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EPLI Coverage for Claims Stemming from the Coronavirus

In uncertain times, and with employers facing liability from novel circumstances, EPLI coverage affords a policyholder the ability to offload much of this newly developing risk.

By **Daniel J. Healy and John M. Leonard** | January 10, 2022

For almost two years COVID-19 has disrupted the workplace and posed dilemmas for employers and employees alike. For employers, tough decisions entail potential liabilities to employees and others. Claims already have materialized and may persist for some time.

A sometimes overlooked form of coverage, Employment Practices Liability Insurance, or “EPLI,” may prove to be an invaluable resource for employers.

A typical EPLI policy will insure against wrongful employment practices. Such practices, while perhaps well-planned and well-intended, can lead to allegations of discrimination, sexual and workplace harassment, wrongful termination or retaliation. Sometimes the lack of a formal practice or procedure can lead to claims based on alleged failure to create adequate workplace or employment policies and procedures. EPLI policies can respond to all of these types of allegations.

EPLI policies may contain exclusions relating to personal injury, pollution-related losses, or losses for which the policyholder had knowledge prior to the policy period of a potential claim. Frequently, EPLI policies exclude insurance coverage for losses arising out of an alleged violation of a statute, such as the Occupational Safety and Health Act (OSHA) or the National Labor Relations Act (NLRA). As with any insurance policy, exclusions in an EPLI policy must be construed narrowly and in favor of coverage.

The Growing List of Reasons to Remember Your EPLI Policy

Considerations surrounding workplace rules in response to the pandemic are major, daily topics for employers. While almost everyone agrees that employers should maintain safe working conditions, many disagree on what is safe and what is over-stepping an employer’s rights over its employees.

Recognizing this responsibility, OSHA has implemented emergency temporary standards (“ETS”) to protect workers from the threat of COVID-19. Running afoul of these government mandates leaves employers open to penalties through OSHA and liability arising from employees adversely affected by the employer’s noncompliance. Moreover, failure to comply with new OSHA ETS could foreclose insurance coverage for such an employer under the exclusion for statutory violations found in many EPLI policies.

Strict adherence to the federal government's directives does not guarantee a workplace free from the threat of coronavirus. An employer could abide by OSHA's ETS to the letter and still have employees fall ill with COVID-19. Employees, too, could comply with their employers' rules regarding COVID-19 safety and still contract the virus. And a worker who gets sick through an actual or alleged contact at their workplace could seek to hold their employer liable for resulting damages.

Unfortunately for employers in such a scenario, many EPLI policies exclude insurance coverage for bodily injury or sickness. However, in turn, many EPLI policies also carve out coverage from this exclusion for emotional distress, mental anguish, and loss of reputation. Contracting a virus that has to date caused the deaths of approximately 750,000 Americans surely would cause an employee emotional distress. Depending on the nature of a claim by an employee against their employer, such a cause of action could trigger coverage under an EPLI policy.

If the employee is required to work in a workspace that leads to infection with the COVID-19 virus, that could be the basis of a purported claim. Similarly, if an employer requires an employee to work in a workplace that the employee believes (perhaps deeply) is not safe and puts the employee in danger of being infected with the COVID-19 virus, perhaps the workplace policy creating the allegedly unsafe workplace could be the basis for a claim. Conversely, employees who refuse to or claim to be unable to comply with required employer policies—such as vaccine mandates or mask mandates—may claim to be adversely affected. Employees often raise religious bases for refusing to comply with such mandates. Others claim that employer restrictions are violations of civil rights.

Since employees commonly work in widely varying roles, there may be legitimate reasons to treat them differently. However, employees may not agree with an employer's disparate treatment of employees or may not agree with the line at which an employer draws a distinction, especially regarding COVID-19 precautions. Vaccinations and masks have become hot-button issues for many people. It is no surprise that employees for a single company can have opposite views, putting employers in difficult positions regarding the appropriate and safe approach to take and what measures to take to enforce safety protocols.

As employee suits often entail a thicket of covered and potentially uncovered claims, it's important to recognize that the duty to defend is generally broader than the duty to indemnify. Many EPLI policies provide that the insurance company must defend the policyholder against suits brought under the policy's broad coverage grant. In New York and other jurisdictions, an insurance company must defend if the allegations of the underlying complaint even potentially implicate coverage. And while an insurance company generally cannot look to facts beyond the policy and the underlying complaint to avoid its duty to defend, it must defend if it is aware of facts outside of those key documents that bring the suit within coverage. Finally, if any part of the complaint alleges a covered loss, the insurance company must defend.

This general defense framework is important for several reasons. First, an injured employee may allege numerous covered causes of action, but also allege a violation of OSHA or a bodily injury cause of action. While an insurance company could argue for the application of an exclusion to foreclose coverage for these causes of action, the inclusion of allegations of covered losses would trigger the duty to defend the entire action. Even a complaint that alleges only a violation of OSHA may be covered, as OSHA's ETS does not apply universally to all employers. Companies with fewer than 100 employees do not fall within the strictures of the ETS. If an employer can make a good faith showing to its insurance company that it complied with all OSHA requirements – or that the OSHA ETS does not bind the employer – that insurance company rightfully should defend its policyholder as it promised to do in the policy.

EPLI Coverage as Safeguard Against Retaliation Claims by Employees

Citing purported freedoms or relying on unverified propaganda regarding risks or ineffectiveness of the vaccines, many people have refused the COVID-19 inoculation. Employers have a right, and in many instances, a duty, to keep and maintain a safe workplace for their employees. Nonetheless, employers that have implemented vaccine mandates face a difficult decision with employees who refuse to comply: loosen restrictions, or terminate the employee. The latter choice opens the employer up to potential allegations of retaliation or wrongful termination in response to the employee's refusal to abide by what the employee may consider overly restrictive workplace requirements.

Fortunately for the policyholder employer, EPLI policies mostly insure against claims of retaliation and wrongful termination. In the first instance, the insurance company should defend the policyholder against the retaliation claim under the framework discussed above. Should the defense prove unsuccessful, the insurance company should indemnify the policyholder under the (generally) broad coverage grant of the EPLI policy.

Employers in a position to make an employment decision based upon an employee's vaccination status must weigh the value of a safe workplace against the potential for liability from a scorned employee. A proper EPLI policy can afford the policyholder peace of mind that it is potentially protected from liability for the difficult choice that it faces.

Conclusion

As with any insurance program, the applicability of EPLI coverage will depend on the facts of each particular claim. However, as a threshold matter, EPLI policies are intended to insure against the broad variety of possible claims that an employer may encounter. In uncertain times, and with employers facing liability from novel circumstances, EPLI coverage affords a policyholder the ability to offload much of this newly developing risk.

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