



DOES MY BUSINESS NEED EMPLOYMENT PRACTICES LIABILITY INSURANCE?

The patchwork quilt of state and federal anti-discrimination and labor laws creates ample opportunity for employers to err in their employment decision making. How often do employers misstep? The U.S. Equal Employment Opportunity Commission reports that in 2007, it received a total of 82,792 charges of discrimination nationwide. The Department of Labor reported 26,933 complaints in 2007. On the state level, the Pennsylvania Human Relations Commission (PaHRC) reported 3,887 new complaints in 2005-2006, the latest year for which statistics are available.

What are the financial consequences to employers of those errors? The federal agencies reported payments by employers of \$512,787,204 with another \$7,929,063.85 paid to resolve state law claims. In 2007 alone, there were over 113,000 claims with almost \$520,000,000 in employer-paid claims! What can you do to protect against financial exposure to your business?

The starting place, of course, is to make sure your HR policies and procedures are in place, comply with applicable laws and are uniformly enforced. In addition to avoiding claims, keeping your HR house in order usually helps you defend against claims when they arise. As we all know, even the best preparation cannot eliminate all risk. Just as your Commercial General Liability Insurance (CGL) policy insures your business against the risk of fire, for example, you should consider purchasing Employment Practices Liability Insurance (EPLI) to protect against employment law claims.

Who Does EPLI Insure?

A good EPLI policy should cover claims brought against the company, any subsidiaries (if applicable), its directors, officers and employees. Make sure that coverage extends to part-time, temporary, leased and seasonal employees and independent contractors as applicable to your business.

What Claims Does EPLI Cover?

As you might expect, EPLI policies cover claims of wrongful termination of employment, workplace harassment and discrimination under state and federal employment laws. Some go further, offering coverage against claims of negligent hiring/supervision/evaluations, invasion of privacy, defamation and intentional infliction of emotional distress.

Whose Claims are Insured Against?

All EPLI policies cover claims brought by current full-time employees. Make sure that the EPLI policy you purchase applies to claims brought by current part-time, temporary and seasonal employees, applicants for employment and former employees (full-time, part-time, temporary and seasonal), as applicable to your business.

The EEOC and PaHRC are empowered to bring claims alleging violations of the statutes they enforce "on behalf of" affected employees. You should determine whether the policy you buy provides coverage for claims brought by the agencies.

What Practices or Acts are Excluded From Coverage?

Like your CGL policy, EPLI policies will exclude coverage for criminal acts, fraud, illegal profit or advantage, intentional violation of law, wrongful acts committed with actual knowledge of their wrongful nature or with intent to cause damage and other egregious conduct. Punitive damages claims cannot be covered as a matter of public policy. Certain claims under employment laws are also typically excluded. The most significant of these are claims under the Fair Labor Standards Acts, COBRA and ERISA claims. Finally, certain costs, such as the cost of modifying your facilities to provide "reasonable accommodation" to the disabled would not be covered.

Do EPLI Policies Provide a Legal Defense?

Yes, if a covered employment law claim is made, virtually all EPLI policies will provide a legal defense. Coverage varies, so determine whether your policy: 1) requires your company to pay the cost of the defense until the deductible is met; or 2) reduces the amount available to pay the claim by the amount paid in the cost of defending it (known as "costs inside limits").

Where the insurer is providing a legal defense, it generally has the right to choose the attorney who provides that defense. Carriers maintain a list of "panel" counsel, or their own "in-house" attorneys or "captive" law firms for this purpose. These attorneys generally do a wide variety of cases and are likely to be less experienced than your regular employment law attorney.

More importantly, such counsel will not know the history of your organization, its culture, or the issues and considerations that are of paramount importance to the company. For these reasons you should, if possible, seek the right to require the insurer to utilize your counsel in the event of a claim and memorialize that right in a "special handling" endorsement to the policy. If this proves to be impossible or cost prohibitive, your regular employment law counsel should work closely with appointed defense counsel in the event of a claim.

What Factors Affect EPLI Premiums?

Doylestown insurance agent, Rick Millham, Jr. of Millham Companies, Inc. says it is not as expensive as you might think so always do your "due diligence" and review a proposal specific to your business. There are a number of factors that contribute to the cost of EPLI, including the number of people you employ, the industry you are in, your frequency of turnover and the longevity of your workforce. Insurers establish rates based on these exposures within your industry and then tailor those rates based on your company's experience.

Does Your Business Need EPLI Insurance?

Recent statistics suggest that while more than one-third of all private companies had one or more discrimination charges or employment-related lawsuits filed against them between 2000 and 2005, fewer than 50 percent of private companies maintain EPLI. Providing coverage for discrimination, sexual harassment and wrongful discharge claims brought under state and federal employment laws, EPLI coverage is a supplement to, but not a substitute for, sound HR practices and procedures. AMM can assist your business in evaluating your employment law issues, including assessing EPLI coverage.

Please contact Bill MacMinn, Esq. at wtm@ammlaw.com or (215) 230-7500, or your AMM attorney to discuss any issues facing your business.