Wisconsin Civil Trial Journal

Spring 2020 • Volume 18 • Number 1

Employment Practice Liability Insurance Provides Essential Risk Management for Businesses of All Sizes
Daniel Finerty

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Wisconsin Defense Counsel

Defending Individuals And Businesses In Civil Litigation

In This Issue…

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Employment Practice Liability Insurance Provides Essential Risk Management for Businesses of All Sizes

by: Daniel Finerty, Lindner & Marsack, S.C.

"*With the growth of employers' liability for discrimination, retaliation, harassment, wrongful termination, and other similar torts ... demand has grown for 'employment practices liability' insurance*."[1]

When Judge Richard A. Posner of the Seventh Circuit United States Court of Appeals authored the *Krueger International, Inc. v. Royal Indemnity Company* opinion in 2007, he likely had no idea how Employment Practice Liability Insurance ("EPLI") coverage would continue to grow and expand into other risk areas not then covered. Today, it has become an almost essential element to safely protecting any business[2] from both the garden-variety employment claims and the potential "runaway jury" that could seriously impact a business's continued viability. In the 1990s, EPLI was born from a need for businesses to better manage and limit their financial risk due to the regularity of employment litigation and the potential "runaway jury" claim. More recently, the *#MeToo* movement, the aging workforce, a patchwork of disability and medical leave laws, and societal trends have continued to subject businesses to increasing financial risk and potential liability from their employment-related decisions. Employers of all sizes, including private-sector, public-sector, non-profit and Native American employers, face the economic and business costs imposed by an almost predictable slew of annual employment claims that dictates EPLI coverage is essential. *This trend appears set to continue*. The 2018 Equal Employment Opportunity Commission (EEOC or Commission) statistics shows discrimination, harassment and retaliation based on sex discrimination (including harassment and pregnancy) and Equal Pay Act charges increased.[3] In 2018, the Commission resolved 141 separate lawsuits and recovered over $53 million dollars from businesses.[4]

I. Covered Claims and Losses

It is critical for practitioners to ensure that their business clients are aware of the nature and extent of their EPLI coverage, the limitations upon that coverage, the availability of additional coverages and that these clients tender any covered claims to the EPLI carrier as soon as they are received.[5] A business looking to initially secure an EPLI policy will typically have to disclose the existence of, or put in place, adequate employment law protections designed to mitigate risk, which means a business will likely have taken a step forward in its employment-related risk mitigation efforts just by applying for EPLI.[6]

While each policy is different, EPLI generally covers an insured business for "employment wrongful acts" that may result in a claim for damages by a current, former or prospective employee.[7] Such claims include discrimination, harassment, retaliation, defamation, invasion of privacy and other wrongful employment practices. Numerous courts have examined whether a particular claim is or is not covered within an EPLI policy; however, most of those opinions are intertwined with the definition of "claim" and "notice," among other terms.[8]

By contrast, EPLI policies typically exclude coverage for OSHA workplace safety citations,

NLRB charges, WARN notice claims, wage and hour violations,[9] ERISA or COBRA claims, unemployment insurance or workers compensation claims or an alleged breach of an employment contract.[10] While coverage will likely be denied for OSHA citations or a primary worker's compensation claim, EPLI coverage may lie for a claim alleging retaliation due to workplace safety complaints[11] or an Unreasonable Refusal to Rehire claim under Wis. Stat. § 102.35(3). EPLI policies typically pay any "loss," the amount to which the insured becomes legally obligated, after the insured satisfies its deductible or self-insured retention, which may include defense costs, settlement amounts, back pay, front pay, and compensatory damages including emotional distress. However, the EPLI policy typically excludes from the "loss" definition damage awards for punitive damages, liquidated damage awards, criminal and civil fines, penalties and other amounts which are, by law, not insurable.

If a business receives an EEOC determination finding reasonable cause that it may have violated Title VII, the EEOC will engage in conciliation with the business to attempt resolution prior to further litigation. Setting aside deductible/SIR issues, the carrier will cover a negotiated settlement amount and attorney's fees for the plaintiff's counsel; however, the EPLI policy will not cover any costs the business may incur associated with Commission-required employee training or employee reinstatement. Those costs will have to be shouldered by the business, not the carrier.

II. Defining the Insured and Covered Employees

While the definition of "company" may be easy to assess in the case of a single corporate entity, the "insured" definition becomes more complicated when there are a number of interrelated companies, subsidiaries and affiliates. To ensure that business clients are protected, practitioners must confirm that their client's EPLI policy broadly covers all corporate entities owned or controlled by the main corporate client. If coverage is not sufficiently broad, a broader "employer" definition may be warranted to ensure all sub-entities are covered during re-negotiation of the policy terms and/or the annual premium. Further, a topic of increasing importance is whether an EPLI policy provides coverage for acts or omissions by, or claims by, a business's volunteers, independent contractors, temporary or leased employees and other individuals outside of the traditional employer-employee relationship. One court has held that, if an EPLI policy does not explicitly address this issue, the business's EPLI policy does not cover a third-party claim filed by an employee of a temporary agency against the business at which the employee was placed and subsequently injured.[12]

When dealing with temporary agencies, joint employment arrangements, or more complicated employment situations, the scope of coverages provided to the businesses should be clarified in advance and contractually negotiated before any issue arise.[13] Businesses that use volunteers, such as hospitals and senior living providers, should review the EPLI policy definition of "employee" to determine if it provides coverage, is silent, or explicitly excludes volunteers or anyone not paid by the business.

III. Claims-Made Policies

EPLI policies are written as "claims-made" policies,[14] which allows a fairly easy definition for the date of loss as the date a "claim" was received by the business. Most policies specifically define a "claim" to mean either a written demand for relief or legal proceedings seeking damages, a definition which encompasses demand letters from plaintiff's counsel, administrative charges and a typical civil summons and complaint filed in state, federal or tribal court.[15] This definition usually includes a threatening letter from an employee's counsel that advises of at least one covered claim. Different definitions of "claim" have led to different results. A Massachusetts district court held that an EPLI policy's "claim" definition, which covered an EEOC charge, unambiguously excluded coverage for the related lawsuit by the EEOC.[16] By contrast,

an Illinois district court held that both the EEOC charge and the EEOC's subsequent federal court lawsuit based on the earlier charge against the business were both covered and were separate claims triggering EPLI coverage.[17]

A dispute may arise in the event a business is not aware that coverage may exist.[18] If the business fails to tender the claim in a timely fashion or does so only after coverage or an extended reporting period has expired, the business may not be able to receive the contemplated benefit in exchange for its premiums. In such cases, a carrier may be well within its rights to deny coverage. However, in some cases, a reservation of rights letter may be issued to reserve the carrier's right to later deny coverage while it investigates the underlying circumstances of the tender and/or whether the insurer's right to defend the claim has been prejudiced by the delay.

IV. The Claim Handling Process

Assuming a covered claim has been received, tendered by the business to the carrier within the coverage period, no exclusions apply and no reservations of rights letter has been issued, the carrier will typically assign panel counsel to handle the claim. Typically, the carrier will assign the claim to a particular panel counsel attorney or firm for the jurisdiction in which the claim was filed or provide the business with the panel counsel firms and the option to choose.[19] Panel counsel firms have an existing relationship with the carrier to handle EPLI claims at a pre-approved rate, generally lower than the panel firm's typical hourly rate, provided by the firm in exchange for the volume of work that the relationship entails. While exceptions may be permitted to allow existing counsel to represent or continue to represent a business client in an employment claim, such exceptions are rare and require, in the least, that such firm agree to the carrier's EPLI rate and its litigation guidelines.[20]

V. Best Practices

While a few "best practices" for handling an EPLI claim and working with the insured clients and their carriers follow, a note of guidance first. It is critical for practitioners to ensure the service provided to the business matches up with the carrier's customer service model. To do this, a timely initial assessment of the claim, an assessment of settlement options and a road map for a successful defense, however the insured and the carrier shall define that term, among other things, are critical to providing an exceptional level of client service that is in line with, or exceeds, the carriers' expectations.

a. Conduct a Thorough Initial Review and Client Interview

After an initial conflict check, acknowledging receipt of the EPLI claim, reviewing the available documentation from the business,[21] and conducting an in-depth interview with the business[22] and personnel involved, counsel must discern, among other things, the factual basis for the employment-related decision the business made and whether it constitutes a legitimate non-discriminatory, non-retaliatory reason.[23] Typically, this reason forms the very center of the business's defenses to a claim. To do so, it is critical to identify the decision-makers and acknowledge that businesses do not make decisions, people do. The information provided by these decision-makers will assist in the defense of the claim going forward.

b. Outline and Discuss Assessment

Once the business has provided the necessary information for counsel to flesh out a response to the complaint, counsel should also re-connect with both the business and the carrier's assigned representative in order to provide a more thorough perspective on the claim. There are several goals to this discussion. First, the discussion ensures the carrier's assigned representative can ask counsel questions regarding both liability and potential damages in order to set an appropriate reserve[24] to cover the potential loss. Second, this discussion allows counsel, the business and the representative to discuss and assess initial considerations including whether the claim should be defended, immediately settled or mediation should be explored to see if the case can be resolved

economically before additional costs are incurred. While dictated by the facts and circumstances of each case, settlement consideration should be given to "hot button" cases such as the EEOC's Strategic Priorities or, currently, *#MeToo* allegations.[25] Third, in the event the claim is to be defended to its end or, at least, to another waypoint at which another settlement assessment should be made, counsel can share thoughts about the 10,000-foot perspective with regard to the defense to liability and damages and share how he or she will defend the claim to secure victory or put the insured and the carrier in an advantaged position to discuss settlement down the road.

c. Outline a Multi-Layered Defense

A road map to a viable, cost-effective defense of the claim should be prepared that will answer the most pressing issue from the business and the carrier, whether that is how to defeat the claim or, if the client and carrier choose to resolve, how to obtain a strategic advantage in litigation to obtain a comparably more tolerable resolution. Counsel's mission, among other things, is to define the route, assess the costs, risks and rewards of each option, and assist the business and its carrier in defining, refining when necessary and reaching the identified goals. That roadmap will define multiple layers of defense.[26] Counsel can begin to chart out the most direct, effective and cost-efficient path to prevail utilizing these defenses and ensure that layers of defense are at the ready to defend the claim. The business and the carrier should regularly be consulted and should always be given regular updates on the likely path this claim will take, based upon counsel's experience, and be available to answer any questions, especially where the complainant is still employed.

d. Execute and Revise When Necessary

Counsel should defend the business and represent the carrier's interests by zealously and cost-effectively advocating for the business regarding both liability and, when necessary, damages. While the venue for the claim will define the path, counsel should regularly seek opportunities to discuss resolution with the opposing party, as guided by both the business and the carrier.

During this time, the defense will likely need to be modified to accommodate changes by the business, the carrier and/or the dramatic nature of employment litigation. It is counsel's job during this process to support the business and the carrier to ensure the parties maintain a cooperative tripartite relationship designed to secure the best result for the business. At times, that relationship may break down. It happens, especially with a company that has never been involved in employment litigation. Regardless of the reason, it is counsel's job to ensure that the relationship, if it derails, gets back on track as soon as possible.

e. Identify Settlement Opportunities

Assuming support for a business's desire to resolve the matter is an option to which the carrier does not object, a potential settlement should be outlined for approval by the business and the carrier. This proposal should ensure that the business and the carrier are both released from liability and any damage claims, that the complainant agrees not to sue and agrees to release any and all claims (known and unknown), that any future references can be provided based upon agreed language or an agreed document placed into the complainant's personnel file (to avoid future disputes) and that any other provisions (such as notice of an alleged breach and time to cure) are included to bind the parties' post-settlement behavior in a manner to avoid future conflict. After approval, the settlement proposal can be provided to the complainant and/or his or her counsel.

VI. Conclusion

When representing insured clients and insurance carriers in EPLI matters, several important points need to be kept in mind. First, the insured client has tendered the claim to the carrier to ensure that it is cost-effectively and competently handed, a job for which counsel is responsible. Second, the carrier's

assigned claims representatives are responsible for effective claims-handling, which includes setting a reserve on any claim, tracking the progress of the claim and any necessary internal reporting, a job for which good communication with counsel is essential. Third, all parties have a mutually-shared goal – to ensure the best result for the insured client. That shared goal should form the centerpiece of each and every discussion the parties have when defending an EPLI claim, as it will always bind the parties together and help counsel support the tripartite relationship. In the end, achieving the best result for the business, in addition to doing so professionally, cost-effectively, and diligently with solid, interactive communication throughout the process for the carrier, can ensure that future cases follow.

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Daniel Finerty, Marquette University Law School 1998, is a Shareholder with Lindner & Marsack, S.C. in Milwaukee, Wisconsin, where he regularly counsels and defends private-sector, public-sector, non-profit and Native American tribal clients, also representing the interests of the clients' EPLI carriers, in employment litigation matters in administrative agencies, federal, state and tribal courts and other venues. He would like to personally recognize the insurance companies for which he serves as panel counsel and their current and former claim representatives and attorneys. Even though their names may not appear here, he acknowledges that he could not have drafted this article without the opportunities they have provided and the trust and confidence they have placed in him. He is grateful to each of them beyond words.

References

1 *Krueger Int'l, Inc. v. Royal Indem. Co.*, 481 F.3d 993, 994 (7th Cir. 2007).

2 Insured business clients will be referred to as businesses, clients or insureds. Their EPLI partners will be referred to as insurers or carriers. Defense counsel that represent businesses and carriers are referred to as practitioners, counsel and the like.

3 *See* https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Feb. 10, 2020).

4 Office of General Counsel FY 2018 Annual Report, available at: https://www.eeoc.gov/eeoc/litigation/reports/18annrpt.cfm (last visited, Feb. 10, 2020). The National Women's Law Center notes that a gender wage gap exists in over 97 percent of occupations and African-American women make 62 cents, Latina women make 54 cents, Native women make 57 cents, and Native Hawaiian and Pacific Islander women make 61 cents for every dollar paid to white, non-Hispanic men. Elizabeth Skerry, *Your Racial and Gender Wealth Gaps Playlist*, NWLC (Dec. 20, 2019), available at: https://nwlc.org/blog/your-racial-and-gender-wealth-gaps-playlist/ (last visited Feb. 14, 2020). These numbers foreshadow continued litigation over the Equal Pay Act.

5 The Author notes that he does not handle coverage but is familiar with these topics by experience.

6 As an example, to apply for EPLI with Arch Essential EPL with Arch Insurance Group, Inc., a business must disclose information regarding its Human Resources Department, hiring process, employee handbook, performance assessments and evaluations, terminations, training on harassment, discrimination and the like, and other employment-related procedures. The application which lists these items, and provides practitioners a good list of items to review with a client looking to secure EPLI coverage, is on Arch's website. *See* Essential EPL – Application, Arch Insurance Group, Inc., available at: https://www.archcapgroup.com/Portals/0/Forms/Executive%20Assurance/EmploymentPractices/APPLICATION%20FOR%20ARCH%20ESSENTIAL%20EPLsm.doc (last visited Feb. 14, 2020).

7 Britton D. Weimer, J.D., Eric D. Satre, Andrew F. Whitman, Ph.D., J.D., CLU, CPCU, T. Michael Speidel, D.D.S., J.D., Employment Practices Liability – Guide to Risk Exposures and Coverage, The National Underwriter Company (2nd Ed. 2012), at pp. 1, 21-22.

8 *See, e.g.*, *LodgeNet Ent. Corp. v. American Intern. Specialty Lines Ins.*, 299 F. Supp. 2d 987 (D. S.D. 2003) (EPLI policy covered both administrative charges and civil complaints as "claim[s]," but policy was ambiguous as to whether same facts amounted to a single claim); *KB Home v. St. Paul Mercury Ins. Co.*, 621 F. Supp. 2d 1271 (S.D. Fla. 2008), *aff'd*, 339 Fed. Appx. 910, 2009 U.S. App. LEXIS 16883 (11th Cir.) (filing of discrimination charge with Broward County Civil Rights Division was an EPLI-covered "claim," however, coverage denied because claim was filed prior to start of EPLI policy period); *SNL Fin., LC v. Phila. Indem. Ins. Co.*, 2009 U.S. Dist. LEXIS 93319 (W.D. Va. 2009), *aff'd*, 455 Fed. Appx. 363, 2011 U.S. App. LEXIS 23529 (4th Cir.) (insured promptly reported EPLI claim when lawsuit was filed; earlier correspondence and discussions with former employee's attorney did not amount to a "written demand for monetary or non-monetary relief" within the policy); *Nat'l Waste Assocs., LLC v. Travelers Cas. & Sur. Co. of Am.*, 51 Conn. Supp. 369, 988 A.2d 402 (2008), *aff'd*, 294 Conn. 511, 988 A.2d 186 (2010) (former employee's unemployment insurance claim, which amounted to a prior "administrative

proceeding," barred coverage for employment litigation filed after policy's retroactive date).

9 An EPLI policy that excludes coverage for claims arising under the federal Fair Labor Standards Act usually excludes coverage for related state and local claims.

10 Weimer, *et al*., at pp. 22-26. A number of carriers currently offer specialty coverage for defense for alleged wage and hours claims in some fashion. *See Insurance Definitions – Wage and Hour Insurance Coverage Endorsement*, International Risk Management Institute, Inc., available at: https://www.irmi.com/term/insurance-definitions/wage-and-hour-insurance-coverage-endorsement (last visited Feb. 11, 2020); Marsh LLC Wage and Hour Preferred Solution, available at: https://www.marsh.com/us/services/financial-professional-liability/wage-and-hour-preferred-solution.html (last visited Feb. 10, 2020) ("[t]he top 10 wage and hour settlements in 2017 totaled $525 million, the second-highest figure in the last decade, according to law firm Seyfarth Shaw").

11 *See* OSHA's Whistleblower Protection Program, OSHA Fact Sheet, available at: https://www.osha.gov/Publications/OSHA3638.pdf (last visited Feb. 14, 2020).

12 *Home Ins. Co. v. Liberty Mut Fire Ins. Co.*, 830 N.E.2d 186, 188-89 (Mass. 2005). The exclusive remedy provision of worker's compensation would likely protect only the temporary agency, not the business, hence, the reference to a "third-party claim."

13 Further, if an EPLI-insured temporary agency agrees to indemnify its business client from employment and other claims, the carrier will have to be involved with that discussion as certificates of insurance will likely need to be exchanged between the parties.

14 Weimer, *et al*., at p. 6. Weimer notes that the Insurance Services Office policies, and "virtually all other EPL policies, are claims-made rather than occurrence policies." *Id*. (*citing Nat'l Waste Assocs., LLC*, 988 A.2d at 187, n.5). The *National Waste* court noted that claims-made policies limit the liability of the carrier to a fixed period of time, which allows it to charge lower premiums. *Nat'l Waste Assocs., LLC*, 988 A.2d at 187, n.5.

15 Weimer, *et al*., at p. 6. The definition of "claim" will be further explained by defining a "wrongful act" which may include an employment-related decision, as outlined in an EPLI policy one court reviewed. *See Martinsville Corral, Inc. v. Society Ins.*, 2018 U.S. Dist. LEXIS 55144, **4-6 (S.D. Ind. Mar. 31, 2018), *aff'd*, *Martinsville Corral, Inc. v. Society Ins.*, 910 F.3d 996 (7th Cir. 2018).

16 *Cracker Barrel Old Country Store, Inc. v. Cincinnati Ins. Co.*, 2011 U.S. Dist. LEXIS 156158 (M.D. Tenn. Sept. 16, 2011) *rev'd by Cracker Barrel Old Country Store, Inc. v. Cincinnati Ins. Co.*, 499 Fed. Appx. 559, 565, 2012 U.S. App. LEXIS 19161, **16-17 (6th Cir. 2012). The Sixth Circuit reversed and held the "claim" definition was ambiguous and susceptible to more than one reasonable interpretation.

17 *John Marshall Law School v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 223 F. Supp. 3d 733, 738 (N.D. Ill 2016) ("there is no question that the policy reasonably may be read as contemplating that an administrative investigation/charge and a lawsuit arising from the same facts are two different claims. Indeed, in the Court's view, this is the most reasonable reading of the policy.").

18 Practitioners can greatly assist their business clients by offering to review their insurance policies to ensure a basic awareness of what is and is not covered. A business that secures a business owner package policy or pre-packaged trade association policy may not necessarily recall the exact contours of the policy. Businesses that pay annual premiums for EPLI coverage will want to access that coverage when necessary.

19 Some carriers are very forthright about panel counsel membership. *See* Approved EPL Panel Counsel Defense Firms, Chubb Insurance – Employment Practices Liability, available at: https://www.chubb.com/us-en/business-insurance/approved-epl-panel-counsel-defense-firms.aspx (last visited Feb. 14, 2020).

20 Some carriers permit the business to identify and use approved employment counsel as part of their marketing strategy. *See* Management Liability – Employment Practices Liability, Philadelphia Insurance Companies, available at: https://www.phly.com/mplDivision/managementLiability/EPLI.aspx (last visited Feb. 11, 2020). With the number of EPLI carriers serving different markets, every business should be able to match an EPLI policy to its need.

21 This documentation typically includes the employee's personnel file, the business's employee handbook, compensation and payroll records, and any and all other communications and related documentation regarding the employee who filed the claim.

22 During this discussion, counsel should advise the business that, to the extent possible, a litigation hold should be initiated and be in place throughout the claim to prevent destruction of any relevant hard-copy or electronic evidence.

23 Other issues to discuss may include whether the prospective, current or former employee that filed the claim, referred to as the "complainant," suffered an adverse employment action and if similarly-situated comparator employees outside of the alleged protected class were treated more favorably by the business than the complainant. Typically, in the early stages, a complainant's protected status may not be subject to a great deal of attention but counsel should ensure due diligence is performed on this issue to ensure that a basic statutory coverage and other defenses, such as timeliness, are preserved from the start. *See e.g.*, *Masri, v. Labor and Ind. Rev. Comm'n*, 2014 WI 81, ¶ 60 ("Wis. Stat. § 146.997 applies only to employees, a category that does not include interns [like Masri] who do not receive compensation or tangible benefits"); *see also* Wis. Stat. § 111.39(1) ("The department may receive and investigate a complaint charging discrimination, discriminatory practices, unfair honesty testing or unfair genetic testing in a particular case *if the complaint is filed with the department no more than 300 days after the alleged discrimination, unfair honesty*

testing or unfair genetic testing occurred.") (emphasis added).

24 "Reserve — an amount of money earmarked for a specific purpose. … Loss reserves are estimates of outstanding losses, loss adjustment expenses (LAEs), and other related items. Self-insured organizations also maintain loss reserves." Insurance Definitions – Reserve, International Risk Management Institute, Inc., available at: https://www.irmi.com/term/insurance-definitions/reserve (last visited Feb. 10, 2020).

25 *See* Executive Summary, U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan, available at: https://www.eeoc.gov/eeoc/plan/sep-2017.cfm (last visited Feb. 10, 2020).

26 As an example, in a typical disability discrimination claim in which a complainant alleges discrimination due to a back injury from a car accident, the layered list of defenses may include that the business was not aware of the complainant's injury; the complainant was not disabled and/or did not have a permanent disability; the complainant was provided with reasonable accommodation; the complainant did not suffer an adverse employment action; and, regardless of the foregoing, the business had one or more legitimate non-discriminatory, non-retaliatory reasons for its employment-related decisions with regard to the complainant, among other defenses.

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