

OVERVIEW

EMPLOYMENT PRACTICES LIABILITY INSURANCE

BASICS

Employment Practices Liability Insurance (EPLI) provides financial protection for insureds against legal proceedings by current, past, or prospective employees and/or government agencies, such as the Equal Employment Opportunity Commission (EEOC), making allegations that the employer has breached either the employee's civil rights or labor laws. Examples of such allegations are discrimination, harassment, contract violations, wrongful termination, or other employment-related issues.



At times, civil rights claims of third parties are also covered if additional coverage was added to the policy. Examples of covered third parties are customers, clients, suppliers, and visitors.

WHAT DOES IT COVER?

The typical EPLI policy reimburses insureds for defense costs and amounts they may be legally obligated to pay in damages, such as back pay, front pay, and compensatory damages. EPLI policies typically do not include: Bodily injury or property damage, punitive or exemplary damages (though many policies may cover to the extent allowed by applicable law), liquidated damages (though many policies cover liquidated damages under the Age Discrimination in Employment Act (ADEA) or the Equal Pay Act (EPA) or fines or penalties when deemed to be uninsurable under applicable law as a matter of public policy.

WHO DOES IT COVER?

The definition of "insured" under most EPLI policies is broad, as to who is covered. Insureds include the company, directors and officers, and all remaining employees past, present, and prospective. This is important because of a complaining employee or government agency's ability to name individuals as defendants in any actions brought alleging a breach of most employment laws.

COMMON CLAIMS

The following types of claims are typically covered by EPLI:

- Discrimination (based on age, disability, gender, national origin, race, or religion)
- Sexual harassment
- Wrongful termination, failure to promote, or deprivation of career opportunity
- Retaliation (taking negative actions against an employee because they report discriminatory practices)
- Employment-related defamation or invasion of privacy
- Breach of employment contract (usually defense costs only)

IMPORTANT PROVISIONS

CLAIMS MADE

EPLI policies can be claims-made (insured becomes aware of claim during the policy period), claims-made-and-reported (insured must also notify the carrier within the allotted time frame), or occurrence based (not typical). EPLI policies are usually claims-made and reported policies, however. These types of 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. This makes it extremely important to review the definition and notice requirements of the insured's policy and follow it faithfully. Failure to report within the proper timeframe could cost coverage for the claim.

DUTY TO DEFEND

One of the most important functions of EPLI policies is the coverage of defense costs. EPLI policies are usually offered with either Duty to Defend or Duty to Indemnify (pay). The Duty to Defend obligates the carrier to: defend the claim and cover all legal fees and costs (capped by the limit). A Duty to Defend policy gives the insurance company greater control over the defense of the employment claim, allowing the carrier to decide about: selecting counsel, litigation strategies, and settlement. Duty to Indemnify policies are available but usually to larger employers. These types of EPLI policies permit the insured to select counsel and have greater say in litigation tactics and settlement decisions.

Some companies may benefit from the insurer's significant control over the defense under a Duty to Defend style policy. Smaller or less legally sophisticated insureds may benefit from giving control of defending employment practices claims to a carrier which is highly experienced in defending these cases and shares the desire for the most beneficial result to all parties. Conversely, some insureds want to maintain their ongoing relationship with outside counsel and retain the ultimate strategic decision-making for themselves. In these cases, a Duty to Indemnify form should be selected or early requests to endorse the insured's preferred counsel on the policy should be made.

KEY EXCLUSIONS

While not an exhaustive list, typical claims excluded from coverage under an EPLI policy include:

- Bodily injury / property damage
- Wages "due & owing", particularly under the FLSA and similar laws
- Workers' Compensation & unemployment payments
- Claims concerning labor relations disputes, such as under ERISA, NLRA, OSHA, WARN Act
- Amounts due under employment contracts: bonuses, stock options & severance (defense covered)
- Claims excluded for public policy reasons, such as CA's Section 533

THE IMPORTANCE OF EPLI

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, such as unavoidable discovery, electronically stored information (ESI) costs, difficulty succeeding on summary judgement due to the fact sensitive nature of the cases, and the statutory shifting of a successful plaintiff's fees to the employer. A "typical" case now costs between \$150K to \$300k just to defend. This, along with verdicts and settlements, easily reaches six or seven figures, especially when the EEOC brings the action. EPLI policies should be considered invaluable to an employer's balance sheet, protecting against high legal costs, verdicts, and settlements.

**To learn more about EPLI Insurance,
contact our team:**

ManagementLiability@BaldwinRiskPartners.com

