

# Employer Update

## Insurance Coverage for Employment Related Claims

*By Karen O. Sheehan*

Employment Practices Liability Insurance (EPLI) gained prominence during the early 1990s following the enactment of the Civil Rights Act of 1991. That Act amended Title VII of the Civil Rights Act of 1964 in various respects, notably by providing for compensatory and punitive damages for intentional discrimination and unlawful harassment and the right to a jury trial. As a consequence, public awareness of the rights and liabilities associated with violation of state and federal anti-discrimination laws grew, and high-profile sexual harassment cases—including the Clarence Thomas-Anita Hill controversy and the Clinton-Jones debacle—heightened the sensitivity of business owners and executives to the extreme cost and other adverse consequences presented by such cases. These developments not only spawned a cottage industry in anti-harassment and diversity training, but also set the stage for

a substantial increase in the demand for EPLI.

In 1991, only five insurance



carriers offered an EPLI product. Today, there are approximately 60 active carriers in this market writing gross premiums totaling approximately 1 billion dollars. According to statistics cited in the *Betterley Report*, an insurance industry publication, this number is actually down from several years ago due to consolidations in the industry and the exit of unprofitable carriers from the market.

As you might expect, the policies of the carriers differ significantly with respect to policy definitions, exclusions, endorsements, conditions and limits of coverage. Because policies differ, employers

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should be careful in comparing policies of different carriers.

### **Types of EPLI policies**

An EPLI policy provides insurance coverage to an employer for its employment actions that may leave it vulnerable to liability. It may be purchased as a stand-alone policy to provide coverage for those employment claims, which may be excluded by other traditional insurance policies, or added as an endorsement to a traditional insurance policy.

### **Claims Reporting**

When a claim has to be reported is an important distinction between carriers. EPLI policies are usually claims-made policies and are thus only applicable to claims that are made during the policy period. Extended reporting period protection is often an additional feature employers may wish to consider.

EPLI policies tend to define “claim” broadly, typically as “any written notice received by an insured that any person or entity intends to hold an insured responsible for a wrongful employment act” or “any judicial or administrative proceeding initiated against any insured seeking to hold an insured responsible for the wrongful employment act.” Most EPLI policies will deem a claim to have been made when any insured first receives notice of it.

### **Covered Insureds**

Most EPLI policies cover claims against the insured company (and sometimes subsidiaries) and its directors, officers and employees. Some policies cover only claims brought by employees, while others afford broader coverage such as instances in which the EEOC brings claims "on behalf of" em-

ployees.

Policy language may vary in how it describes covered employees. The broadest definition will include full-time, part-time, temporary, leased and seasonal employees. Some policies exclude part-time, temporary, leased or seasonal employees from coverage because these employees are unlikely to receive the same training and workplace acculturation as full-time employees. Some carriers will provide coverage for independent contractors, jointly held corporations, partnerships or joint ventures.

### **Covered Risks**

Traditionally, EPLI policies only provide coverage for those employment practices that have been specifically enumerated in the policy and are committed by the named insured or an employee acting in his or her scope of employment. The definition of coverage is vitally important to the quality of the policy.

Coverage may be described in terms of “wrongful employment acts” or “employment practices.” These terms are usually defined in the policy to include a list of specific acts, such as discrimination, harassment, retaliation, wrongful termination, wrongful discipline, defamation, invasion of privacy, intentional infliction of emotional distress, as well as others. It is important to read the policy to determine exactly what types of acts are covered.

### **Common Policy Exclusions**

Policy exclusions often include:

- Bodily injury – since commercial general liability policies already provide coverage for such claims;
- Specified state and federal stat-

utes - such as workers' compensation statutes, the Fair Labor Standards Act, and the Employee Retirement Income Security Act of 1974;

- Breach of written employment contracts;
- Fraudulent, dishonest or criminal conduct; and
- Fines, penalties and punitive damages.

Employers should carefully read any EPLI policy prior to purchasing such a policy to ensure they understand what the policy does and does not cover.

### **Duty to Defend/Selection Defense Counsel**

EPLI policies vary greatly with regard to who has the duty to defend and the right to select defense counsel. The majority of EPLI policies provide that the insurer has a duty to defend and the right to select defense counsel.

If the employer has a strong preference regarding the selection of defense counsel, the preferred counsel should be specifically named on an endorsement to a duty-to-defend policy. Otherwise, the insurer will select counsel from a panel list maintained by the insurer.

Most EPLI policies state that defense costs erode the limit of liability that would otherwise be available to pay out damages or settle a claim. There are, however, some EPLI policies that do provide for defense costs being supplemental to limits. Thus, it is important to look at this issue carefully.

### **Control of the Defense/Settlement**

The control of the defense is also a significant factor in any EPLI policy. Insurers often retain significant control as

to the defense of an action, and accordingly, EPLI policies generally require that an insured not agree to arbitration, make any payment, settle any claim or admit liability without consent of the insurer. The insurer normally retains the right to negotiate settlement of any claim. However, many policies provide that the insurer will not settle or compromise a claim or suit without the name insured's written consent.

Employment actions often include certain emotional dynamics because of the nature of the employer-employee relationship. This emotional facet can be an impediment to settlement, as an employer may prefer to litigate a case to conclusion rather than settle the dispute. For this reason, a policy may in-

#### **HR ALERT: Washington State Adopts Paid Family Leave**

Washington Gov. Chris Gregoire, D, signed a bill May 8 that provides for up to five weeks of paid family leave. Eligible employees who need leave to care for a newborn child, a newly adopted child or a child placed into foster care will be eligible for up to \$250 per week beginning October 1, 2009.

The new law makes Washington the second state, after California, to adopt paid family leave. Washington's version requires employees to take paid leave concurrently with the federal unpaid Family and Medical Leave Act leave. It also establishes a joint task force on family leave insurance that is required to make recommendations by January 1, 2008, on how the benefits will be financed.



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clude a “hammer clause” which caps the insurer’s coverage where the insured refuses to consent to settlement. Basically, this type of provision grants the insurer the right to recommend settlement. If the employer refuses the recommendation, the insurer's liability will be limited to the amount recommended. Some EPLI policies also contain provisions that allow the insurer to force the case into arbitration, mediation or other alternative dispute resolution mechanisms.

### **Obtaining Coverage**

EPLI insurers typically look to see whether an employer has implemented smart employment practices prior to underwriting an EPLI

policy. Having a strong anti-harassment and discrimination policy, a complaint and investigation program, and an employee handbook that contains at-will language will likely decrease premiums. Insurers will also want to examine the employer’s claims history with respect to employment disputes.

### **Conclusion**

Prior to purchasing EPLI it is important to compare the insurance coverage of various carriers. It is also important to read and understand the terms of the EPLI policy to understand what terms are included and excluded.