

Managing the Risk Of Employee Claims

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► **Employers face a wide variety of claims. Employment practices liability insurance (EPLI) provides coverage and pays defense costs.**

THE #METOO MOVEMENT HAS NATURALLY caused many companies to make greater efforts to prevent and police sexual harassment in the workplace. Protecting employees from any form of sexual misconduct, harassment and even violence should undoubtedly be the primary goal of these efforts.

Even so, there will be incidents, claims and other occasions that will require companies to protect their interests. In such situations, counsel and risk managers should consider employment practices liability insurance (EPLI), which can provide coverage and pay for the defense of such claims. EPLI policies cover the many types of the claims employees make against their employers that are not covered by workers' compensation policies, including sexual harassment.

Initial Matters

EPLI policies are generally sold on a claims-made basis, which means that claims made against a company during the policy period are covered. There are some wrinkles to consider, however, especially if one is buying such a policy for the first time, or perhaps changing carriers for better terms or coverage. Most claims-made policies have a retroactive date, which provides that claims made during the policy period based on acts that took place before the "retro date" are not covered. When buying new coverage, companies should negotiate for the earliest retro date they can get, taking into consideration relevant statutes of limitation.

When switching carriers, one option that is sometimes available is to purchase "tail coverage" under the expiring policy that extends the policy 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. Read your policy and choose wisely. It's also important to be careful when answering any questions on a policy application regarding known or potential claims, as this can be a minefield.

Coverage Basics

The terms, coverage and exclusions of EPLI policies vary widely, but the 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 (WARN) Act, the Fair Labor Standards Act, the Employee Retirement Income

Security Act (ERISA) and COBRA. Policies are not uniform, so read them carefully. Moreover, if a particular policy excludes one of the above types of claims, it might be possible to have it added by request by endorsement.

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

Definition of a "Claim"

A policyholder will usually receive notice of an employment claim in one of four ways: oral complaint from an employee; written notice



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from a claimant; written notice from an agency such as the Equal Employment Opportunity Commission (EEOC); or receipt of a lawsuit. Whether any or all of the above will trigger coverage under a particular policy will depend on the policy’s “claim” definition. This definition can affect when notice is due, when defense costs are covered and other secondary but

important matters. A fairly typical definition of claim reads:

Claims means:

- (A) a written demand for monetary damages;
- (B) a civil proceeding commenced by the service of a complaint or similar pleading, including any appeal therefrom;

(C) an arbitration proceeding; or
(D) a formal administrative or regulatory proceeding commenced by the filing of a notice of charges, formal investigative order or similar document.

This covers most possible claims, except for those made orally. Still, the definition could be broader and include provisions that the demand can be for relief other than monetary damages, including “reinstatement, re-employment or re-engagement.” Such a change does more than effect a change in when coverage is triggered. It can also create a much broader substantive coverage grant. Another potential broader definition would consider a request to toll a statute of limitations period to be a claim.

Defense Costs and Related Issues

Even meritless claims can be expensive to defend, and 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 just reimburse the policyholder after a claim is resolved. Another common issue is the allocation of defense costs among covered and uncovered claims. Whether the insurance company pays only costs associated with covered claims may depend on the wording of the policy, as well as applicable state law.

Policyholders may also face disputes with insurance companies over the choice of defense counsel. Here again, the policy language is key. For example, some policies attach a list of “panel counsel” that the insurance company has preapproved for the relevant jurisdiction. It is also common for a policy to provide that the policyholder can select its own defense counsel, subject to the reasonable approval of the insurance company.

In all circumstances, if the insurance company reserves the right to deny coverage, the policyholder should have broader options to choose independent counsel to protect its interests.

Interrelated Wrongful Acts

The concept of “interrelated wrongful acts” combines separate claims that arise from a set of similar and related acts into a single loss. Doing so can have various effects: It can cause the claims to be subject to only one deductible or only one set of policy limits, and it can affect whether notice is timely. Because these factors cut in different directions depending on the circumstances of each set of claims, policyholders and insurance companies do not consistently favor or oppose the grouping of claims. For example, if a large deductible is applicable, the insurance company might oppose grouping many small claims together. But if a set of claims has damages that would exceed policy limits, then the insur-

ance company might prefer grouping the claims together to confine them to the limits of a single policy.

Courts that are called upon to determine such disputes usually pay close attention to policy language. The applicable language in these situations not only varies from policy to policy, it also can be found in different policy sections – in the definition of “loss” or of “interrelated wrongful acts,” for example, or in the sections that set out the notice requirement or policy limits. It may even be found in an exclusion that provides that any claim related to a prior claim under an earlier policy is not covered. Separately, the limit of liability could provide that any claim that triggers this provision is subject to a single limit of liability.

Fraudulent or Malicious Acts Exclusions

Most EPLI policies contain an exclusion for deliberate and seriously wrongful acts. One example states that the insurance company will not be liable for any claim “arising out of, based upon or attributable to the committing in fact of any criminal or deliberate fraudulent act.”

This exclusion omits an important protection for policyholders. Because so many claims contain allegations of such acts, it is now common for these exclusions to contain an exception, saying 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 that faces allegations of fraud will have its defense costs paid, and will only lose coverage if the fraud is proved. Another common exception provides that the criminal or fraudulent act of one policyholder will not be imputed to other policyholders.

In the past, some EPLI policies had even broader exclusions for any intentional act. Many complaints alleging discrimination or sexual harassment contain allegations of conduct that arguably involves intentional acts. As a result, insurance companies have largely eliminated simple “intentional acts” exclusions from their policies, while retaining the narrower exclusion for “criminal or deliberate fraudulent acts.” A policyholder presented with a policy that contains the simple intentional acts exclusion should either negotiate the exclusion out of the policy or purchase from a different insurance company.

Complex, But Sound

The #MeToo movement is raising awareness of the various risks stemming from potential employee claims. Securing insurance coverage for claims can be complex, but a sound policy can be a critical source of financial support when dealing with such claims. A company faced with an employee claim should immediately notify the insurance companies providing coverage for that claim. And if the insurance company denies the claim, do not take no for an answer. ■