

LEGALLY SPEAKING / Call Before You Dig: Hidden Risks of Excavating

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You've most likely heard of the "Call Before You Dig" statute, but did you know that even if you give the notice required under the statute, you could still be assessed a civil penalty and found liable for repair costs, court costs, attorney's fees and punitive damages if you damage an underground utility line? Read on for tips to protect your business from potential liability.

Before you dig, you must:

(1) provide notice to the Indiana Underground Plant Protection Service ("IUPPS") that you intend to excavate, and (2) specify the physical location of the proposed excavation, or perform "white lining," or marking, of the area to be excavated. See Ind. Code § 8-1-26-16. Although giving notice will protect a contractor from incurring certain statutory fines, notice alone will not protect a company from liability should the excavation cause damage to an underground utility line.

Pursuant to Indiana Code § 8-1-26-22, if the contractor, in digging, causes "pecuniary loss" to the operator of an underground utility line that results from a violation of the statute, the operator may sue the contractor for: (1) actual damages to the utility line, (2) the cost of the lawsuit, and (3) reasonable attorney's

fees. Ind. Code § 8-1-26-22. The court may also, at its discretion, award punitive damages up to three times the amount of the operator's actual damages. *Id.* The statute requires more than just notice and a contractor may violate the statute, and therefore be liable for these damages, even if it satisfies the notice requirements under the statute. Notably, after providing notice, and once the underground utility lines are marked, it is a violation to come within two feet of a marked underground utility line with the cutting edge or point of mechanized equipment. In essence, even after notice is given and all utility lines are marked, the contractor may be held to a "strict liability" standard and found liable for any damage caused to an underground utility line.

This possibility should encourage caution, even when the excavation is guided by markings that show the position of underground utility lines. These markings may not be precise and are only two dimensional—they do not reflect the depth of the underground equipment. In some instances, a pipe or conduit will have settled or sagged to a greater depth than expected; thus, despite an accurate surface indication, the contractor cannot predict with certainty the depth of the line and may be liable for accidentally damaging the line. For example, if a contractor attempts to excavate under a pipe that is believed to be five feet below the surface, and then accidentally hits the pipe because that particular section of pipe had sagged several feet, the contractor risks a potential claim from the utility operator under the statute.

Actual costs and expenses to repair the underground utility line, the

cost of a lawsuit, attorney's fees, punitive damages, and civil penalties are not the only damages that a contractor may face in defending a claim brought by a utility operator under this statute. Third parties may also attempt to assert claims for consequential damages. Consequential damages claimed by a third party as a result of a loss of utility service may include loss of business and temporary replacement of lost services.

Due to unknown factors such as the actual depth, you cannot fully eliminate the risk of damaging underground utility lines and equipment. But you can manage the risk by understanding your obligations under the statute, using extreme caution when excavating in areas where underground utility lines have been marked and obtaining insurance that covers this risk to the fullest extent possible. To ensure that your business is fully protected from the attendant risks of excavation, contact your insurance agent and your attorney to review your policy and to help you decide the appropriate type and amount of insurance you should purchase to cover these risks to the extent possible.

