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## Helpful Tips for Obtaining and Managing EPL Coverage

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Businesses of all sizes should have coverage for employment practice claims. EPL policies are now sold as endorsements to workers' compensation policies or packaged with property and liability policies. The EPL endorsement generally funds the defense costs for employee claims, including those that are unsuccessful.

The following actions are points to keep in mind before and after securing coverage:

- **In some cases, the insurer may have an extensive program of loss prevention as part of the EPL policy coverage and may be able to assist an organization in developing sound employment practices.**

EPL underwriters will be looking for the following common mistakes before writing the policy and assessing premiums:

- Lack of employee handbook/harassment policy.
- Insufficient applicant evaluation.
- Inadequate or erroneous documentation of personnel decisions.
- Incomplete or inaccurate employment evaluations.
- Failure to have appropriate procedures in place to investigate complaints.
- Failure to follow severance procedures for:
  - Negotiating releases and waivers of claims.
  - Providing COBRA and other required benefits information.
- **Reach agreement with the CGL, D&O, and EPL insurers on selection of defense counsel when the policies are placed or renewed.**

The choice of defense counsel can be critical to the success of an employment-related claim. Insurers may have a list of approved defense counsel, while many organizations have their own list of outside counsel that they deal with on a regular basis. In some cases, the lists may include the same names, but they may not. Large businesses with corporate risk managers or in-house counsel often prefer to predesignate the liability defense counsel, so they can maintain better control over the claim and are assured of working with counsel that understand the company and its industry. Large organizations typically have a self-insured retention of \$500,000 or \$1 million within which the business manages claims with its own defense counsel.

Most EPL forms pay for or reimburse the insured for defense costs. The insurer usually controls settlement, but businesses should make sure the insurer does not have the right to settle without the insured's consent. In order to encourage the insured to agree to settlement, insurance companies may use what is known in the industry as a "hammer clause." A hammer clause generally states that, if the insured refuses the settlement offer, the insurer's responsibility to pay the loss is capped at the amount of the settlement offer. The clause may allow for continued participation by the insurer even after the insured has rejected a settlement offer.

- **Report every likely claim situation to all insurers: D&O, CGL, EPL, and umbrella/excess carriers.**

Most policies are claims-made coverages, not occurrence coverages, so claims must be reported within the policy period itself or any extended period in order to be covered. The insurer generally agrees to pay damages only if a claim is first made during the policy period or within a 30-to-60 day period after the policy period ends. The timing of a claim can be a critical issue in pay-related discrimination cases, for example. The Lilly Ledbetter Fair Pay Restoration Act of 2009 resets the statute of limitations for pay-related discrimination cases to provide

an employee with 180 days to file a formal complaint of discrimination after receiving *each paycheck*, rather than only after the initial instance of pay discrimination.

- **Let involved parties know that EPL coverage may be available.**

When a business has an EPL policy that extends liability coverage to third parties, customers, clients, and vendors, the business's attorney should inform parties involved in a claim that the coverage may be available for the specific claim or lawsuit. When possible, protect the interests of involved parties in a settlement agreement: directors, officers, involved employees, third parties, and agents/brokers with an interest in the settlement.

Under most D&O policies the insured, not the insurance company, controls the defense of claims, although the insurance company may eventually pay for all or part of the defense. Risk managers may require that the insurer include a provision stating that it will advance defense costs once the deductible or retention is satisfied, similar to the language in the standard D&O policy.

- **Engage attorneys with experience in employment law to help the business prevent or minimize claims.**

Counsel experienced with a particular business or industry can more effectively assist in managing the risks. It is vital for counsel to understand the nature of each employee group within an organization, the history of past employee or union complaints, the attorneys who were involved, and whether any employees are covered by a collective bargaining agreement.

## Managing the Claims Process

- The insured should immediately place all potentially liable insurers (CGL, workers' compensation, employers liability, auto, EPL, umbrella, excess, etc.) on notice and tender any demand letter, complaint, threat of suit, or possibility of a suit to the carriers. The organization's insurance broker can assist in determining potentially applicable insurers and in providing notice.
- Because EPL policies are claims-made policies, timely notice is a condition of coverage. Notice should be provided pursuant to the notice instructions in the insurance policy, even when there is some question whether the policy will cover the claim. When a claim is filed or the employer receives notice that a claim may be filed, the employer should send all evidence regarding the nature and scope of the incident with the request for defense of the claim to trigger the insurers' obligations to investigate.
- When an employee files a lawsuit, the insured should engage experienced, specialized counsel who understand the nuances of coverage triggers and how to manage discovery demands, press coverage, and public relations issues. Insureds will be interested in protecting their reputations (that they did not commit discriminate, create a hostile work environment, ignore reports of sexual harassment, etc.) and may wish to "defend on principle to the U.S. Supreme Court." However, the insurer will calculate the cost of dealing with the case and will want to settle when it is economically reasonable to do so. An expert counsel will know how to deal with both plaintiffs and insurers. Depending on who controls the choice of defense counsel, an organization may have to pay the costs of the specialized counsel itself or seek reimbursement from the insurer.
- When dealing with an insurer, the insured should remember that many insurance company employees are authorized to say "no," and fewer are authorized to say "yes." Thus, it is important to deal with the insurer's representatives with the authority to say "yes" to demands and settlement offers. A representative with experience in handling employment claims can be a valuable resource for the insured with limited employment practices claims experience.
- The insurer should send out the reservation-of-rights letter as soon as possible. Some states require insurers to provide notice of reservations about coverage within specific time periods or waive all coverage defenses. An organization facing an employment practices claim should check with counsel about any timing requirements in the applicable jurisdiction. The purpose of a reservation-of-rights letter is generally *not* to decline coverage, but instead to make sure the insured is aware of potential coverage issues that may, at some future date, limit or preclude coverage.
- There should be full disclosure of any genuine conflict of interest between the insured and insurer. In case of a conflict of interest, the insured should retain independent counsel, which may be covered under the policy.

## Post Claim Loss Reduction

Loss reduction involves post-claim activities planned before any claims are filed. Ideally, an employer will consider post-claim loss reduction as part of the overall process of purchasing employment practices insurance. Subrogation in insurance provides loss payment from third parties. Arbitration, mediation, and public relations efforts are event reduction strategies. Catastrophe or contingency plans are a coordinated approach to liability loss reduction.

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