

Employment Practices Liability Insurance Could Be Right For Your Organization

By Jillian Barron

As many employers have become painfully aware, increasing numbers of employees are choosing to take workplace disputes to court. Employees are asserting a wide array of claims arising out of their employment, including discriminatory discharge and failure to promote, harassment, retaliation, failure to accommodate disabilities, and wrongful termination based on alleged violations of an implied contract or public policy. Even where the employer is ultimately successful in defending against such claims, the costs of litigation are high.

In the past, some general liability insurance policies were broad enough to cover employment-related claims. Over time, however, insurance companies have responded to increasing costs by explicitly excluding coverage for most claims arising out of employment. At the same time, they have developed a separate product called Employment Practices Liability Insurance (“ELPI”) to cover such claims.

Employers of all sizes would be well advised to consider whether EPLI is appropriate for their business. Coverage and restrictions on the employer’s autonomy vary considerably from policy to policy.

- ◆ **Coverage of claims and individuals.** EPLI generally covers a range of employment-related claims, such as those for discrimination, harassment, retaliation, wrongful discipline or termination, and intentional or negligent infliction of emotional distress. However, individual policies may exclude specific claims or, alternatively, may limit coverage to a list of specific claims. Further, coverage may be limited to claims by current or former employees, or may extend to non-employees, such as customers. Who is covered may also vary – from the employer organization itself, to its officers, directors, employees, and former employees.
- ◆ **Coverage of defense costs and damages.** Most policies contain limits on the kind and amount of costs that are covered. Some policies cover only the cost of defense, while others also cover the cost of settlement or an adverse judgment, including the opposing party’s attorney’s fees. Coverage may be excluded for punitive damages or for damages resulting from intentional acts. Coverage also may be limited to in-court litigation, or may include pre-litigation defense activities, such as investigation and responding to administrative charges.
- ◆ **Employer autonomy.** Some ELPI policies allow the insured employers to choose its defense counsel, while others leave selection of the counsel up to the insurance company. Even where the employer has some say in the decision, it may have to select counsel from a list predetermined by the insurer. Policies similarly vary with respect to whether the employer has the right to settle a claim, or to withhold approval for settlement, or whether the insurance company has the final say in such matters.

The cost of EPLI policies vary considerably, based in part on the kind of coverage chosen among the options discussed above. Additional factors impacting cost include:

- ◆ **The amount of any deductible.** An employer may prefer to reduce its premiums by having a high deductible, which serves as a kind of catastrophic insurance, leaving the employers to handle smaller claims with less weight.
- ◆ **The size and nature of the workforce, and the history of claims.** Generally, a larger workforce and number of past claims will result in higher premiums.
- ◆ **The sophistication of the employer's human resource policies.** An employer may be able to reduce ELPI cost by showing it has minimized the risk of claims through effective policies and procedures prohibiting discrimination and harassment and addressing potential employee concerns that arise.

Given the range of coverage and costs involved in ELPI policies, employers should explore the options available to them. Ultimately, the choice of whether to obtain a policy, and which one to choose, will necessarily involve some balancing of costs and benefits. Nevertheless, regardless of the choices made, most employers will want to be sure that they have the right to approve settlement terms and to select defense counsel with whom they are comfortable. Even where the insurer generally limits counsel to a pre-selected list, employers may be able to insert a provision in their policy allowing them to use specific counsel of their own choice. To ensure a policy will actually meet their needs and expectations, employers would do well to review the policy with employment counsel before a final decision is made.

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