your tax department
 - Public filings – joining the left and right hands
 - Acquisitions/dispositions/internal transactions

QUESTIONS/ THANK YOU

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