



Employment Practices Liability

Limit exposure to costly litigation

Your organization could consistently rank at the top of a “Best Places to Work” list and still be blindsided by an employee lawsuit claiming discrimination, sexual harassment or some other employment practice misdeed. Even if the charge is without merit, the cost in legal fees, management time and reputational damage can be staggering – particularly to mid sized and smaller enterprises.

When it comes to protecting your organization against any such legal claims, as the old saying goes, an ounce of prevention is worth a pound of cure. And another bit of timeless wisdom applies: better safe than sorry. That’s where employment practices liability insurance (EPLI) comes into play – not to be confused with general liability insurance, which covers third-party liability exposures other than to employees. Organizations should evaluate if they need such a policy. And if you have EPLI in place, but haven’t reviewed it in more than two or three years, it’s a good idea to take a fresh look at your coverage.

This paper will describe important steps to minimize litigation risk related to employment practices liability and how the right insurance coverage can protect you if you incur a claim.

Liability Overview

Some employment practices claim categories get a lot of publicity, such as sexual harassment and large class action cases, but don’t be misled. You might be more vulnerable to more mundane categories of litigation (see the list of common claims in the next section).

The scope of potential employment practices liability is broad. It’s not just about things that happen (or are alleged to have happened) to your own employees. Claims, possibly not covered under a general liability policy, can also involve acts by your employees toward a third party such as a vendor or customer. For example, decisions by employees of a residential property manager could lead to tenant discrimination claims against the company.

You’re not just vulnerable to claims from current employees. You can also face allegations from former employees, seasonal employees and even people who sought employment with you but were not hired. You also could be held liable for acts or the behavior of your customers or vendors toward your own employees; if a court is persuaded, it could be deemed you failed to adequately protect employees.



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Another way to appreciate the breadth of liability that generally can be covered by EPLI is to know which federal laws you could be accused of violating (see list at the bottom of this page). In addition, state laws and even local ordinances can be the source of employment practices liability. States and localities often set higher standards than the federal government in many areas, including paid sick leave requirements.

Incidents and Allegations

The most common categories of employment practice incidents and allegations (Employment Practices Wrongful Acts) include:

- Discrimination based on age, race, gender, religion, national origin and other factors
- Sexual and other forms of employee harassment
- Wrongful termination
- Retaliation
- Breach of employment contract (i.e., oral, written or implied, including employment handbooks and personnel manuals)
- Failure to employ or promote
- Defamation
- Privacy violations, including employee medical information governed by the Health Insurance Portability and Accountability Act (HIPAA)
- Violations of the Family and Medical Leave Act.



One of the federal laws governing employment issues is the Americans with Disabilities Act.

Which Federal Laws Govern Employment Practices?

The primary federal laws governing employment issues that could trigger an employment practices claim are:

- Civil Rights Act of 1964: The umbrella law covering most employment discrimination categories.
- Equal Pay Act: The original law banning gender-based pay discrimination.
- Patient Protection and Affordable Care Act: Sets rules and standards for employer-provided and individually purchased health coverage.
- Equal Employment Opportunity Act: Prohibits employment discrimination on the basis of race, color, national origin, sex, religion, age, disability, political beliefs and marital or familial status.
- Age Discrimination in Employment Act: Sets age 40 as the threshold for assessing potential discrimination against older workers.
- Americans with Disabilities Act: Establishes standards for employers with regard to accommodating employees with disabilities.
- Health Insurance Portability and Accountability Act (HIPAA): Provides for employer-paid health benefits following employment and privacy of employee health records.
- Family and Medical Leave Act: Establishes the right for employees to take some unpaid leave to accommodate medical problems, both their own and those of family members.

These issues are typically covered by EPLI and would be excluded from your general liability insurance. The latter covers incidents like an injury suffered by an employee of a customer on your premises or caused by your product. The scope of EPLI is expanding, however, as some carriers now have the ability to add coverage for workplace violence and crisis management expenses.

An employment practice generally not covered by EPLI is compliance with the Fair Labor Standards Act's rules regarding minimum wage and overtime eligibility. Also generally excluded under EPLI are issues arising from employee benefit plans under ERISA, the Occupational Health and Safety Act (OSHA), workers' compensation issues, criminal acts and privacy violations stemming from a company's systems being compromised by a hacker.

Limiting Your Risk

It's always better to prevent claims from arising in the first place than deal with them after they have occurred, no matter how rapidly and efficiently. The Insurance Information Institute recommends a six-step approach to limiting your risk.

The first step is to create written workplace policies on employment practices, post them and include them in your employee handbook.

Most carriers offer free policy templates for your handbook and procedures when you purchase EPLI. Key handbook provisions related to employment practices include the company's equal employment opportunity policies, no-harassment policy (sexual or discriminatory), employment at will policy, progressive discipline, grounds for termination and a handbook acknowledgement form, which is signed by employees and returned to you. An employment attorney generally should play a role in reviewing your employee handbook.

The institute's remaining five recommended steps to limit employment liability risk are:

1. Train management, supervisors and employees about ethical and legal workplace practices, as well as diversity and cultural sensitivity issues.
2. Screen employees thoroughly prior to hiring them, avoiding any discriminatory practices.
3. Clearly define job expectations.
4. Review employee performance regularly, keeping written records of reviews.
5. Maintain written records of all employment-related practices, complaints, investigations and employee responses.

Employment Practices Liability: a Risk-Reduction Checklist

Here are some questions to ask yourself. A "no" to any of these should be addressed:

- Has your employee handbook been reviewed within the last two years by an employment law attorney?
- Are hiring managers and front-line supervisors regularly trained on laws and regulations governing employment practices?
- Do you have a clear zero-tolerance policy against illegal forms of discrimination and sexual harassment?
- Are employees aware of your policy and has it been consistently enforced?
- Do you have an effective procedure for employees to voice their concerns about employment practices without fear of retaliation?
- Are you adequately insured against employment practices litigation?



Also, to nip some potential claims in the bud, establish a communication channel employees will feel comfortable using to report behavior or actions that violate company policy. Employees' confidence in that reporting mechanism needs to be grounded in the knowledge that allegations will be taken seriously and investigated.

Even if you do everything right, sooner or later you are likely to incur some kind of employment practices claim. That's where EPLI can provide value. As with other forms of liability insurance, an important consideration when selecting EPLI coverage is whether the contract covers claims made during the policy period (a claims-made policy, including prior acts) or only incidents that occur during the contract period that ultimately lead to claims (occurrence-based coverage).

A claims-made policy is recommended to include retroactive protection to cover incidents that occurred prior to the policy contract period. When changing EPLI carriers, it's important to try to secure claims-made coverage with "full prior acts" or a back dated "retroactive date" to avoid coverage gaps. If that's not possible, try to purchase an extended reporting period (tail) from the original carrier.

Other Critical Matters

There are three other critical matters to understand about EPLI coverage. First, incident reporting requirements are very stringent to preserve coverage. Incidents that could lead to a claim, including receipt of an Equal Employment Opportunity Commission (EEOC) notice, must be reported to the carrier immediately.

Second, most EPLI policies for small and mid sized employers have a "duty-to-defend" provision, placing the onus on the carrier to take on any legal battles.* For that reason, EPLI carriers nearly always use their own panel attorneys who are highly experienced in addressing typical employment practices matters. (Sometimes an arrangement can be negotiated to use one's own attorney, but that agreement must be reached in advance.)

Third, employers are not permitted to negotiate their own settlement with a plaintiff. That role belongs exclusively to the EPLI carrier. These stipulations help to keep the cost of EPLI affordable for most employers.

* For a legal definition of "duty-to-defend," visit <https://definitions.uslegal.com/d/duty-to-defend-clause/>

Is Your EPLI Coverage Adequate?

Take a fresh look at your EPLI coverage by asking yourself the following questions:

- Have you considered an option for an additional defense limit outside the policy aggregate limit? Defense costs could erode your policy aggregate, not leaving anything additional to pay for actual settlement or damages.
- Are you sharing your EPLI aggregate limit with other management liability coverage parts such as D&O and Fiduciary? If so, you should explore the cost of separate aggregates. It might not substantially increase your total premium.
- Would your coverage extend to an invasion of privacy due to wrongful internet activity?
- Do you have independent contractors working for you that you would like to protect?
- Is there a "carve-back" to the bodily injury exclusion to include mental anguish or emotional distress?
- Are you concerned about potential wage and hour claims based on Fair Labor Standards Act (FLSA) requirements? Many EPLI policies exclude these, but such coverage generally can be added by endorsement at a sublimit and for defense only.
- Does your policy extend coverage for acts against a third party, such as a client or vendor?