Make Sure Your EMPLOYMENT PRACTICES LIABILITY INSURANCE Covers the Right Risks

By Darin J. McMullen

While no employer is immune from employment-related lawsuits, particularly in a sluggish economy, the hospitality industry faces unique, yet recurring, challenges in terms of employment-based claims. Because the hospitality industry is among the leaders in workplace diversity, discrimination claims based on race, gender, religious beliefs and sexual orientation are commonplace. Further complicating matters for hospitality employers, employment suits arising out of employees' use of social media are burgeoning. Additionally "wage and hour" class-action lawsuits continue to proliferate, particularly for the restaurant industry, and carry with them the potential for hundreds of millions of dollars in liability. Consequently, prudent companies seeking to minimize exposure for employment-related lawsuits should appreciate the nature of Employment Practices Liability Insurance (EPLI) and how it applies to the emerging trends in hospitality based employment litigation.

EPLI policies are not one-size-fits-all, as they are frequently 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 upon race, age, gender or national origin, as well as claims alleging sexual harassment and wrongful termination. Some EPLI policies may also 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 will likely 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 what 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 (NLRA), the Worker Adjustment and retraining Notification Act (WARN), ERISA, OSHA claims, claims for punitive damages, claims alleging intentional acts, as well as 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. Consequently, 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 of your insurance company is typically 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 and can vary widely from policy to policy. Because of this variance, it is imperative to understand exactly what is and is not a "wrongful employment act" under your specific policy.

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 may simply require that the insurance company pay for the cost of defending claims. Once again, 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.

Recently, "wage and hour" class-action lawsuits under the FLSA, or its state-law equivalents, have become increasingly common and increasingly popular among class-action law firms. The restaurant industry, particularly national and international franchises, have been popular targets of this type of litigation. "These "wage and hour" suits allege violations of the FLSA arising out of how employees are paid, which are particularly problematic for industries which pay its employees by the hour, including tips."

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

Ironically, 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 can easily escalate and total in the millions of dollars. Although coverage of defense costs is of great benefit, policyholders must appreciate and 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, the hospitality industry finds itself with an ever-expanding target on its back. Consequently, hospitality businesses have an increasing need to look to EPLI coverage for these growing potential liabilities. Although many aspects of EPLI policies are suited to meet the emerging trends and claims in employment litigation, policyholders can only maximize their EPLI coverage through a full analysis of available policies and understanding of the terms of their current coverage.

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