Buying the Right Employment Practices Liability Insurance Policy

by Robert M. Horkovich and Darin J. McMullen

As the American economy struggles to recover from recession, employment-related lawsuits are rising at an alarming pace. The United States Equal Employment Opportunity Commission (EEOC) reported that for fiscal year 2010, private-sector workplace discrimination charges filed with the agency nationwide reached an all-time high of 99,922. Employment suits arising out of employees' use of social media are burgeoning, as are "wage and hour" class-action lawsuits, which carry with them the potential for hundreds of millions of dollars in liability. Consequently, companies seeking to minimize exposure for employment-related lawsuits need to exercise considerable due diligence in the purchase of employment practices liability insurance (EPLI) policies. While EPLI policies potentially offer broad protection against the most prevalent risks, purchasing the wrong policy may radically diminish the value of the insurance.

EPLI policies are not one-size-fits all: 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. Notwithstanding important differences, 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.

Most EPLI policies also provide coverage for retaliation claims, which the EEOC reports surpassed race-based discrimination claims as the most frequently filed charge nationwide in 2010 -- a year in which employee claims saw an across-the-board increase, including in charges based upon race, age and disability. Policyholders 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 -- and again, exclusions vary quite a bit from policy to policy. Commonly excluded claims include those arising under the National Labor Relations Act (NLRA), the Worker Adjustment and retraining Notification Act (WARN), the Employee Retirement Income Security Act (ERISA), Occupation Safety and Health Administration (OSHA) claims, claims for punitive damages, claims alleging intentional acts and claims arising under workers compensation laws. These types of claims are common, and many employers are aware that they are particularly exposed to some or all of them. Such companies must take care to avoid buying EPLI policies that exclude the very risks for which they are seeking coverage.

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" is often defined in the policy and can vary widely from policy to policy. Because of this variance, a policyholder must 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 it may simply 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.

Recently, "wage and hour" class-action lawsuits under the Fair Labor Standards Act (FLSA) or its state-law equivalents have become increasingly popular among class-action law firms. These suits, alleging violations of the FLSA arising out of the rules governing how employees are paid, often focus on issues such as paid breaks during the workday, donning and doffing of equipment, or overtime pay. 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.

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 such claims under the FLSA. Many of these endorsements do not provide indemnification and only provide coverage for defense costs -- which, in "wage and hour" class-actions, can easily escalate into 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.

The best means of controlling EPLI risks is to establish strong workplace rules and comply with them. In hard economic times, however, suits proliferate, and no employer is immune. That reality heightens the need for employers to be smart shoppers when purchasing EPLI insurance, and to be sure that policy terms cover their most salient risks. ■

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