

Got Employees? Understand the Benefits and Limitations of Employment Practices Liability Insurance (EPLI)

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August 18, 2023



Employment practices liability insurance (commonly known as 'EPLI') coverage is a critical and necessary tool in any employer's toolbox because such policies can help cover significant legal costs and damages associated with certain employment-related claims asserted by current,

former, and prospective employees.

How to effectively use that tool, however, depends on the actual terms of the employer's EPLI policy as well as the specific facts and circumstances related to the employment liability claim the employer is facing. That said, the following are six points regarding EPLI for employers to have in mind when facing an actual or potential employment dispute.

First, when in doubt, put your EPLI carrier on notice of any potential employment dispute. This includes receiving a letter from the employee's attorney, a notice of a Charge of Discrimination from the Equal Employment Opportunity Commission (EEOC), or a notice of a complaint filed by an employee with any state or federal agency. Regardless of what you think may or may not be covered in the EPLI policy (more on that below), it is imperative to put the carrier on notice. Failure to do so could jeopardize your EPLI coverage and may give the carrier a sound basis to deny coverage for the dispute. Putting the carrier on notice is critical to reserving the company's right to utilize the coverage, but such notice does not mean the company is actually filing a claim. If you're concerned about reporting a potential claim or not clear if a matter may be considered a potential dispute for purposes of your EPLI policy, consider consulting with legal counsel experienced in insurance matters to provide you with guidance.

Second, if the company decides to file a claim and the EPLI carrier denies the claim, consider seeking a second opinion. Insurance policies are riddled with various exceptions and carve outs for coverage and can be difficult to interpret. Legal counsel can assist in determining the carrier's obligations under both the policy and applicable law. Importantly, under North Carolina and other state's laws, the carrier could well have a duty to defend (meaning, it is obligated to cover legal costs defending the company against the claim) even if it is later determined the carrier does not have a duty to indemnify the company for the claim (meaning, it is not obligated to pay any damages awarded for the claim).

Third, ensure the company understands the limits to its EPLI coverage and properly budgets for its share of financial responsibility. EPLI often includes a deductible or self-insured retention that the employer is responsible for paying out of its pocket towards its legal fees or as payment to the claimant before any insurance dollars will kick in for the claim. Deductible/retention amounts vary, but it is not uncommon for them to be a significant dollar amount for an employer, ranging from \$25,000-\$50,000, or more. The amount of the employer's out-of-pocket exposure to meet its deductible/retention could bear on the business decision as to whether to file the claim or seek resolution of the matter without filing a claim. Also contributing to that decision is that filing a claim could result in the insurer raising premiums or non-renewing the policy.

Fourth, understand what claims EPLI is intended to cover. Although EPLI typically covers claims of discrimination, harassment, retaliation, and negligence related to certain federal laws, most EPLI policies do not cover wage claims. This means any litigation regarding unpaid salary, overtime, bonuses, or commissions would not ordinarily be covered by EPLI. Accordingly, the employer should keep litigation fund reserves for not only paying the EPLI retention amount but also for funding non-covered wage-related claims for which the EPLI carrier is not obligated to provide indemnity for. Employers should also have reserve funds for any claims for which the employer does not file an EPLI claim.

Fifth, EPLI policies typically require the employer to use the insurer's preferred legal counsel in defending claims. Where disagreements regarding EPLI coverage arise, insurance defense counsel is precluded from taking a position for either the carrier or the employer, as counsel represents both parties and is therefore precluded from taking a position adverse to one of the counsel's clients. For this reason, an employer may need to keep its corporate counsel and/or outside legal counsel involved in EPLI matters to ensure its interests against its carrier are sufficiently considered and protected.

Finally, the employer should work with its insurance broker on a regular basis to reevaluate its EPLI policy terms. Common policy terms and issues to visit with the broker include the following:

- Policy limits. Is there adequate coverage to account for the number of employees?
- Settlement. Will the carrier contribute to a settlement, and under what conditions?
- Choice of Legal Counsel. Does the policy allow for choice of legal counsel, or does the carrier have the exclusive right to select counsel? If the latter, the employer may want to discuss negotiating a change in the policy regarding the choice of legal counsel.

Ward and Smith's Insurance Counseling and Recovery Team can help businesses review their EPLI policies and strategize other insurance needs.

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