

## **Malpractice Insurance Expert Advice**

# **Employment Practices Liability Insurance**



By *Bill Gompers*

Employment Practices Liability Insurance (EPLI) coverage protects an employer against employment practices liability (EPL) claims of discrimination (age, sex, race, disability, etc.), wrongful termination, and sexual harassment. Many medical practices and healthcare providers

are not aware of this growing exposure and overlook the potential catastrophic loss they could face from an EPL claim, since it is usually excluded from most professional liability insurance coverage. Defense expenses are often the largest component of the total loss amount paid to settle employment practices litigation.

Some of the federal laws that address employment liability, in addition to the numerous state and local laws and rules and regulations, governing healthcare providers include:

- Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1991, which amended Title VII to include additional recoveries for the claimant and gave claimants the right to a jury trial
- Family Medical Leave Act (FMLA)
- Age Discrimination in Employment Act (ADEA)
- Americans with Disabilities Act (ADA)

### **Why you should have this coverage**

Employers' susceptibility to employment-practices liability has increased dramatically in recent years due to the evolving economic, political, and legal environment. During these troubling economic times, disgruntled employees are much more likely to file employment-practices claims as a means of obtaining money from employers. Recently enacted employment laws have expanded employee rights, giving rise to new causes of action that may be brought against employers and create greater rights of recovery for damages. The US Equal Employment Opportunity Commission (EEOC) reported

that they received nearly 100,000 filings in 2012. This represents the trend of increasing filing year after year. The EEOC also reported that it secured more than \$400 million in monetary awards for the latest reporting period. Retaliation claims surpassed racial-discrimination claims as the most frequently filed charge, while allegations of violations based on religion, disability, and age also increased.

Statistically, employment-related claims occur more frequently with healthcare providers than any other type of business simply due to the nature of a medical practice and its increased vulnerability to employment-practice issues. Physicians and healthcare providers are often perceived as having very "deep pockets," and represent a rich target for lawsuits. Healthcare providers, including physicians' and other providers' offices and healthcare facilities, present a unique and difficult employment-practices-liability-insurance exposure. In addition, healthcare providers have patient and vendor discrimination and harassment exposures (third party).

Small to medium employers, such as healthcare providers and medical offices, are often targeted for several glaring reasons. Most do not have a human resource department, training is often focused on clinical issues and very rarely provides the required human resources and personal development training and intelligence that are gained in many other business organizations, there is a lack of proper procedures set in place, and in many cases, they carry inadequate or no insurance.

### **Some striking EPL facts:**

- Over 40% of all employment-related lawsuits are filed against employers with fewer than 100 employees.
- 75% of litigation against entities involves employment disputes.
- Legal-defense costs for discrimination and harassment average more than \$75,000 before trial.

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## **EPL claims are on the rise – beware of retaliation**

It is important to know that employees can make a complaint directly with the Equal Employment Opportunity Commission rather than filing a complaint directly with their employer. The EEOC is charged with enforcing civil rights, ADA, the Equal Pay Act, and the ADEA. In the last 10 years, the number of charges made to the EEOC has increased 24%. Last September the EEOC released a performance report indicating it had its busiest year ever, securing more than \$365 million in monetary relief through its administrative enforcement activities.

The EEOC reports that 40% of the claims it sees are related to retaliation. According to Monitor Liability Underwriters, one of our key insurance carriers, wage and hour filings outnumber all other workplace class actions, with an average defense cost of \$100,000 per claim. Wage and hour claims allege that an employer has failed to pay overtime wages owed to an employee. Within the last five years there has been significant, high-profile class-action litigation in this area. The bottom line is that employers have an increasing exposure for these types of claims.

## **Understanding the complexities of an EPLI policy**

Most EPLI policies differ in what is and what is not covered. It is important to understand what is included in the coverage. Particular areas of concern are:

- In cases where the insured and insurer disagree over settlement, a “Hammer Clause” allows a carrier to limit its claim payment to no more than the amount it could have settled for, plus defense costs.
- Some EPLI policies protect the insured entity from allegations that its employees discriminated against or harassed a third party, such as patients, vendors, and suppliers.
- Most EPLI policies contain a series of exclusions and coverage limitations. Common exclusions include those for:
  - Claims relating to litigation or EEOC proceedings commencing prior to the policy’s inception date
  - Deliberately fraudulent, dishonest, or criminal conduct or sexual molestation
  - Acts committed with the intent to cause harm
  - Violations of the Employee Retirement Income Security Act of 1974 (ERISA)
  - Bodily injury (not including emotional distress or mental anguish)
  - Property damages
  - Benefits, such as Social Security, unemployment insurance, workers’ compensation, disability insurance, etc.

- Wage and hour violations, including violations of the FLSA (Fair Labor Standards Act) and state-law equivalents but excluding the Equal Pay Act
- Events such as a major work-force reduction, acquisition, or merger
- In addition, EPLI policies tend not to cover equitable relief such as job reinstatement or an injunction against future wrongful employment practices.

## **Every Employer Is At Risk**

An employer can do everything right and still be hit with an employment-related lawsuit. Employment Practices Liability Insurance is critical to protecting employers from unforeseen defense expenses—which can add up fast and have a significantly negative effect on the employer’s bottom line. From the moment employers begin the pre-hiring process until the final exit interview, they are vulnerable to suits alleging discrimination, sexual harassment, wrongful termination, employment misrepresentation, wrongful discipline, or failure to promote.

One great benefit to this coverage is the ability to access free loss-prevention services through the carrier. Resources often include a toll-free Q&A hotline with access to labor attorneys and/or HR specialists. Smaller practices with limited human resource capabilities will find this benefit invaluable in the event that a potential claim or situation arises. Many policies provide on-line resources such as mandatory training.

To sum it up in the simplest of terms, EPLI coverage is like “human resource malpractice insurance.” Given the complexity and variations of coverage, it is important that at-risk entities consult professionals with knowledge in the EPLI arena and expertise in the healthcare-provider field.

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