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Class Action & Litigation

Employment Practices Liability Insurance: Answers, but Questions

Employment Practices Liability Insurance (EPLI) has been around for about 20 years now, and for some employers it has been a good investment. For others, it has been a disappointment, and for still others it remains a mystery. My own view is that every employer should consider adding EPLI to its insurance coverage, but should do so with a clear understanding of EPLI's limitations and cost.

So, what should employers expect and what should they watch out for when they shop for EPLI? That's the focus of today's post.

Employers should first understand what, if any, coverage they have for employment claims under existing policies. Most organizations have some form of Comprehensive General Liability (CGL) insurance, and some have Directors' and Officers' Liability (DOL) insurance. Those policies sometimes include coverage of employment-related claims, but that's more the exception than the rule. Individuals who own businesses may even have personal insurance that covers employment-related claims. Most of the time, however, such coverage will be minimal or non-existent. EPLI is likely to be an addition to existing business insurance.

EPLI can be very expensive. Like any form of insurance, its cost will depend on how much it covers, how good or bad a risk the insured is, and how much of a deductible ("retention") the insured is willing to live with. It is always a good idea to insist on a detailed understanding of what premiums will be, how and when they will be paid, how and when they can increase, and whether the employer has the option to accept a larger retention but pay lower premiums. EPLI providers generally do some sort of risk assessment to determine how likely the employer seeking coverage is to be the target of claims, and that assessment can have a significant impact on premiums. It is important to understand the risk assessment process and to make sure that the insurer gets a full and realistic picture of the employer's employment practices, policies, and claims history.

I have seen situations in which incomplete information provided to a prospective insurer resulted in the insurer quoting prohibitively high premiums. When the insurer finally got a complete picture of the employer's situation, the quoted premiums went down. The reverse can happen too, of course.

Employers should also understand that EPLI is not a perfect shield against employment claims. Some kinds of claims are not covered at all. Exclusions-uncovered claims-include WARN Act, FLSA wage and hour, COBRA, OSHA, and ERISA claims. Workers' compensation and unemployment claims are not covered. Some policies also exclude coverage for punitive damages or claims that allege "intentional acts" (whatever that means). Usually, though, discrimination, retaliation, whistleblower, defamation, invasion of privacy, misrepresentation, employment-related negligence, and "wrongful termination," "wrongful discipline," or "wrongful demotion" claims are covered. It also may matter when the claim arises, when it's reported to the insurance carrier, and who's being accused of wrongful acts.



The good news is that if a claim is covered, the insurance company pays the cost of defending the claim, pays the cost of settling it if settlement is possible, and pays any judgment awarded against the employer.

It is absolutely critical, whether an employer is shopping for insurance or is already covered, to understand the limits of coverage and the requirements for reporting claims. There is often no leeway in EPLI policies. If an employer misunderstands the protection it has purchased, reports a potential claim too late, misses a premium, or disagrees with the insurance company's handling of the claim, the result can be surprising and expensive.

Employers have a lot to think about when it comes to deciding whether EPLI is a worthwhile investment. In my next post, I'll talk about some of the other issues that surround EPLI, like choice of counsel, control over settlement, and what happens when a covered lawsuit includes uncovered claims.