AmWINS Group, Inc.

EMPLOYMENT PRACTICES LIABILITY: #WHATSTRENDING

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ON YOUR TEAM.

U.S. Senate confirmation hearings of Supreme Court justices typically receive broad news coverage. One particular hearing in recent memory, however, gained much more media interest than usual. Broadcasts were focused on questions not about the nominee's qualifications, but rather allegations of sexual harassment. No doubt this scenario sounds familiar. But for the purposes of this discussion, the case in question took place in 1991. The justice involved was Clarence Thomas.

Not only did this event influence public perception of harassment, it coincided with increased interest in employment practices liability (EPL) insurance. At the time, only five insurance companies offered EPL insurance policies covering sexual harassment and discrimination in the workplace.[1] In the aftermath of the hearings, the sale of coverage increased, as companies sought to protect themselves from the defense costs and damages associated with sexual harassment claims.

Over nearly 30 years, EPL insurance has continued to be influenced by forces taking place in society and culture. This article will explore the top trends shaping the EPL market and how carriers and brokers are responding.

TODAY'S TOP EPL TRENDS

Compare 1991 with 2020 and one may experience a sense of déjà vu. Once again, a Supreme Court nominee faced allegations of sexual misconduct, heightening the national dialogue about the topic. The more recent hearings also coincided with heightened public awareness of sexual misconduct and the #MeToo movement. However, unlike 29 years ago, companies today face a significantly more complex environment, including many EPL-related risks beyond harassment, 24/7 news coverage and the viral spread of employment-related allegations through social media. This environment is shaping insurance purchasing behavior and the insurance marketplace.

Here are the top eight trends affecting the EPL insurance market today

1. **COVID-19.** The COVID-19 pandemic has had a massive impact on employees and human resources departments across the country. We are now experiencing a record number of layoffs, furloughs, unemployment and underemployment. There are also more employees working remotely, which creates a different set of risk management concerns. While we are very early in the process and there are not many facts, figures or statistics pertaining to impacts on the EPL insurance market, there are common trends surfacing including the following.
    - Discrimination or harassment claims resulting from unfair targeting of employees during furloughs/layoffs due to race, sex or nation of origin.
    - Invasion of privacy concerns arising from employees being questioned about personal travel or their family's health history, including exposure to the virus.

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- Disability discrimination (ADA) claims arising if proper accommodations are not provided to employees while working from home or employees not given the option to work remotely.
- Negligent evaluation claims resulting from management asking employees to return to the office too soon.

2. **Black Lives Matter.** Since the first landmark case involving the restaurant chain Denny's in 1994, race and discrimination have been a driving factor of EPL loss trends. On May 25, 2020, George Floyd died in police custody in Minneapolis, MN. The subsequent protests, media coverage, social media outrage and riots have brought racial injustice to the forefront. This will undoubtably impact employment relations, market development and underwriter response. However, it is unknown exactly how claims or other insurance impacts will materialize.

3. **#MeToo.** Founded in 2006, the #MeToo movement gained momentum over the next 10 years as an anti-sexual harassment slogan and focused on exposing unacceptable predatory behavior in the workplace. Sexual harassment claims continue to be one of the most common employment issues employers face, despite being the most frequently written policy and training offered to managers, supervisors, and employees. In fact, in states like California, employers with 50 or more employees are required to provide two hours of sexual harassment prevention training to all supervisors every two years.

   The #MeToo movement also arguably coincided with a change in strategy by the U.S. Equal Employment Opportunity Commission (EEOC), which began conducting outreach events and training seminars and created a "harassment prevention action team." Following these actions, the number of sexual harassment lawsuits filed against employers increased by 50 percent.

   The EEOC also recovered $70 million for sexual harassment victims in 2018, almost $25 million more than the prior year. And legislative changes making it easier to file claims took place at the state level. For example, in 2019, New York state changed the definition of harassing conduct from "severe and pervasive" to more than a "petty slight and trivial inconvenience."

   The #MeToo movement has shown that companies must be ready to quickly address sexual harassment, assault and discrimination in the workplace. However, on the flip side, how a company reacts to sexual harassment claims may give rise to EPL counterclaims made by the accused.[2]

4. **Equal Pay and Wage Laws.** Pay history is an example of state-level legislation having an impact on EPL claims. For example, Illinois amended its Equal Pay Act effective September 29, 2019. The changes preclude employers from requesting or requiring wage or salary history from an applicant as a condition of being interviewed, considered or hired. Employers cannot screen applicants based on their current or prior wages or salary histories or obtain an applicant's wage or salary history from any current or former employer.[3]

5. **Transgender employees.** The EEOC has previously issued guidance stating that discrimination and harassment based on gender identity or gender expression violates Title VII of the 1964 Civil Rights Act as it relates to sex discrimination. However, on June 15, 2020, the U.S. Supreme Court determined Title VII did indeed protect gay and transgender workers from workplace discrimination. It remains to be seen how this will impact EPL claims.

6. **Age discrimination.** The Age Discrimination in Employment Act prohibits age discrimination against employees and applicants age 40 or over. But in a recent study, insurer Hiscox found that that 21% of related U.S. workers have experienced discrimination in the workplace because of their age.[4] The number of discrimination charges filed with employers and the EEOC by workers age 65 and over doubled from 1990 to 2017—and demographic trends are likely to cause this number to continue to increase. According to the U.S. Bureau of Labor Statistics, workers age 55 and up will make up 25% of the U.S. workforce by 2024, compared with 13% in 2001.

7. **Wage and hour.** In wage and hour claims, an employee alleges that his or her employer has failed to pay overtime wages. In recent years, a number of high-severity wage and hour claims have been filed on a class action basis. Additionally, scope of allegations continues to broaden, with lawsuits increasingly alleging denial of wage supplements or wage benefit claims under state or local laws that mandate paid sick days or other paid time off.[5]

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State and local governments are also enacting more and more legislation around the minimum hourly wage, the classification of employees as hourly or salaried, and the classification of individuals as independent contractors or employees. California's rewriting of independent contractor rules, effective January 1, 2020, is the most recent example of the last trend.

8. **Medical and recreational marijuana.** Growth in cannabis business has corresponded with increased sector employment, making it one of the fastest-growing job markets in the country. The number of job openings within the industry at the end of 2018 were up 76% over the prior year,[6] and cannabis is projected to hit a job creation rate of 110% in just three years, from 2017 to 2020, eclipsing that of other high-growth sectors.[7]

   Expanding business combined with a high number of hourly and part-time employees typically results in more employment-related lawsuits. Additionally, cannabis operations face other employment-related issues on the state and local level. For instance, both New York City and the state of Nevada enacted changes to dramatically restrict employers' ability to drug test for marijuana.[8]

   In recent court cases, a New Jersey appellate court held that a disabled employee may sue his former employer under the New Jersey Law Against Discrimination (NJLAD) for alleged discrimination based on the employee's use of medical marijuana, and a Delaware state court held that a medical marijuana user may proceed with a lawsuit against his former employer after his employment was terminated because of a positive post-accident drug test result for marijuana.[9]

MARKET DEVELOPMENT

To frame the market's response to emerging trends and increased EPL risks, it's helpful to take a brief look at how coverage developed. Initially, workers pursued action under employers' general liability (GL) policies, using the theory that harassment and other discrimination was "bodily" harm. GL markets quickly responded with employment-related claims exclusions that exist today.

Professional liability carriers began endorsing errors & omissions and directors & officers forms to provide coverage for employment practices. However, these policies are written with individuals as the named insured. Because discrimination claims are typically brought against companies, rather than individual directors or officers, coverage often could not be found within these forms.

Stand-alone EPL forms designed to cover claims against employers took shape. Today, EPL insurance is available as either a stand-alone policy or endorsement to another form. It provides protection against many kinds of employment-related claims, including the "big three" of sexual harassment, discrimination (based on religion, age, ethnicity, gender, disability, skin color, sexual orientation or race), and wrongful termination. Also typically covered are:

- Breach of employment contract
- Negligent evaluation
- Negligent compensation
- Failure to employ or promote
- Wrongful discipline
- Deprivation of career opportunity
- Emotional distress or mental anguish
- Invasion of privacy

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Most EPL policies will provide defense or reimburse a company for the costs of defending a lawsuit in court, as well as for judgments and settlements, with legal costs covered regardless of a suit's outcome. Beyond the basic employer protections provided by typical EPL forms, the full scope of coverage and available endorsements vary in the marketplace. Some key distinctions among carriers' policies include:

Wage and hour insurance coverage endorsement. This covers claims alleging that an employer failed to pay overtime to an hourly employee. Typically, coverage applies to defense costs only (not to settlements or judgments) and is offered at a relatively low sublimit.

Duty to defend versus duty to pay. When written on a "duty to defend" basis, the insurer retains the right to select defense counsel and control the process. On a "duty to pay" policy, the insured is responsible for defense and the insurer is obligated to reimburse the cost.

Third-party coverage. Third-party EPL applies to claims made by nonemployees, usually customers, who allege that an employee engaged in wrongful conduct, typically sexual harassment or discrimination.

Punitive damages. EPL forms originally excluded punitive damages. Today, coverage for these damages may be obtained either by endorsement or as part of an insurer's standard EPL form, where allowed by law. Some insurers apply a sublimit to punitive damages coverage.

Immigration Investigation coverage. Employers are at risk for violating federal, state or local immigration laws, and these violations are not covered by the basic EPL coverage form. Immigration Violation coverage has become available by endorsement to some carriers' policies. This endorsement provides coverage for defending managers charged with violations of immigration laws and both civil and, where allowed, criminal fines and penalties. Coverage is usually subject to a sublimit that is part of the policy's overall limit.

Crisis management services. In addition to insurance coverage provided by the policy, some carriers will offer public relations and other services to address reputational harm in the advent of a highly publicized claim.

UNDERWRITER RESPONSE

Throughout the evolution of EPL insurance, the form has been influenced by societal changes. Today's coverage is no exception. In response to increasing claims and areas of risk, key changes are being seen in several areas.

- **Limiting wage and hour coverage.** Across the industry, some carriers are not offering this for certain classes, such as restaurants/retail, hospitality, financial institutions and healthcare. They are also being more selective when it comes to size of the account and are unwilling to offer coverage above certain employee-count thresholds.
- **Tightening third-party wording.** For accounts that have seen third-party losses, or for problematic classes such as hospitality and retail, some carriers are limiting third-party coverage to harassment only. Others are also limiting the definition of who is a third party, using terms such as "any natural person" or similar verbiage. Still others exclude third-party coverage altogether.
- **Adding biometric exclusions (Illinois).** In 2008, Illinois passed the Biometric Information Privacy Act (BIPA), which requires consent to collect biometric information (such as fingerprints and facial recognition details). A recent Illinois Supreme Court ruling against Six Flags in a BIPA suit determined that plaintiffs do not need to prove actual harm, only that a violation has occurred. As a result, and because of the potentially severe nature of large or class action claims involving many employees, some carriers are adding an exclusion to Illinois EPL policies for acts related to biometric data collection.
- **Past Acts Exclusion.** Carriers are attempting to manage their COVID-19 exposure by adding a Past Acts Exclusion. This happens more often when business is being placed for the first time, the account has a problematic loss history, or the account is moving carrier

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- **Limit Management.** Throughout the entire Executive Risk space, carriers are managing their exposure by decreasing limits. Most carriers are unwilling to go above a $5M limit, which is also creating a fair amount of Excess opportunities.
- **Overall Rate.** Since March 2020, rate increases have gone from single to double digits. This trend will continue into the foreseeable future as the true impact of COVID-19 layoffs and furloughs is yet to be seen.

Additionally, the underwriting appetite for EPL has ebbed and flowed over the years. Today, we're seeing market conditions in the EPL segment harden, with rates increasing anywhere from 10% to 50% for many classes of business. Steeper increases are seen in problematic classes, such as healthcare and hospitality, as well as problematic states, such as Florida, Illinois, New York, and Texas. California in particular has seen significant hardening, with some underwriters increasing retentions dramatically in the state or pulling out of the market altogether.

COVERAGE ASSESSMENT

Despite the risk employers face, EPL insurance is an undersold coverage, particularly among smaller companies. According to some market reports, only 23% of companies with fewer than 100 employee are investing in EPL coverage; 34% of businesses with between 500 and 700 employees have EPL; and 40% of businesses employing more than 1,000 people have a policy.[10]

The role of insurance agents and brokers is to help clients manage risk, and this starts with getting clients to recognize costs associated with employment-related claims. The average cost for defending and settling employment law cases is $160,000, according to Hiscox.[11] Also reported is that the average jury award for an employment-related case is $217,000, and the average duration of an employment claim spans more than 300 days[12]

Education on exposure is very important. Agents and brokers need to combat the feeling of "It won't happen to us;" in fact, the question for most businesses is not if, but when, they will face an EPL claim.

Additionally, it's important to understand the EPL market, which is more complex than it has ever been. Policies need to be reviewed to ensure they are best in class and enhance the client's risk management program. Some key areas to consider include:

Defense costs. In addition to evaluating duty to defend versus duty to pay language, as previously mentioned, assess whether costs are inside or outside the limits, or if they have a sublimit.

Wage and hour. As noted above, more carriers are limiting wage and hour coverage. Employers should assess whether available coverage has a sublimit and whether it will pay damages in addition to defense costs.

Settlement clauses. EPL policies vary in whether insureds can approve a settlement agreed to by the insurer and claimant (this applies to duty to defend forms only).

Prior acts. Although it is important to make every attempt to prevent future losses and purchase insurance to pay for them in the event that they occur, companies may still be liable for incidents that occurred in the past. Recent allegations appearing in the news have referenced events that took place decades ago. Statutes of limitations vary by state and companies may still be responsible for transgressions going back many years. It is therefore essential to ensure that your EPL insurance policy has full prior acts coverage.

Reporting provision. All policies contain provisions specifying how and within what timeframe the insured must report incidents that may lead to claims. It is in the best interest of the employer that the EPL policy's provision is as narrow as possible to define the specific top executives, such as CEO, general counsel or HR manager, who are subject to this reporting clause. This ensures that the reporting window begins only when those executives become aware of an incident.

Defense allocation. Defense allocation clauses specify how defense costs will be paid when an underlying claim includes both covered and uncovered incidents or parties. From the standpoint of the employer, a best-in-class policy will pay 100% of defense costs for any claim that triggers defense under the policy, even if part or all of the claim is found to involve uncovered incidents.
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SUMMARY

For the past 30 years, employment practices liability has tracked closely with changing social trends. Today, an employer's risk of allegations by employees is heighted by both increased public intolerance for harassment and instant, worldwide distribution of news through social media. A Facebook post, Tweet or hashtag can quickly go viral, putting a company on the defense and creating potentially devastating consequences. EPL insurance is more important than ever in this environment. And it is incumbent on insurance professionals to understand the insurance marketplace so they can best help clients manage risk.

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