

Matching Your EPLI to Your Actual Employment Risks

by Robert M. Horkovich and Darin McMullen

No employer is immune from employment-related lawsuits, particularly at a time when the Department of Labor, the Equal Employment Opportunity Commission and the National Labor Relations Board are inclined to take an employee's side in disputes. Employment practices liability insurance (EPLI) provides important protection against this ongoing but ever-evolving risk.

Prudent companies seeking to minimize exposure for employment-related lawsuits should appreciate the nature of employment practices liability insurance and how it applies to emerging trends in employment litigation.

BROAD COVERAGE GRANTS, BUT NO UNIFORMITY

Employment practices liability insurance policies are not one-size-fits-all. They frequently are sold as manuscript policies and can have varying coverage terms and exclusions. This lack of uniformity requires a policyholder to carefully assess the most frequent or likely employment-related claims it may face and purchase the policy that best suits its needs. Nevertheless, EPLI policies typically provide coverage for a broad range of claims, including claims of discrimination based on race, age, gender or national origin, as well as claims alleging sexual harassment and wrongful termination.

Some EPLI policies also may provide coverage for claims alleging breach of employment contracts, defamation, failure to promote or negligent evaluation, wrongful discipline, and workplace torts. Wage-and-hour claims likely will be covered only by endorsement, as discussed below.

Most EPLI policies also provide coverage for retaliation claims, which surpassed race-based discrimination claims in the past four years as the most frequently filed charge with the EEOC. Thus, hospitality employers can take some measure of comfort in knowing that types of claims that are becoming most frequent are covered under most standard EPLI policies.

Of course, EPLI policies are not without limitation. Commonly excluded claims include those arising under the National Labor Relations Act, the Worker Adjustment and

Retraining Notification Act, and the Employee Retirement Income Security Act. Exclusions also include Occupational Safety and Health Association claims, claims for punitive damages, claims alleging intentional acts, and claims arising under workers' compensation laws. These types of claims are common, and certain employers may be more susceptible to them than to covered claims. It is imperative to evaluate whether or not your company is likely to face the types of claims that are excluded from coverage in advance of purchasing your EPLI policy.

Traditionally, EPLI policies provide for indemnification as well as the defense of employment-related claims. The indemnification obligation is typically for amounts that the policyholder is "legally obligated" to pay in connection with a "wrongful employment act." The term "wrongful employment act" often is defined in the policy and can vary widely from policy to policy. It therefore is imperative to understand exactly what is and is not a wrongful employment act under your specific policy.

DEFENSE COSTS LOOM LARGE—AND COVERAGE VARIES WIDELY

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 they simply may require that the insurance company pay for the cost of defending claims. Familiarity with the defense provisions is critical because often the cost of defense of employment-based lawsuits will be greater than the cost of any settlement, verdict or award.

WAGE AND HOUR, A LA CARTE

Recently, wage-and-hour class action lawsuits under the Fair Labor Standards Act and its state law equivalents increasing have become popular among class action law firms. Because wage-and-hour suits typically allege violations of the FLSA with regard to the method by which employees are paid, they are particularly problematic for many in industries that pay employees by the hour, including tips.

Fine Print

For employers with large workforces, the potential liability in these cases can be staggering, often in the tens to hundreds of millions of dollars. Moreover, claims arising under the FLSA traditionally have been excluded under many EPLI policies.

The proliferation of these class action wage-and-hour suits has resulted in a number of insurance companies selling an endorsement that provides coverage for wage-and-hour claims under the FLSA. Many of these endorsements do not provide indemnification and only provide coverage for defense costs, which easily can escalate and total in the millions of dollars. Although coverage of defense costs is of great benefit, policyholders must understand the scope of exactly what type of coverage they are purchasing for FLSA claims and wage-and-hour class action lawsuits.

As emerging technologies introduce new risks, and as wage-and-hour class actions proliferate, employers face new vulner-

abilities with regard to their employment practices. Although many aspects of EPLI policies are suited to meet the emerging trends and claims in employment litigation, policyholders only can maximize their EPLI coverage through a full analysis of available policies and understanding of the terms of their current coverage. ■

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