The ABCs of Employment Practices Liability Insurance Coverage

by Darin J. McMullen

Although many employers regularly face employment litigation, employment-related lawsuits tend to increase during a stagnant or faltering economy. At such times, companies of all sizes are exposed to employment practices litigation, which can have enormous defense costs even if a settlement or verdict is relatively low. In order to best insulate themselves from costly verdicts, settlements and defense costs, policyholders should consider and understand employment practices liability insurance (EPLI) policies, including key concepts related to what is and is not covered, who is covered and how EPLI coverage operates.

EPLI policies are relatively new, having been introduced less than 20 years ago. Although an approved ISO form EPLI policy exists, EPLI policies are most often sold as manuscript policies and can have varying coverage terms and exclusions. Because EPLI policies are not uniform, a policyholder must carefully read a proposed policy prior to purchase. The key is assessing whether, based upon the policyholder's business, the policy will provide coverage for the employment claims that it is most likely to deal with and for whom such coverage will be provided.

Typically, EPLI policies cover a wide variety of employment-related claims including claims of discrimination based upon race, age, gender or national origin. Claims alleging sexual harassment, wrongful termination and retaliation are also commonly covered. Additionally, EPLI suits may also provide coverage for claims alleging breach of employment contracts, defamation, failure to promote or negligent evaluation, wrongful discipline and workplace torts. EPLI policies will provide coverage for the corporate entity as well as its employees, including supervisors, managers, directors and officers who are often named as individual defendants in employment litigation.

Although EPLI policies cover a broad spectrum of employment-related claims, this coverage is not unlimited. Among the more commonly excluded claims are those arising under the National Labor Relations Act, the Worker Adjustment and retraining Notification Act, the Fair Labor Standards Act, ERISA, OSHA claims, claims for punitive damages, claims alleging intentional acts, as well as claims arising under workers compensation laws. It is therefore important to evaluate whether or not your company is likely to face the types of claims that are excluded from coverage.

EPLI policies traditionally provide for indemnification as well as the defense of employment-related claims. The nature of these obligations should be understood by the policyholder. Often your insurance company's indemnification obligation is for amounts that the policyholder is "legally obligated" to pay in connection with a "wrongful employment act." The term "wrongful employment act" is often defined in the policy. In order to be apprised of what may or may not be covered by your policy's indemnification provision, it may also be helpful to discuss with counsel how those terms have been interpreted in the jurisdiction or jurisdictions where the policyholder is likely to be sued.

Because the defense costs associated with employment litigation often exceed the actual damages awarded or paid through settlement, the defense provisions of an EPLI policy are critical. Typically, defense costs are included in and subject to the limits of insurance. The defense provisions of your EPLI policy may require your insurance company to defend the claims, or it may simply require that the insurance company pay for the cost of defending claims. If your insurance company is only required to reimburse or pay for defense costs, you have more latitude in selecting your counsel of choice, subject to insurance company approval.

If your insurance company is required to defend the claims, it may appoint counsel from a pre-approved list of "panel counsel" - the members of which often have a pre-existing relationship with your insurance company. If defense counsel is appointed by your insurance company under a reservation of rights letter, it is critical for a policyholder to monitor the potential conflict of interest that arises from that attorney's dual representation of you and your insurance company. In such cases, the policyholder may be entitled to independent counsel of its choice.

Understanding how your EPLI policy defines a claim is critical because a claim triggers when your insurance company begins to incur liability for defense costs. While policy language varies, "claim" is often defined to include "written demands for monetary or non-monetary relief" and can also include the mere request to toll the statue of limitations on a claim. Additionally, the commencement of civil, administrative or arbitration proceedings is also considered a "claim" under many policies. Policyholders should be familiar with this language, as well as the reporting requirements of

your policy, and should err on the side of caution by providing notice to their EPLI carriers as soon as possible. When in doubt, provide notice and eliminate any subsequent late notice defenses your insurance company may be otherwise tempted to raise.

Although EPLI insurance is still an evolving product, with a relatively small body of case law interpreting policy ambiguities, an understanding of these concepts will increase a policyholder's odds of avoiding coverage disputes - or prevailing in them.

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