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EMPLOYMENT PRACTICES LIABILITY INSURANCE:
WHAT EVERY EMPLOYER SHOULD KNOW

Recent media reports, including an article in the *Omaha World Herald,* confirm that employers are increasingly seeking insurance coverage for employment-related claims. Although this insurance has existed for years, it has become more prevalent in the wake of the #MeToo movement. The market for policies covering sexual harassment, discrimination, and unfair termination accusations—commonly referred to as employment practices liability insurance ("EPLI")—is projected to grow to $2.7 billion by 2019. Still, a minority of companies carry such coverage. As demand grows, employers should be aware of the unique features of EPLI coverage and prepare to negotiate favorable policy language. We hope the following information will aid your efforts.

ABOUT EPLI

Employers purchase EPLI to supplement general liability insurance and cover claims related to employment practices brought by current and former employees. Generally, EPLI provides coverage for claims of unlawful discrimination in hiring, promotions or terminations, sexual harassment, wrongful termination, and retaliation. These policies may also cover defamation, invasion of privacy, breach of employment contract, and negligent hiring or supervision. EPLI typically does not cover claims arising from bodily injury and workers compensation issues, wage and hour violations, and some federal statutes including, for example, the National Labor Relations Act (NLRA), the Occupational Safety and Health Act (OSHA), and the Employee Retirement Income Security Act (ERISA). EPLI coverage protects companies and their directors, officers, and employees.

While EPLI can be an important part of your organization's risk management strategy, protecting against costly litigation expense and potential liabilities, EPLI is no substitute for preventative business practices that minimize the risk of lawsuits, such as thorough documentation, conducting accurate employee evaluations, updating employee policies, and promptly investigating workplace complaints.

PAYING FOR EPLI

Like other types of insurance, the cost of EPLI depends on a variety of factors specific to your business and risk management goals. EPLI policies are subject to a "retention", (i.e., deductible) that the employer must meet for judgments, settlements, attorney's fees, and other covered expenses. Larger companies are generally subject to larger retentions because they are exposed to greater risk and insurance companies do not want to handle minor claims. Additionally, retention amounts will likely increase in proportion with the number of claims brought.

Although large companies are more likely to purchase EPLI, smaller companies should also consider obtaining such coverage, as they can be more vulnerable to the expenses of litigation. Keep in mind, however, that not all EPLI policies are the same. It is important to consult your

insurance broker and employment defense attorney regarding costs associated with your policy, and self-insurance may be a better option if the retention is too high.

COVERAGE CONSIDERATIONS

In a lawsuit for an employment-related claim, your insurer will control litigation and pay for the legal costs associated with defending your organization. This process and the costs covered differ depending on your policy. When reviewing EPLI, you should discuss the following with your employment defense attorney:

- When and how you must report claims to the insurer;
- Whether the policy is written on a claims-made basis, meaning coverage is triggered when a claim is made against the employer during the policy period;
- Whether the policy prohibits or limits your organization's ability to settle claims and the size of potential awards;
- Coverage of damages, including front pay, back pay, and emotional and mental distress;
- Careful review of definitions in the policy, including:
    - Broadening definitions of "harassment" and "discrimination",
    - Eliminating "oral demands" from the definition of "claim", and
    - Including independent contractors, temporary and seasonal employees, and prospective employees in the definition of "employee";
- Whether to purchase additional coverage for certain statutory violations, such as Fair Labor Standards Act (FLSA) wage and hour claims; and
- How to include a choice of counsel provision (discussed below).

Discussing these subjects is important to ensure your EPLI policy promotes your organization's risk-management goals.

NEGOTIATING FAVORABLE POLICY LANGUAGE: CHOICE OF COUNSEL

Perhaps the most important language in your EPLI policy is a choice of counsel provision. Most policies provide that the insurer will select your defense counsel. This means you could lose the right to choose which lawyer or law firm will represent you for employment-related claims. Instead, the insurance company would designate a pre-approved law firm and/or attorney(s) called "panel counsel" to defend you.

Panel counsels are usually comprised of insurance defense attorneys or employment attorneys from large, national firms. Unfortunately, an insurance company's panel counsel may not be your best choice because the attorneys may not be as familiar with your organization's particular policies and practices or the underlying facts of the dispute, they may not have sufficient employment law experience, or you may lack trust in their judgment, which only personal experience with each other can provide.

The best way to ensure that your counsel of choice can defend your employment-related claims is to include a choice of counsel provision designating a law firm for you to work with in your EPLI policy. Your policy may refer to this process as requesting a rider, accommodation, or endorsement. If your business has an established relationship with an attorney or firm, choosing your own counsel is critically important to defending your organization. Making this designation is no more expensive than using panel counsel, as the policy likely places a cap on attorney's fees. Additionally, designating your counsel of choice as your pre-selected counsel does not bind you to use the firm, but only creates the option.

Although insurers are more likely to approve your choice of counsel at the outset of policy negotiations, they may still be willing to allow other representation after claims have been brought. By designating your counsel of choice, you ensure that you will be represented by a firm that is familiar with your organization's unique needs to provide the best defense for your employment-related claims.

Although EPLI is no substitute for proactive, preventative business practices, it can be an important part of risk management as organizations face increased employment-related claims. Communicate with your employment defense attorney to ensure the inclusion of favorable policy language that meets your needs and includes a choice of counsel provision. For additional information or if you have any questions, please contact a member of Cline Williams' Labor and Employment Section:

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