Employment Practices Liability Insurance (EPLI) Policies and Coverage

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A Practice Note discussing employment practices liability insurance (EPLI) policies and coverage issues for employers. It covers EPLI's key characteristics, benefits to employers, scope of coverage, and common policy provisions. It also includes practical considerations for employers obtaining EPLI policies. This Note contains general information and is jurisdiction neutral.

Employment practices liability insurance (EPLI) policies allow employers to mitigate risk and reduce the costs associated with certain employment-related claims and litigation. EPLI policies are a relatively new insurance offering and have become increasingly popular because of:

- The rising volume and costs of employment practices litigation.
- The employment practices exclusions added to many other insurance policies.

Employers must understand how EPLI policies differ from and interact with other types of insurance to maximize the benefits of EPLI coverage.

This Note addresses:

- Common characteristics of EPLI policies.
- The benefits of obtaining EPLI coverage.
- The scope of EPLI coverage, including common policy exclusions.
- Key defined terms and other EPLI policy provisions.
- Considerations for employers litigating and settling EPLI-covered claims.
- Practical tips for employers purchasing EPLI policies.

This Note primarily addresses EPLI policies, but discusses other types of insurance where relevant. For more information on other types of insurance policies, see Practice Notes:

- Insurance Policies and Coverage: Overview (9-505-0561).
- Commercial General Liability Insurance Policies: Property Damage and Bodily Injury Coverage (Coverage A) (9-507-2539).
- Commercial General Liability Insurance Policies: Personal and Advertising Injury Coverage (Coverage B) (0-507-2567).
- Directors and Officers Liability Insurance Policies (2-504-6515).

For a collection of insurance-related resources, see Insurance Policies and Coverage Toolkit (4-506-1171).

OVERVIEW OF EPLI POLICIES

EPLI is a form of insurance that employers can obtain for certain employment practices liability. It generally covers claims alleging that the employer engaged in unlawful conduct in connection with the employment relationship, including claims by individuals such as:

- Employees.
- Former employees.
- Applicants for employment.

Certain EPLI policies also may cover claims made by the Equal Employment Opportunity Commission (EEOC) on behalf of these individuals.

Common claims covered by EPLI policies include allegations of:

- Discrimination (see Practice Note, Discrimination: Overview (3-503-3975)).
- Harassment (see Practice Note, Harassment (9-502-7844)).
- Wrongful termination, including constructive discharge and retaliation (see Practice Note, Retaliation (5-501-1430)).
- Defamation, including libel and slander (see Practice Note, Defamation Basics (w-001-0437)).
- Invasion of privacy.

For more on covered claims, see Wrongful Employment Acts and Claim.

EPLI does not generally cover claims under the Fair Labor Standards Act (FLSA) or comparable state wage and hour laws, such as claims for:

- Unpaid overtime.
- Minimum wage violations (see State Minimum Wage Chart: Overview (0-593-5405)).

- Misclassification of employees as exempt or nonexempt.
- Misclassification of independent contractors (see Practice Note, Independent Contractor Classification (4-503-3970)).
- Meal or rest breaks (see State Laws on Meal and Rest Break Requirements Chart: Overview (9-618-0745)).

For more on FLSA and related state claims, see:

- Practice Note, Wage and Hour Law: Overview (2-506-0530).
- Practice Note, Defending Wage and Hour Collective Actions (9-504-1604).
- Wage and Hour Laws: State Q&A Tool ().

EPLI also does not generally cover contract-based claims and certain other statutory claims (see Common EPLI Policy Exclusions).

EPLI can be purchased as a stand-alone policy or as an endorsement (or addendum) to another type of policy, such as a commercial general liability (CGL) or directors and officers (D&O) liability insurance policy (see Stand-Alone Policies Versus Endorsement Coverage).

INTERPLAY BETWEEN EPLI AND OTHER INSURANCE POLICIES

Employment-related claims against a company may trigger coverage under one or more types of insurance policies, including:

- EPLI policies.
- D&O policies (see Directors and Officers (D&O) Liability Policies).
- Errors and omissions policies (see Errors and Omissions (E&O) Policies).
- Workers' compensation policies (see Workers' Compensation (WC) Policies).
- CGL policies (see Commercial General Liability (CGL) Policies).

Employers must understand how each policy is unique and how EPLI policies interact with other insurance policies that may cover a particular claim.

Directors and Officers (D&O) Policies

D&O policies are distinct from EPLI policies, but sometimes overlap in coverage. D&O policies typically provide insurance for the negligent acts, omissions, or statements made by directors and officers of a company that result in claims against the company. Companies often purchase D&O policies because they have agreed to indemnify directors and officers for certain conduct, but then need reimbursement from an insurer for those costs.

The key differences between EPLI and D&O policies are:

- **The breadth of coverage.** D&O policies typically cover acts by the directors and officers of a company only. EPLI policies typically cover acts by a broader group of employees and other "insured persons" (see Insured Persons).
- **The type of coverage.** D&O policies typically carry only a duty to pay (that is, a duty to indemnify the company for costs and losses). EPLI policies often carry a duty to defend, giving the insurer more control over the defense of an EPLI claim than a D&O claim (see Duty to Defend Versus Duty to Pay).

The same set of facts may trigger both a D&O and an EPLI policy, but they typically each cover different claims. For example, if a company president commits careless financial acts, this negligent conduct may lead to employee layoffs, salary reductions, or retaliatory terminations of individuals who reported the misconduct. Individual claims against the president for mismanagement may trigger coverage under the company's D&O policy. However, discrimination or retaliation claims against the company brought by former employees who were laid off because of the mismanagement are likely excluded under a D&O policy, but may be covered by an EPLI policy.

Errors & Omissions (E&O) Policies

E&O policies function as a form of malpractice or professional liability insurance. They protect the company and its employees when covered employees either:

- Make an error in advice, recommendation, judgment, or design.
- Fail to do something they should have done in their professional capacity.

The same individual may be an insured person under both an E&O and EPLI policy, with the nature of the claim determining which policy applies. For example, a law firm's E&O insurance covers claims against its lawyers arising from the lawyers' advice or service to their clients. However, a claim against a lawyer for sexually harassing another firm employee more likely triggers coverage under its EPLI policy than its E&O policy, because the incident did not result from an error or omission done as part of the employee's professional legal practice.

Workers' Compensation (WC) Policies

WC policies also may cover an employer for workplace injuries but the claims arise in a different context. For example, an employee whose hand has been cut while working at the employer's factory implicates the employer's WC policy. If that same employee has been inappropriately groped by another employee in the factory, the employee's claim for sexual harassment may trigger coverage under the EPLI policy.

Commercial General Liability (CGL) Policies

Some employment-related claims may trigger coverage under an employer's CGL policy and an EPLI policy. CGL policies generally insure companies for certain injuries that occur within the coverage territory during the policy period. CGL policies generally fall into two categories:

- Bodily injury and property damage (Coverage A) (See Practice Note, Commercial General Liability Insurance Policies: Property Damage and Bodily Injury Coverage (Coverage A) (9-507-2539)).
- Personal and advertising injury (Coverage B) (see Practice Note, Commercial General Liability Insurance Policies: Personal and Advertising Injury Coverage (Coverage B) (0-507-2567)).

Many CGL policies specifically exclude employees' bodily injuries, personal injuries, or both from coverage to distinguish CGL claims from workers' compensation claims. Many CGL policies also require that an "occurrence" (typically, an accident) caused the injury or damage. As a result, courts typically view intentional employee conduct, such as discrimination or harassment, as non-accidental and therefore outside the scope of traditional CGL policies (see, for example, *Woodstock Resort Corp. v. Scottsdale Ins. Co.*, 927 F. Supp. 149, 154-55 (D. Vt. 1996) (intentional infliction of emotional distress was not an "occurrence" when it resulted from "deliberately and intentionally" terminating employee's employment)). Many CGL policies also have explicit exclusions for wrongful employment practices. Other CGL policies more broadly define personal injury to include libel, slander, defamation, false imprisonment, and other tort claims that may overlap with EPLI coverage.

STAND-ALONE EPLI POLICIES VERSUS ENDORSEMENT COVERAGE

There are key differences between stand-alone EPLI policies and EPLI coverage purchased as an endorsement to another insurance policy, such as a CGL or D&O policy. For example, stand-alone EPLI policies:

- Often have broader coverage than endorsement policies. For example, endorsement coverage under a D&O policy may cover only directors and officers, leaving the company vulnerable if employment practices claims are based on lower-level employees' conduct (as they often are).
- Often carry the broader duty to defend rather than a duty to pay (see Duty to Defend Versus Duty to Pay).
- Have separate policy limits. With endorsement coverage, the policy's aggregate limit may include both EPLI claims and those brought under the underlying D&O or CGL policy. If purchasing endorsement coverage, a company should ensure the aggregate policy limits are sufficient for all anticipated claims (see Policy Limits for Liability and Defense Costs). However, separate policies may come with high deductibles or premiums (see Self-Insured Retention Amounts and Deductibles).

Companies should understand these differences when obtaining EPLI insurance to avoid the unanticipated consequences of purchasing the wrong kind of coverage.

DIFFERENCES BETWEEN CLAIMS-MADE AND OCCURRENCE-BASED POLICIES

There are multiple kinds of EPLI policies. Companies should be aware of the differences because the kind of EPLI policy affects the scope of coverage it provides. EPLI policies can be:

- Claims-made policies.
- Occurrence-based policies.
- Claims-made-and-reported policies, which are a variation of the claims-made model.

EPLI policies typically are claims-made policies.

Claims-Made Policies

A claims-made policy protects the policy holder against claims (see Claim) made against insured persons (see Insured Persons) during the policy period, or during any extended reporting period, if the insured purchases extended coverage. Under a claims-made policy, depending on the policy language and applicable state law, an insured's failure to promptly notify the insurer of the claim may bar coverage, even if the insurer is not prejudiced by the delay (see Notice Provisions).

A claims-made policy does not cover claims asserted by the employee after the policy period expires, even if the conduct giving rise to the claim occurred during the policy period. However, some claims-made policies provide "prior acts" coverage and cover claims arising from conduct that occurred before the policy period, but reported by the individual harmed during the policy period (see Prior Acts and Retroactive Date).

For more on claims-made policies generally, see Practice Note, Insurance Policies and Coverage: Overview: Claims-Made Coverage (9-505-0561).

Claims-Made-and-Reported (or Double Anchor) Policies

Some EPLI policies are claims-made-and-reported policies (also called double anchor policies). These policies require both that:

- The claim is made against the insured during the policy period.
- The insured report the claim to the insurance company during the policy period.

For double anchor policies, notification to the insurer of a claim is critical because reporting the claim during the policy period is generally a precondition to coverage. When possible, and absent compelling reasons, companies should try to avoid these policies because they can create coverage gaps if the company cannot report a claim that was made to the insurer during the policy period. Alternatively, if using a double anchor policy, the company should try to negotiate a grace period for reporting claims after the policy period expires.

Occurrence-Based Policies

An occurrence-based policy obligates the insurer to pay for claims arising out of occurrences (as defined in the policy) during the policy period, regardless of when the harmed individual reports the claim against the company or the company reports the claim to the insurance company. Although less common than claims-made EPLI policies, policy endorsements to CGL and D&O policies may be written as occurrence-based coverage. Many employment claims, such as sexual harassment, discrimination, or hostile work environment claims, involve conduct occurring over many years. For these claims, occurrence-based coverage may result in lengthy and costly coverage disputes about whether an occurrence took place in the policy period.

For more information on occurrence-based policies, see Practice Note, Insurance Policies and Coverage: Overview: Occurrence-Based Coverage (9-505-0561).

DUTY TO DEFEND

When choosing an EPLI policy, employers must decide between policies that provide a duty to defend and policies with a duty to pay (or duty to indemnify). The duty to defend generally includes the insurer's obligation to:

- Defend the claim or lawsuit.
- Cover all legal fees and costs (up to the policy limit) (see Policy Limits for Liability and Defense Costs).
- Pay for any covered liability (up to the policy limit).

A duty to defend policy gives the insurance company greater control over the defense of the employment claim, including key decisions about:

- Selecting counsel.
- Settlement.
- Trial strategies.

Some companies may benefit from the insurer's degree of control over the defense that accompanies the duty to defend. For example, a smaller or less legally sophisticated company may appreciate relinquishing control of defending its employment practices claims to an experienced insurance carrier. Conversely, companies that want to maintain their ongoing relationship with outside counsel should ensure that the EPLI policy specifically allows use of the company's selected counsel or that the desired law firm be added to the insurer's list of approved panel counsel (see Attorney Selection and Management Process).

Duty to Defend Versus Duty to Pay

The duty to defend is broader than the duty to pay. Unlike an insurer's duty to pay, an insurer's duty to defend extends to any claim that is potentially covered by the EPLI policy, even if it is meritless or fraudulent. The duty to defend therefore may exist even where:

- EPLI coverage is in doubt.
- EPLI coverage is ultimately is denied.
- No damages are awarded.

In contrast, an insurer's duty to pay provides for the indemnification or advancement of defense costs. The duty to pay does not require the insurer to directly defend any claims potentially covered by the policy, but rather only to reimburse the insured for covered costs and losses. The insured controls the defense of the claim together with the insurer, which typically has the right to approve certain activities, but cannot unreasonably withhold approval (see Pre-Approval Process).

Duty to Defend Reasonably Related Claims

A major benefit of EPLI coverage is that a duty to defend policy typically requires the insurance company to defend covered claims, as well as any reasonably related claim, even if:

- The reasonably related claim is not otherwise covered by the policy.
- Defending the covered claim benefits the reasonably related non-covered claims.

Because discrimination and harassment claims (typically covered by EPLI) are often combined with related claims, such as wage and hour claims (typically not covered by EPLI), a policy with a broad duty to defend may provide employers with greater protection against the substantial costs of defending even excluded claims.

BENEFITS OF EPLI FOR EMPLOYERS

Employment-related claims are an unwanted but necessary cost of doing business for even the most well-intentioned employers. Given recent trends, EPLI policies may benefit employers in several ways.

VOLUME OF EMPLOYMENT CLAIMS

Employment claims occupy a significant portion of the federal docket. In 2015, 12,205 employment discrimination cases (as well as 2,076 discrimination cases under the Americans with Disabilities Act (ADA), which are tracked separately) were filed in federal district courts. Employees can file discrimination charges with various federal, state, and local agencies, such as the EEOC, for free, increasing the potential that disgruntled employees may file a claim. Online resources available through various administrative agencies provide employees with information making it easy for them to file claims against their employers. After a post-recession dip in annual EEOC charges, the number of charges filed annually is once again on the rise (increasing from 89,385 in 2015 to 91,503 in 2016) (EEOC, Charge Statistics FY 1997 Through FY 2016). EPLI policies can help employers insure against some of these known risks.

COST OF DEFENDING EMPLOYMENT-RELATED CLAIMS

Defending even weak, single-plaintiff employment claims can be costly for employers, not including the potential liability on these claims. Several factors unique to employment claims make them relatively expensive to defend, namely:

- Unavoidable discovery and electronically stored information (ESI) costs (see Unavoidable Discovery and ESI Costs).
- The disproportionate discovery burden (see Employer's Disproportionate Discovery Burden).
- The employer's limited ability to recover its fees (Employer's Limited Ability to Recover Attorneys' Fees).

Unavoidable Discovery and ESI Costs

Employment claims are often highly fact-intensive, meaning that resolution through early dispositive motion practice, such as summary judgment, may be difficult. For example, in a typical sexual harassment claim, the alleged harasser and the victim often are the only individuals present for key events or conversations, leading to the classic "he said, she said" dispute. Because there are disputed facts, the case cannot be resolved on summary judgment, and likely requires a fact-finder (jury or judge) to weigh the credibility of the employee plaintiff against the credibility of the alleged harasser. The company's costs of proceeding (even if it prevails on the merits) include:

- The costs of discovery through the trial.
- The costs of attorneys' fees through trial.
- The costs and fees involved in the trial itself, such as demonstrative exhibits and expert witness fees.
- Any costs and fees related to appeal.

Depending on the scope of coverage and policy limits, EPLI can go a long way toward covering these costs, though the company still must absorb non-monetary intangible costs, such as the time associated with company employees preparing to testify and attending trial.

Employer's Disproportionate Discovery Burden

In employment practices cases, employers generally possess or control most of the relevant documents and ESI. In contrast, plaintiffs possess and control little of the relevant documents and ESI, though with the ubiquity of social media, text messages, and similar forms of communication, this imbalance may be shifting. The practical consequence is that employers bear a disproportionate share of costs associated with ESI, including:

- Preserving the information in the event of threatened litigation (see Practice Note, Practical Tips for Preserving ESI (8-500-3688) and First Steps for Identifying and Preserving Electronic Information Checklist (0-501-1791)).
- Data collection (which sometimes requires hiring ESI experts or vendors) (see Considerations When Selecting an E-Discovery Vendor Checklist (4-520-7423)).

- Conducting legal review of the information before production (see Standard Document, Budget Template: Document Production (8-544-6025)).
- Using ESI meaningfully throughout the litigation (which also may require hiring experts or vendors).

Although the Federal Rules of Civil Procedure (FRCP) were revised in 2015 in part to address proportionality concerns, employers still face significant discovery costs in employment practices claims. For more on the FRCP amendments, see Legal Update, Overview of December 2015 Amendments to the Federal Rules of Civil Procedure (W-000-6911).

For more on e-discovery in employment cases, see Practice Note, E-Discovery in Employment Cases: Practical Considerations for Employers (W-002-6980).

Employer's Limited Ability to Recover Attorneys' Fees

Employers have little ability to recoup attorneys' fees and costs associated with defending employment-related claims even when they prevail. Although sanctions exist for certain kinds of vexatious claims, US employers largely operate under the American Rule, meaning that each party bears its own litigation costs. While some employment statutes contain fee-shifting provisions allowing prevailing plaintiff employees to recover their attorneys' fees and costs, those same statutes generally do not allow prevailing employers to recover their fees. In short, employers without EPLI may spend large sums to defend even a meritless claim without any way to recoup those expenses.

For more on seeking attorneys' fees, see Attorneys' Fees Toolkit (W-002-5083).

Substantial Liability Risks

Employment cases carry a risk of large judgments and awards, especially if they reach a jury. For example, in 2015, a Denver jury awarded a group of seven plaintiffs approximately $15 million for race discrimination and retaliation claims (*Camara v. Matheson Trucking, Inc.*, 2015 WL 1538362 (D. Colo. Feb. 27, 2015) (final judgment)). In 2016, the California Court of Appeal upheld a lower court verdict for an employee who was terminated for stealing a bell pepper from the workplace cafeteria. The plaintiff alleged that this reasoning was a pretext for age discrimination and other illegal motives. A jury awarded the plaintiff $3.2 million in compensatory damages and $22.8 million in punitive damages, which the trial court reduced to $13 million. (*Nickel v. Staples Contract & Commercial, Inc.*, 2016 WL 3101345 (Cal. Ct. App. May 26, 2016) (unreported).)

Settlements also can be expensive. For instance, in 2016, the EEOC secured $482 million in recovery on behalf of individuals who had filed discrimination charges. Of that number, more than $345 million came from settlements. (See EEOC, What You Should Know: EEOC's Fiscal Year 2016 Highlights.)

It is not unusual for defense costs, along with verdicts and settlements, in discrimination, harassment, and retaliation cases to reach six or seven figures, especially when the EEOC brings the action. EPLI policies can provide valuable protection against both verdicts and settlements if they have sufficiently high policy limits (see Per-Claim and Aggregate Policy Limits).

EPLI POLICY DEFINITIONS AND SCOPE OF COVERAGE

Like with other types of insurance, many EPLI coverage disputes turn on the interpretation of defined terms in the policy. State law controls the interpretation of any vague or undefined terms and may limit or expand coverage.

While not an exhaustive discussion of all the terms or definitions in a particular EPLI policy, this Note highlights those that are most unique to EPLI policies or most often litigated. For more on the rules of contract interpretation applicable to insurance policies, see Practice Note, Insurance Policies and Coverage: Overview: Special Rules of Construction for Insurance Policies (9-505-0561).

DECLARATIONS PAGE

The front page or pages of the EPLI policy contain a declaration of key policy terms. The insurance declarations page simplifies the contract review process by giving the policyholder a basic overview of its insurance policy on the first page. The declarations page typically lists:

- The primary insured.
- The insured's address.
- The policy limits.
- The policy deductible or self-insured retention amounts.
- The policy period.
- Other named insureds.
- Other key information that varies from insured to insured.

Companies should ensure that the key terms and definitions are consistently represented in each of the declarations page, the policy, and the insurance binder outlining the parties' initial agreement.

INSURED

EPLI coverage issues often involve determining whom the policy insures. EPLI policies typically define the "insured" broadly to include the "company" (sometimes also called the "organization") and other "insured persons" (see Insured Persons). Employers must carefully review these definitions to ensure that the policy covers all relevant actors within the employer and any related entities.

The definition of company also directly impacts whether a claim is covered. Coverage disputes often arise regarding related business entities, such as subsidiaries (see Subsidiaries and Related Business Entities).

Subsidiaries and Related Business Entities

An employer should not assume that an EPLI policy covers related business entities of the specifically named insured entity. If an employer is comprised of several entities, such as parent companies or subsidiaries, the EPLI policy should expressly cover all these entities as insureds. This may be done by including them in the definition of "company" or "organization" or adding them as additional named insureds. This is especially important where employees regularly transfer among related entities.

INSURED PERSONS

Insured persons generally include any current or former employees of the insured company or organization. Unlike D&O policies, which protect only directors and officers (see Directors and Officers (D&O) Policies), EPLI policies insure a broader category of workers, such as:

- Full-time, part-time, or seasonal employees.
- Directors or officers of the company.
- Managers or supervisors.

Insured persons may also include:

- Volunteers.
- Third parties.
- Independent contractors working for the named insured.
- Temporary or leased employees working for the named insured.
- Owners and their families (for partnerships and sole proprietorships).

This broader EPLI coverage can be especially valuable to companies where lower level managers have hiring and firing responsibility or co-worker disagreements give rise to employment disputes, which commonly occurs.

EMPLOYEE

Some EPLI policies expressly define employee as any person who receives wages or salary from the insured for work that is directed and controlled by the insured. This means that, unless otherwise expressly included, volunteers who do not receive compensation, but who perform services for the company, may be excluded. Independent contractors may similarly be excluded under this definition (see Independent Contractors). Further, a policy that requires that a worker be "acting in his or her capacity" as an employee to be covered under the policy may lead to fact-intensive disputes about whether employees were working within the scope of their employment when they committed the alleged wrongful acts.

When EPLI policies do not expressly define the term employee, courts rely on common law principles (which vary by state) to determine whether an individual is an employee of the insured for coverage purposes. This inquiry generally includes several non-dispositive factors, including who:

- Pays the employee.
- Controls the details of the employee's work.

Independent Contractors

EPLI policies generally exclude independent contractors or are silent on the issue, in which case coverage is not assumed. If a company wants coverage for its independent contractors, it should ensure the policy explicitly lists independent contractors as insured persons. If included, the definition of independent contractor should clearly delineate who is covered.

If an EPLI policy allows for coverage of independent contractors, it often limits that coverage to:

- Claims brought against independent contractors in their capacity as contractor.
- Situations in which the insured and the independent contractor have a written agreement confirming the independent contractor relationship.

If independent contractors are not expressly included, coverage disputes may turn on whether the independent contractor is actually an employee who is wrongly classified. For example, if an employee sues the company based on the conduct of an independent contractor, the company on one level wants to distance itself from the independent contractor to avoid liability for that conduct. However, if it has an EPLI policy that does not expressly cover independent contractors as insured persons, it must either forego insurance for that claim or argue that the individual is actually an employee and therefore covered as an insured. Seeking coverage for this claim, however, may create greater potential liability for the employer on the misclassification issue than the underlying lawsuit.

Employers should understand that defining independent contractors as an insured does not generally provide coverage for misclassification claims by independent contractors against the company, and those claims typically are not covered by EPLI policies. Some employers, however, have sought coverage for misclassification claims under a misrepresentation theory (claiming that the employer misrepresented to the individuals their employment status), though not with much success (see, for example, *Admiral Ins. Co. v. Kay Auto. Distribs., Inc.*, 82 F. Supp. 3d 1175, 1182 (C.D. Cal. 2015) (finding fraud claim regarding employee wages and misclassification fell within wage and hour policy exclusion); see also FLSA and Other Wage and Hour Claims).

For more on independent contractors generally, see Practice Note, Independent Contractor Classification (4-503-3970).

Leased or Temporary Employees

Leased or temporary employees raise another issue regarding the scope of EPLI coverage. While employers may use leased or temporary employees provided by staffing agencies to avoid payroll hassles and reduce benefit-related expenses and issues, claims against these employees and the company based on their alleged bad acts may not be covered under the company's EPLI policy. When an EPLI policy is silent on the issue, some courts have held that the insurance policy did not cover the leased worker's actions against the company leasing the worker (see, for example, *Home Ins. Co. v. Liberty Mut. Fire Ins. Co.*, 830 N.E.2d 186, 188-89 (Mass. 2005)).

If a company uses leased or temporary employees and wants EPLI coverage for their actions, it should negotiate with:

- Its insurance carrier to include either or both:
  - the staffing or leasing agency with which it works as a named insured in its own EPLI policy; or
  - leased employees as insured persons in its own EPLI policy.
- The staffing or leasing agency to either or both:
  - include the client company as a named insured on the staffing or leasing agency's EPLI policy; or
  - indemnify the client company for actions of the temporary or leased employees.

For more on temporary staffing arrangements, see Standard Document, Temporary Employee Staffing Agreement (0-543-6105).

Third-Party Claims

EPLI policies typically cover claims made by current and former employees. They may also be drafted to cover claims brought by third parties, such as leased employees, independent contractors, customers, clients, suppliers, and visitors (see Independent Contractors and Leased or Temporary Employees). While third-party coverage has increased in recent years, it is still not the norm. When provided, carriers generally restrict the coverage to certain types of harassment or business relationships, such as claims alleging that an employer allowed a customer or vendor to harass an employee. Third-party coverage may be especially important to entities whose employees interact with the public frequently, such as those who work in the hospitality or entertainment industries, at educational facilities, and with similar entities.

Employers also should confirm whether coverage exists for the wrongful acts of third parties when committed against the named insured's employees.

PRIOR ACTS AND RETROACTIVE DATE

Like other claims-made policies, most EPLI policies provide a degree of prior acts coverage for claims based on conduct that predates the policy period. Full prior acts coverage, which is unusual, does not contain a retroactive date and covers claims made during the policy period based on prior acts no matter when they occurred. More often, insurers include a retroactive date, which limits coverage to claims that occur after the retroactive date and are reported by the harmed individual to the company during the policy period.

To avoid coverage gaps, employers should ensure that the retroactive date is not the same date as the effective date of a new policy. For example, if a claim concerning a company with claims-made-and-reported EPLI coverage arises but was not reported to the insurance carrier during the policy period:

- The claims-made-and-reported policy does not cover the claim because it was not reported in the policy period.
- If this company switches to a claims-made EPLI policy with a retroactive date that is the same as the first day of the policy period, the claim would not be covered by the new policy either, because it was not made after the retroactive date in the second policy.

For more on prior acts and retroactive dates, see Practice Note, Insurance Policies and Coverage: Overview: Retroactive Dates (9-505-0561).

WRONGFUL EMPLOYMENT ACTS

The definition of wrongful employment acts determines what workplace conduct is covered by the policy. At a minimum, EPLI generally insures against claims of:

- Discrimination alleging that an employment decision was based on age, sex, race, religion, color, national origin, or another protected class.
- Retaliation.
- Unlawful harassment.
- Wrongful termination, including constructive discharge and retaliatory discharge.

EPLI policies may cover discrimination or harassment based on a claimant's membership in one of:

- Specifically identified protected classes.
- The protected classes in the federal anti-discrimination statutes (see Practice Note, Discrimination: Overview (3-503-3975)).
- A catch-all category of protected categories that are not covered under federal discrimination statutes, but protected under state or local law (see Anti-Discrimination Laws: State Q&A Tool).

Many insurance carriers provide enhanced coverage for a broader universe of employment-related claims, such as claims for:

- Misrepresentation to an employee or applicant.
- Defamation, including libel and slander.
- Invasion of privacy.
- Negligent training or supervision.
- Wrongful failure to promote, discipline, or deprivation of career opportunity.
- False imprisonment or detention.
- Violation of certain leave laws.

EPLI policies vary greatly. For instance, an increasing number of EPLI policies are beginning to cover various leave claims, such as allegations of retaliation or interference under the Family and Medical Leave Act (FMLA). Ultimately, an employer exploring EPLI should carefully review the types claims (or wrongful employment acts) covered and excluded by the policy to ensure it captures the claims that most concern the employer (see Common EPLI Policy Exclusions).

CLAIM

The definition of "claim" in EPLI policies determines what event:

- Triggers coverage.
- Triggers the insured's duty to notify the insurance carrier of the situation (see Notice Provisions).

Claim is commonly defined in EPLI policies as a judicial or administrative proceeding, suit, or demand made by or for a current, former, or prospective employee for damages (or other relief) because of an alleged wrongful employment act (see Wrongful Employment Acts). Sometimes an EPLI policy limits a claim to a written demand. Some EPLI policies also cover proceedings (including audits) brought by the EEOC or an equivalent administrative agency.

A claim typically contains two parts:

- Facts regarding an alleged wrongful employment act or acts.
- A demand for monetary or other relief (although some policies do not cover claims solely for declaratory or injunctive relief).

Some EPLI policies define claim more specifically, such as further defining when a suit occurs or explicitly listing what proceedings or hearings constitute a claim.

The definition of claim in a claims-made policy is particularly important when determining coverage for discrimination claims brought by the EEOC. For example, if an employee files a charge with the EEOC, and the EEOC brings a claim against the company based on that charge, the "claim" may be deemed "made" when the employee files the charge, and not when the EEOC files the subsequent lawsuit (see *Cracker Barrel Old Country Store, Inc. v. Cincinnati Ins. Co.*, 499 F. App'x. 559, 566-67 (6th Cir. 2012)). Some courts, however, have found that an EEOC charge and a subsequent lawsuit arising from the same facts are separate claims, with each claim triggering coverage (see, for example, *John Marshall Law Sch. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2016 WL 7429221, at *3-4 (N.D. Ill. Dec. 26, 2016)). This determination depends on the policy language and applicable state law.

LOSS

"Loss" is commonly defined as the amount the insured is legally obligated to pay in:

- Damages, including:
  - back pay;
  - front pay; and
  - compensatory damages, including emotional distress damages, but not damages for bodily injury.
- Settlements (if entered into in accordance with the policy).
- Defense costs.

Damages typically do not include:

- Punitive or exemplary damages (though some policies may cover to the extent allowed by applicable law).
- Liquidated damages (though some policies may cover liquidated damages under the Age Discrimination in Employment Act (ADEA) or the Equal Pay Act (EPA)).
- Fines or penalties.
- Matters deemed uninsurable under applicable law.

(See Common EPLI Policy Exclusions.)

For more on remedies available in employment cases, see Employment Litigation Remedies Toolkit (W-003-4894).

COMMON EPLI POLICY EXCLUSIONS

Some types of employment claims are commonly excluded from EPLI coverage. An employer should realize and understand the limits of an EPLI policy's coverage before purchasing it.

While not an exhaustive list, common exclusions include:

- Claims for bodily injury (such as assault and battery) and property damage (commonly covered by a company's GCL policy).
- Wage and hour claims, including claims under the FLSA and related state laws (see, for example, *Payless Shoe Source, Inc. v. Travelers Cos., Inc.*, 585 F.3d 1366, 1376 (10th Cir. 2009) (finding that FLSA exclusion barred claims for violations of similar state laws)).
- Workers' compensation claims (covered by a company's workers' compensation policy).
- Unemployment insurance claims.
- Claims for breach of express or implied contract, such as claims regarding:
  - stock options;
  - profit-sharing plan payments;
  - bonus plans or payments; or
  - arbitration awards, where the claims are derived from a contract providing for arbitration (see, for example, *TVN Entm't Corp. v. Gen'l Star Indem.*, 59 F. App'x 211, 212 (9th Cir. 2003)).
- Claims arising from labor relations disputes, such as:
  - unfair labor practices (ULP) under the National Labor Relations Act (NLRA);
  - violations of the Railway Labor Act (RLA) or other traditional labor laws; or
  - breaches of or conflicting interpretations of rights under a collective bargaining agreement with unions.
- For more information on labor relations disputes, see Labor Union Basics Toolkit (1-519-1211).
- Claims under other federal statutes, such as:
  - the Worker Adjustment and Retraining Notification Act (WARN) or similar state law (mini-WARN) claims;
  - the Occupational Safety and Health Act (OSH Act);
  - the Employee Retirement Income Security Act (ERISA); and
  - the Consolidated Omnibus Budget Reconciliation Act (COBRA).
- Claims arising from fraudulent, dishonest, or criminal activity.
- Claims excluded for public policy reasons (see Public Policy Exclusions).

FLSA AND OTHER WAGE AND HOUR CLAIMS

Most EPLI policies do not cover wage and hour claims, such as claims brought under the FLSA for off-the-clock work, overtime pay, misclassification of employees as exempt or nonexempt, and similar claims. For example, a policy may contain an exclusion for any "loss for any claim for violation of responsibilities, duties, or obligations imposed on an insured under any wage and hour law." Historically, the rationale for this exclusion was that the employer has the ability to control how and when employees are paid, so an insurer should not bear the risk of intentional misconduct. Practically speaking, insurance companies are reluctant to cover these claims because they are expensive to defend and carry potential liability in the millions of dollars, especially in class or collective action suits.

Notably, however, in the past few years, some insurers have begun to offer narrowly tailored coverage for select wage and hour claims in stand-alone policies or as endorsement coverage for EPLI policies. Typically, these wage and hour policies cover only defense costs (up to a cap), although some policies for large employers may also cover the costs of settlements or judgments (see, for example, *Admiral Ins. Co.*, 82 F. Supp. 3d at 1179 (EPLI policy excluded coverage for claims involving wage and hour laws, but covered up to $100,000 in defense costs for those claims)).

Absent specific wage and hour coverage (often offered through an endorsement to an EPLI policy), companies have had limited success obtaining coverage for wage-related claims under most EPLI policies. Some litigants have argued that employee misclassification suits should be covered as an employment-related "misrepresentation" claim (*Prof'l Sec. Consultants, Inc. v. U.S. Fire Ins. Co.*, 2010 WL 4123786, at *3 (C.D. Cal. Sept. 22, 2010) (denying motion to dismiss, court found allegations of employer's misrepresentation about plaintiffs' entitlement to overtime sufficient to trigger duty to defend and establish potential for indemnity coverage despite FLSA exclusion)). At least one court held that the failure to reimburse an employee's necessary business expenses as required by statute may be a covered claim despite an EPLI's policy's wage and hour exclusion, therefore triggering the insurer's duty to defend a wage and hour class action (*Hanover Ins. Co.*, 2016 WL 6698936, at *3-4; *Phase II Transp., Inc. v. Carolina Cas. Ins. Co.*, 2017 WL 424903, at *4 (C.D. Cal. Jan. 9, 2017)).

However, other courts have not interpreted EPLI policies with wage and hour exclusions as covering wage and hour claims under any theory (*Gauntlett v. Ill. Union Ins. Co.*, 2012 WL 4051218, at *13 (N.D. Cal. Sept. 13, 2012); *Cal. Dairies Inc. v. RSUI Indem. Co.*, 617 F. Supp. 2d 1023, 1050 (E.D. Cal. 2009) (rejecting misrepresentation argument as a "strained interpretation" of the policy)).

PUBLIC POLICY EXCLUSIONS

EPLI policies often do not cover various damages items because of public policy reasons. For instance, EPLI policies often do not usually cover:

- Criminal fines.
- Civil fines.
- Penalties or statutory liquidated damages.
- Punitive damages (for which coverage is expressly prohibited under some state laws).

These exclusions are based on the premise that public policy precludes insurance companies from condoning and encouraging illegal acts by insuring a company for the intentional injuries it causes. In other words, the fear is that companies would disregard the law and public safety if they knew they would be covered monetarily for these violations. However, this is not a public policy concern in every state, especially when the damages or penalties arise from an employer's vicarious liability based on the conduct of its employees (see, for example, *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 670 (Tex. 2008) (Texas public policy did not prohibit EPLI coverage of exemplary damages for gross negligence)).

COUNTERCLAIMS

Most policies by definition do not cover counterclaims against employees, as they generally only cover claims made **against** the insured (*Mt. Vernon Fire Ins. Co. v. VisionAid, Inc.*, 91 F. Supp. 3d 66, 71-72 (D. Mass. 2015)). Even the broad duty to defend does not generally cover defense expenses related to an offensive counterclaim (*Int'l Ins. Co. v. Rollprint Pkg. Prods., Inc.*, 728 N.E.2d 680, 693-94 (Ill. App. 2000)). However, some courts have found that counterclaims that were inextricably intertwined with and strategically necessary to the defense were covered by the insurer's duty to defend (*Safeguard Scientifics, Inc. v. Liberty Mut. Ins. Co.*, 766 F. Supp. 324, 333-34 (E.D. Pa. 1991), rev'd on other grounds, 961 F.2d 209 (3d Cir. 1992)).

For more on counterclaims, see Practice Note, Employment Litigation: Counterclaims Against Employees (8-585-3165).

OTHER EXCLUSIONS

EPLI policies often limit coverage for certain types of relief, damages, or losses for practical reasons. For example, some EPLI policies exclude certain losses or damages, such as:

- Costs associated with:
  - reinstatement (though front pay is generally covered);
  - providing accommodations under the ADA; and
  - injunctive relief.
- Employee benefits, such as stock options and deferred compensation.

Employee benefits may be excluded because they are contractually based and EPLI policies often do not cover claims for breach of contract (though some policies provide this coverage). Damages such as the costs of providing an ADA accommodation or reinstating an employee are often excluded because they are hard or impossible to quantify.

POLICY LIMITS FOR LIABILITY AND DEFENSE COSTS

PER-CLAIM AND AGGREGATE POLICY LIMITS

Like other insurance policies, EPLI policies have both a per-claim limit and an aggregate payout limit for each policy period. A per-claim limit is the total amount an insurer will pay on a single claim, while an aggregate limit is the total maximum amount an insurer will pay for all claims under that policy during the policy period. Companies should ensure that the per-claim limit is sufficient for the types of claims it expects to face, as well as for catastrophic claims. Companies should also understand how claim is defined by the policy, for example whether an EEOC charge and subsequent lawsuit count as one claim or two (see Claim). The aggregate amount also should be sufficient to cover the anticipated frequency and amount of potential claims, especially given the high costs associated with EEOC enforcement actions and other class-based claims.

Defense expenses under EPLI policies typically count toward the total liability limit, making early case resolution an attractive option for both companies and insurance companies.

SELF-INSURED RETENTION AMOUNTS AND DEDUCTIBLES

EPLI policies usually subject companies to a self-insured retention (SIR) amount. The SIR is what the insured must pay out-of-pocket for defense costs during the initial stages of the claim. Once costs reach the SIR amount, the insurance carrier pays the full amount of costs (up to the policy limit).

Other plans require an insured to pay a deductible on a claim rather than a SIR. Like the SIR, a deductible is an amount that the insured must pay before the insurer pays out on claim. The key difference is that with deductible plans the insurer pays the total policy limit **minus** the deductible. With SIR plans, the insurer is obligated for the full policy amount after the employer pays the SIR.

Plans with a higher SIR or deductible usually offer an employer more control over claims and generally have lower premiums. These policies best serve employers seeking to limit insurance protection to catastrophic claims. In contrast, plans with lower retention amounts or deductibles generally have higher premiums. These policies may be more appealing to companies that anticipate frequent, less catastrophic employment claims and want to limit their out-of-pocket defense costs.

OTHER KEY POLICY PROVISIONS

EPLI policies often have other unique features, including:

- Specific claim notification procedures.
- Detailed procedures and controls over attorney selection and work product.
- Strong control over the settlement process.
- Arbitration or alternative dispute resolution processes for handling coverage disputes.
- Provisions for reviewing and auditing applicant or insured employment processes.

NOTICE PROVISIONS

Most policies specify what conduct triggers coverage and when an insured must notify the insurance carrier of a claim. Often, when an insured must notify the insurer hinges on how claim is defined under the policy (see Claim).

Claims Trigger Notice Obligations

Policies vary regarding what information triggers the policyholder's duty notify the insurance company of a claim. For example, typical actions that may constitute a claim and therefore trigger the insured's duty to report include:

- A lawsuit filed in state or federal court.
- A written demand for money damages or other relief, including for arbitration.
- An administrative charge filed with a federal, state, or local governmental agency, such as the EEOC or a state-equivalent fair employment practice agency (FEPA).
- An investigation or audit by a governmental agency, especially if the governmental agency indicates that it has identified a problem or is seeking some remedy.

Administrative charges and government investigations are a frequent source of EPLI coverage disputes. Courts examine policy language in detail to determine whether a claim existed at the time of the administrative agency's involvement. For example, a federal district court in Texas held that an EEOC charge was a "claim" related to the subsequent lawsuit, and that under the policy related claims were treated as a single claim. The employer's notice of the initial EEOC charge, not the subsequent lawsuit, therefore triggered its obligation to notify the insurance company. (*Munsch Hardt Kopf & Harr P.C. v. Exec. Risk Specialty Ins. Co.*, 2007 WL 708851, at *3-4 (N.D. Tex. Mar. 8, 2007).)

Similarly, an EEOC class action against an insured commenced when the first charge leading to the EEOC's investigation and lawsuit was filed, not when the EEOC filed its lawsuit (*Cracker Barrel Old Country Store, Inc.*, 499 F. App'x at 566; see also *Certain Underwriters of Lloyds of London v. Scolari's Warehouse Mkts., Inc.*, 2007 WL 7266254 (D. Ct. Nev. Washoe Cnty. Feb. 28, 2007)). However, a New Mexico state court held that an EEOC charge was not a claim, because it did not contain a demand for relief as required under the policy definition of claim (*City of Santa Rosa v. Twin City Fire Ins. Co.*, 143 P.3d 196, 198 (N.M. Ct. App. 2006)).

Not all employee complaints trigger the duty to report the claim to the insurance company. Unless the policy specifies to the contrary, an employer generally has no duty to report:

- Oral or vague demands.
- Generalized complaints by employees, including terminated employees.
- An attorney letter offering to meet to avoid litigation.
- An unsigned draft complaint (*SNL Fin., L.C. v. Phila. Indem. Ins. Co.*, 455 F. App'x 363, 368-69 (4th Cir. 2011)).

Insureds and insurers should avoid confusion by directly and clearly addressing this topic in the policy. If in doubt, employers should generally report to the insurance company in writing rather than risk violating the notice provision and losing coverage.

Discovery Clauses

Many EPLI policies now include discovery clauses, which require insureds to notify their carrier when they become aware of circumstances that **may** give rise to a claim. In an EPLI policy with a discovery clause, employers should err on the side of caution and report any potential claims to their insurance carriers immediately.

Time Frame for Notice

Insurance companies typically require the insured to notify them of a claim "as soon as practicable." Some policies require the insured to report within a specific timeframe, such as 30, 60, or 90 days after the claim is made (or in some cases, after the expiration of the policy period). For EPLI policies that include a specific time frame for reporting, prompt reporting is essential, as the insurance carrier can deny coverage based on late reporting. Under any policy, employers should report claims quickly, or they may risk costly and protracted litigation over coverage or a loss of coverage altogether.

Method for Notification

EPLI policies also dictate how an insured must notify the insurance company of the claim. For example, some policies require written notification. Even if a policy allows for oral notification, the company should also notify the insurance carrier in writing to establish proof of notification. Companies also should determine whether policies allow or require email or another form of electronic or online notification. For a sample claim notification letter, see Standard Document, Notice of Claim: Claims-Made Policy (5-505-4325).

ATTORNEY SELECTION AND MANAGEMENT PROCESS

Because many EPLI policies carry a duty to defend, carriers must ensure that qualified legal counsel handles the matter. Carriers therefore often exercise control over counsel selection, attorneys' fees, and costs. Insurers often structure EPLI policies to maintain control over the attorney selection and management process in several ways.

Panel Counsel

Many insurance companies, especially larger carriers, have panel counsel. Panel counsel are a group of law firms or attorneys that the insurance company has pre-approved to handle EPLI matters for their insureds. The panel counsel model can provide pre-vetted, experienced employment counsel to insured employers with less experience in legal matters.

While some EPLI policies limit an insured to using panel counsel, others allow insureds flexibility in selecting their attorneys. If an employer has a strong preference for using attorneys of its own choosing, that employer should ensure that it purchases a policy with an insurer that:

- Does not limit it to using panel counsel.
- Has approved its preferred law firm as panel counsel.
- Has approved the use of the employer's preferred law firm as an exception to a panel counsel requirement.

If seeking an exception to use non-panel counsel, employers should support their requests by providing to the insurer:

- The name of the preferred attorney or law firm and their contact information.
- The length of time that attorney or law firm has handled the company's legal matters.
- Any other relevant factors showing the value of that attorney or law firm, such as how:
  - using them can save the insurance company money; and
  - they are competent to handle the matters in question.

Conflict of Interest and Independent Counsel

Even with duty to defend policies, if there is an actual conflict of interest between the insurer and insured, the insured may be entitled to independent counsel at the insurer's expense. A conflict may exist, for example, if:

- The complaint (or agency charge) alleges mutually exclusive theories of liability, that is, one that is covered by the policy and one that is excluded.
- The complaint (or charge) disproportionally seeks a damage type that is not covered by the policy (such as punitive damages) compared to covered damages (such as compensatory damages).

Whether a conflict of interest exists is determined under applicable state law. (See, for example, *Nat'l Cas. Co. v. Forge Indus. Staffing Inc.*, 567 F.3d 871, 874-76 (7th Cir. 2009).)

Attorneys' Fees and Expenses Caps

To maintain control over the defense of EPLI claims and minimize the costs associated with the defense, many insurance companies place caps on the hourly rates that attorneys can charge while performing work on EPLI-covered matters. Insurance companies may require these caps regardless of whether the EPLI policy requires the use of panel counsel. As a practical matter, these caps limit which attorneys are willing to handle a matter even if the policy allows the insured to choose its own counsel because the caps on hourly fees can be one-third or less of the attorney's typical hourly rate. Sometimes an employer with a strong preference for its regular outside counsel can get the insurance company to pay its attorneys' fees up to the capped amount, with the employer agreeing to make up the difference between the covered amount and the attorneys' regular fees.

Pre-Approval Process

To control costs and ensure that the EPLI carrier is informed of strategic decisions in the case, EPLI policies often contain detailed requirements for pre-approval for certain legal work or defense costs. Typical expenditures that require pre-approval under EPLI policies are:

- Computerized or extensive legal research.
- Motion practice.
- Certain discovery, such as videotaped depositions.
- Expert expenses.
- Vendor expenses.
- Conversations or meetings among multiple lawyers within the same law firm.

Some policies also address whether they cover attorneys' travel time and related expenses, and whether they must be pre-approved. Employers must get the necessary approvals required by their policy or risk forfeiting coverage for unapproved expenses.

Case Assessments and Status Reports

Some carriers and EPLI policies require the insured to provide case assessments and periodic status reports. The law firm handling the EPLI claim generally is responsible for preparing them. This information allows the insurance carrier to be involved in strategic decisions, such as whether and when to settle the claim. It also allows the insurance carrier to set aside reasonable monetary reserves at an early juncture for any anticipated adverse judgment or lengthy and costly litigation.

Many EPLI policies require an initial case assessment within 30 to 60 days of receiving the claim. This requires that the attorney promptly investigate the claim, collect and review documents, and interview relevant witnesses to draft the case assessment. The detail required in the case assessment varies based on many factors, including:

- The insurance carrier.
- The claims representative assigned.
- The complexity and potential liability in the case.

Counsel must keep the EPLI carrier informed of major developments in the case. The insured should follow-up with any law firm that is not doing this.

For more on cases assessments, see:

- Practice Note, Employment Litigation: Single Plaintiff Employment Discrimination Cases: Case Assessment (6-521-2819).
- Employment Litigation: Case Assessment Checklist (1-522-0992).

CONSENT TO SETTLE AND HAMMER CLAUSES

Because many EPLI policies are written on a duty to defend basis, they typically give the insurer a high degree of control over the settlement process.

Insurer's Right to Control Settlement

EPLI policies commonly contain a "consent to settle" provision, which may:

- Give the insurer the right to settle a claim with the insured's consent as long as that consent is not unreasonably withheld.
- Require the insured to get the insurer's consent to settle the claim.

Companies should generally ensure that a proposed EPLI policy requires the insured's consent before the insurer can settle a claim.

The EPLI carrier's right to control the settlement process is often disputed. For example, a company may have more at stake than the settlement amount, and have legitimate reasons not to settle, such as:

- Concerns about harm to its image or reputation if it settles a frivolous claim.
- Fear that settlement with one employee may lead to claims by similarly situated employees, or otherwise set a precedent or establish an unwritten policy.

In contrast, an insurance carrier may be more focused on the value of the claim and the costs of defending the claim.

Hammer Clauses

When the insured and insurer disagree about whether or for what amount to settle a claim, an EPLI's hammer clause may be determinative. Hammer clauses typically limit the insurer's obligation to pay additional costs the employer incurs after the insurer would have settled, including any combination of:

- Settlement costs.
- Defense costs.
- Judgments.

The rationale for these clauses is that an insurance company should not be obligated to defend a claim for an insured that wants to continue litigating unreasonably.

The scope of hammer clauses varies depending on the EPLI policy. Some policies follow a traditional approach, which allows a carrier to limit its maximum claim payment to the amount it could have settled for at the time the hammer clause is invoked. Others follow a "soft hammer" approach, which allows the carrier and the insured to share the costs incurred after the insurer would have otherwise settled the claim.

ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION PROVISIONS

EPLI policies sometimes contain dispute resolution provisions that detail how to handle disagreements between an insured and an insurance company over the scope of coverage or payment of costs. For example, some policies have arbitration or alternative dispute resolution (ADR) provisions that require an insured to submit to binding arbitration (without a right of appeal) for these disputes. This procedure is useful for ensuring that a dispute is handled and decided quickly and with finality. However, it also risks that the insured will be responsible for defense fees and costs that the insurance company is unwilling to pay, without any recourse to the courts.

Employers can take proactive steps upfront to minimize cost disputes with insurance companies, for example, by requesting policy terms that require the insurance company to immediately pay any undisputed costs, so that a dispute over a small portion of fees does not excuse withholding payment of the entire bill. For more practical strategies, see Article, Minimizing Litigation Costs by Maximizing the Value of Insurance Coverage (8-502-7415).

OBTAINING EPLI INSURANCE

Companies should involve counsel well-versed in insurance matters when purchasing an EPLI policy. Legal involvement is important because these policies are essentially contracts that can result in significant exposure to the employer if it does not pay proper attention to the various policy provisions, especially coverage and exclusion language.

OBTAINING EPLI THROUGH A BROKER

An insurance broker acts as an intermediary between a company (the insurance buyer) and the insurer. The broker represents the company during negotiations and during the policy period. Competent brokers can analyze the EPLI risks to the company and advise on issues such as a reasonable SIR, deductible, or premium, and other provisions within the proposed policies.

OBTAINING EPLI THROUGH A PEO

Some businesses contract with a professional employer organization (PEO) to perform certain human resources functions. PEOs often offer EPLI policies that cover certain employment claims.

PEO EPLI may be advantageous for some employers, especially small companies or companies with limited or no human resources departments. They generally are cheaper than EPLI policies purchased individually through a broker because of the PEO's leverage to negotiate better prices in the market place. In some cases, the EPLI policy may cover all the PEO's clients, allowing the insurance company to spread its risk over many companies. Further, PEOs can provide benefits beyond EPLI, such as:

- Human resources functions.
- Sample employee handbooks and policies.
- Training.
- Access to employment attorneys or hotlines.
- Other employer resources.

For a small company, purchasing these benefits separately could be cost-prohibitive, and a PEO may be an effective way to get the benefits bundled in an affordable package. For a sample PEO agreement, see Standard Document, PEO Client Service Agreement (2-529-7405).

However, companies seeking EPLI through a PEO should ensure the policy meets their needs. PEOs charge fees, so a business should make sure that the combined fee and EPLI coverage is worth it. PEO EPLI policies sometimes have more limitations, such as exclusions for:

- Subsidiaries or related entities of the company.
- Non-compensated officers or directors.
- Certain kinds of employment claims.

Additionally, some PEO EPLI policies are subject to an aggregate limit for all the PEO's clients, which means that claims by the PEO's other clients may reduce available coverage. Finally, the PEO works with the insurance carrier to handle a claim, which may give the company less control of the process by having the PEO as an intermediary.

EPLI POLICY APPLICATION PROCESS

Many EPLI carriers closely scrutinize insureds' internal employment practices, both during the EPLI application process and throughout the policy period. An application for EPLI insurance is typically long and requires a company to gather a host of information. Insurance companies review many factors, including:

- The size of the company, including the number and types of employees.
- Where the business is located.
- The nature of the business.
- The company's claim and litigation history.
- The length of time the company has been in business.
- The relevant discrimination, harassment, retaliation, and complaint reporting policies.
- Circumstances and information relating to any known or potential claims.

Failing to disclose circumstances and information relating to any known or potential claims on an EPLI application can be grounds for the insurance carrier to later contest coverage (see, for example, *Or. Mut. Ins. Co. v. Victorville Speedwash, Inc.*, 2015 WL 12656274, at *5-6 (C.D. Cal. Jul. 6, 2015)).

Some insurers require that applicants for EPLI disclose details about their internal employee policies or require periodic internal audits as a condition for coverage. When applying for new EPLI coverage or seeking renewal of coverage, an insurer may audit the company's:

- Employment practices.
- Handbooks and policies (see Practice Note, Employee Handbooks: Best Practices (4-513-9448)).
- Complaint reporting procedures.
- Claims history.

These requirements can be demanding on employers, especially those without established HR departments or larger organizations with many different policies and practices.

Recognizing that a well-run company may reduce EPLI-covered claims, more insurance carriers are offering assistance to policyholders to prevent wrongful employment practices, for example, by providing:

- Model employment practices policies and forms.
- Training modules.
- Consultant services.
- Employment practices help lines serviced by lawyers.
- Comprehensive manuals summarizing pertinent employment laws and potential employment practices issues.

While these additional resources should not replace the advice of independent labor and employment counsel, they may be a good starting point for answering questions that would otherwise go unaddressed and blossom into claims.