



Employment practices liability insurance

*Think you're covered? Look closer. EPLI is like car insurance: it varies in its coverage, says insurance industry veteran **Mark Fitzgerald***

The relationship between employer and employee is covered by a myriad of federal and state regulations (e.g., Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Family Medical Leave Act, and Wage and Hour Laws). Businesses, particularly those with more than 50 employees, are more vulnerable than ever before to employee lawsuits.

Employment practices liability insurance (EPLI) was designed to help companies contain the risks associated with this litigation. However, an

incomplete understanding of EPLI coverage can lull employers into a false and costly sense of security. It is important for employers to understand where the risks lie, what their companies can do to minimize risks, and finally, that EPLI coverage varies widely among insurance carriers.

Common EPL risks

Lawsuits filed by employees against employers run the gamut. The most frequent include discrimination based on sexual orientation, religion, age, race, national origin, hiring, firing, and promotions, as well as harassment, including sexual and other forms. Moreover, the more employees a company has, the higher is the likelihood of an EPL claim. Forty-four percent of employers with 50–249 employees have claims filed against them, versus 80 percent of employers with more than 500 employees.

Not surprisingly, larger companies are better covered. Just 19 percent of employers with 25–50 employees have EPLI, compared with 49 percent of employers with 250–500 employees. Today, any company with employees should have EPLI coverage tailored to meet its needs.

Among the top providers of EPLI are AIG, Chubb, Lloyds, Travelers, Hartford, and CNA. Since policies vary widely among carriers, it is essential to raise the right questions when purchasing EPLI, including

- What is the scope of coverage relating to legal defense costs? For example, 100 percent for covered and uncovered claims? Limited to \$1 million?
- Is there an option to cover full defense costs in addition to the limit of liability?
- Is there a “duty to defend” option?

Further, manufacturers whose employees come in frequent contact with non-employees should consider third-party EPL coverage. Similarly, businesses that employ temporary, part-time, leased, or independent contractors should consider including coverage for these individuals.

Some other options, amendments to exclusions, and waivers a manufacturer might consider include

- an amendment of the bodily injury exclusion to “carve back” coverage for emotional distress, mental anguish, humiliation, or loss of reputation,

- an amendment to the Fair Labor Standards Act exclusion to carve back coverage for the Equal Pay Act,
- the deductible waiver, and
- hammer clauses, which transfer responsibility from the carrier to the insured for amounts exceeding the first settlement offer made by the carrier (i.e., if the insured does not agree to settle and the final settlement exceeds the initial offer)

It is also wise to review the coordination of coverage relating to a situation where claims are covered under multiple coverage parts. In these instances, EPLI coverage should be applied first.

The best defense

Just as the right EPLI is advisable for all manufacturers, effective workplace policies to avoid employee litigation are equally important. Every company must have an employee handbook drafted under the direction of an experienced employment and labor law firm. This handbook should be provided to every employee and its policies and procedures communicated clearly. Additionally, regularly scheduled training programs should be held for supervisors and other employees to educate them regarding key workplace legislation and how to promote compliance. Virtually every interaction an employer has with an employee or potential employee is governed by a federal or state law.

The recruitment, interviewing, and hiring process is fraught with potential landmines that could lead to claims ranging from discrimination to breach of contract or wrongful discharge. Employment applications alone can leave a company vulnerable to a lawsuit. In addition, immigration considerations, background checks, and screenings—whether medical, drug and alcohol, psychological, personality, or lie detector—are all areas that must be handled judiciously.

Once an employee is hired, caution must be applied when conducting evaluations, discipline, and terminations. Manufacturers need to be especially alert to the liabilities associated with prohibited conduct and protected classes. In all instances, every exchange with an employee should be documented and records meticulously maintained in the event that the company must

defend against an EPL claim. That documentation, strong workplace policies, and the right EPLI coverage are a manufacturer's best defense against the rising tide of employee lawsuits.

One manufacturer's experience

One might think that large, international corporations have all the proper protocols in place to avoid workplace litigation. One look at the court dockets will dispel this myth. Boeing, the aerospace giant, has been the defendant in several EPL lawsuits, primarily related to race and gender discrimination. From 1997 through 2003, the company had five discrimination suits filed against it on behalf of African-American, Asian, and female employees. In 1999 Boeing settled for \$15 million in *Staton v. Boeing*, a class-action lawsuit filed by some of its African-American employees. The "racial quota" case was sent back to the district court for review in 2002 based on a ruling by the 9th US Circuit Court of Appeals that the method of distributing the sum among the plaintiffs, and the compensation to the lawyers, were suspect. After two hearings, the district court approved a consent decree outlining \$7.3 million in monetary relief as well as injunctive relief valued at approximately \$4 million in fees and costs. In another settlement of a pay-disparity claim by female and minority workers, Boeing settled for \$4.5 million. There were others as well.

It is estimated that from 1997 through 2003, Boeing spent over \$1.3 billion in various race- and gender-related programs to address its errant employment practices. This sum is easily greater than the sum of the company's settlement figures, but it drives home a point. Further, since these lawsuits were filed, the company's employment practices have been monitored by three federal agencies: the US Department of Justice, the US Equal Employment Opportunity Commission, and the US Department of Labor.

Clearly, this manufacturer and others can avoid incurring huge expenditures (whether in settlements or in restitution-type initiatives), as well as governmental monitoring, by adhering to lawful workplace practices and having the right EPLI coverage. ■

Mark Fitzgerald is vice president, commercial insurance, at Cook, Hall & Hyde, Inc.