



Employment Practices Liability Insurance and the #MeToo Movement

by Robert M. Horkovich and Mark Garbowski

The #MeToo movement has driven many companies to ramp up efforts to prevent and police sexual harassment in the workplace. But not even the best policies and practices can prevent all claims of harassment. Although there are many hurdles and prerequisites to securing insurance coverage for sexual harassment, employment discrimination and other employee claims, a company's insurance policies are a critical source for financial support against such claims.

Employment practices liability insurance (EPLI) policies usually cover claims for discrimination on the basis of race, national origin, religion, sex (including pregnancy), age or disability, including related claims for harassment. Policies commonly exclude claims arising under workers compensation laws and policies, and claims under federal labor laws unrelated to discrimination or harassment, such as union-related laws, the Worker Adjustment and Retraining Notification Act, the Fair Labor and Standards Act, the Employment Retirement Income Security Act and COBRA. Policies are not uniform, so read them carefully. Even if a particular policy excludes one of the above types of claims, it might be possible to have it added by endorsement.

One issue is the extent to which many of the claims purportedly covered under EPLI policies are insurable. Based on public policy, states often place limits on the extent to which intentional acts may be insured and claims of discrimination or harassment often can include allegations of knowing and intentional acts. Thus, a company should consider carefully when purchasing an EPLI policy which state's law likely will apply and whether that state has commented on the public policy issue.

RETRO DATES

EPLI policies are generally sold on a claims-made basis, which

means claims made against the company during the policy period are covered. There are some wrinkles to consider, however, if one is buying such a policy for the first time or changing insurance companies for better terms or coverage. Most claims-made EPLI policies have a retroactive date, which states that claims made during the policy period based on acts that took place before a certain date are not covered. When buying new coverage, negotiate for the earliest retro date you can get, taking into consideration relevant statutes of limitation. When switching insurance companies, one option that is sometimes available is to purchase "tail coverage" under the expiring policy that extends it to cover claims in the future, as long as the underlying acts took place before the policy expired. This can allow the new policy to have a retro date simultaneous with the policy inception. Also, consider giving notice under the expiring policy for potential claims that have not yet been made. Some policies require this, while others permit it at the policyholder's discretion. Be forthright when answering any questions on a policy application regarding known or potential claims, as this can be a minefield and lead to a misrepresentation/concealment defense.

DEFINITION OF A CLAIM

A policyholder usually will receive notice of an employment claim in one of four ways:



- Oral complaint from an employee
- Written notice from a claimant
- Written notice from an agency such as the Equal Employment Opportunity Commission
- Receipt of a lawsuit

Should your company be faced with a claim related to its employment practices, immediately notify, in writing, all insurance companies that may possibly provide coverage for that claim and forward all relevant information regarding the claim to the insurance company.

Whether any or all of the above will trigger coverage under a particular policy will depend upon the policy's "claim" definition. This definition can affect when notice is due, when defense costs are covered, and other secondary but important matters. Ideally, the definition will include provisions that the demand can be for relief other than monetary damages, including "reinstatement, reemployment or re-engagement." Such a change does more than effect a change in when coverage is triggered—it can create a much broader substantive coverage grant.

DEFENSE COSTS AND RELATED ISSUES

EPLI policies commonly require the insurance company to pay the costs of defending claims. Disputes may arise over whether the insurance company is required to advance defense costs or instead only reimburse the policyholder after a claim is resolved. Another common issue concerns the allocation of

defense costs among covered and uncovered claims. Whether the insurance company may pay only costs associated with covered claims may depend upon the wording of the policy as well as the applicable state law.

FRAUDULENT OR MALICIOUS ACTS EXCLUSIONS

Most EPLI policies contain an exclusion for deliberate and seriously wrongful acts. Because so many claims contain such allegations, it is common now for these exclusions to contain an exception that provides that the exclusion applies only "if a judgment or other final adjudication adverse to the Insured establishes such a deliberately fraudulent act or omission." This clause ensures that a policyholder who faces allegations of fraud will have its defense costs paid, and only will lose coverage if the fraud is proven. Some policies omit this vital exception, so make sure it is included in your policy. Another important exception provides that the criminal or fraudulent act of one policyholder will not be imputed to other policyholders. ■

Robert M. Horkovich is managing partner and shareholder in the New York office of Anderson Kill. He is a trial lawyer who has obtained more than \$5 billion in settlements and judgments for policyholders from insurance companies. **Mark Garbowski** is a shareholder in the New York office of Anderson Kill. His practice concentrates on insurance recovery, exclusively on behalf of policyholders, with particular emphasis on professional liability insurance, directors and officers insurance, fidelity and crime-loss policies, internet and high-tech liability insurance issues.