

Employment Practices Liability Insurance:

Aileen Marchese, assistant vice president of Employment Practices Liability at Hartford Financial Products in New York, assesses the evolving landscape of EPL.

It goes without saying that all companies should implement sound employment policies and procedures to mitigate or eliminate employment claims - but that isn't always enough. Even with sound employment policies and procedures, companies in today's employment environment may still face litigation.

Essentially, the area of employment law is ever changing and employees have become much more aware of their rights. In addition, poor economic times tend to exacerbate employment lawsuits. Employment claims continue to increase from year to year and the costs to defend and settle these cases also continue to rise.

Despite the demand for clear information on the cost and settlement value of employment claims, there is no single inclusive data base that offers such information. There are several reasons for this. Claims can be brought by or before federal and state agencies such as the Equal Employment Opportunity Commission (EEOC) and/or other human rights commissions such as the Fair Employment Practices Agencies (FEPA). These claims can be litigated in both state and federal courts - or settled without litigation and/or jury verdicts. Additionally, in these situations, settlement figures often are not available because of confidentiality agreements. However, consider these statistics:

The EEOC received 84,442 charges in 2002, representing more than a 4 percent increase from 2001. In 2002, monetary benefits obtained without litigation via the EEOC were almost \$258 million, an increase of 4 percent from 2001, and an increase of almost 220 percent since 1992.

According to Jury Verdict Research, in 2002 the probability of a plaintiff (employee) verdict was 75 percent. This is up from 71 percent in

2001 and 67 percent in 2000.

According to Jury Verdict Research, 25 percent of jury awards in discrimination cases exceeded \$500,000 and 13 percent exceeded \$1,000,000 during the period 1996 to 2002. These awards do not include defense costs, which can often be three times the settlement costs.

As a result, it is imperative for companies to be protected against these increasing liabilities. It is equally important to understand the scope and terms and conditions of an Employment Practices Liability (EPL) Insurance Policy.

Underwriting a Company

From the underwriter's perspective, the key to underwriting and analyzing EPL risk is to understand a firm's employment practices and procedures. Some of the key factors underwriters look for when deciding to insure a risk and what terms and conditions to propose include the following:

Does the company require all prospective employees to complete, sign and date an attorney-vetted application containing an EEO statement, an employment at-will statement, a statement that the application is not a contract, a statement indicating that false information will result in termination, and an authorization to conduct background checks? Are background checks conducted for all employees?

Companies should have an employee handbook, created and reviewed by employment and labor counsel and disseminated to all employees. The handbook should contain such policies and practices as an ADA/Reasonable Accommodation policy, a Family Medical Leave Act policy, a Military Leave policy and directions to report problems. A Sexual Harassment policy including a definition and prohibition against quid pro quo and hostile environment, and a Comprehensive Anti-Discrimination and Harassment policy also should be included, along with procedures for investigation and assurances of no retaliation or discipline for those found to have been discriminated against or harassed.

Companies should have a procedure for posting all positions

and provide employees with access to the postings.

Employment practices liability underwriters usually ask if all employees are provided with annual performance appraisals. They'll also want to know if the company conducts compulsory annual anti-harassment/discrimination training for all employees and management training in such skills as how to conduct a proper interview and how to conduct a performance appraisal

Termination practices such as exit interviews are important. Are exit interviews conducted and, if so, does the company use standardized questions and document them? When the company reduces workforce, does it offer severance and obtain waivers/releases in exchange for severance?

Underwriters often ask about diversity in the overall workforce and in management. What percentage of the workforce is 40 and over?

Understanding the Terms and Conditions of an EPL Policy - An Insured's Perspective

No matter how sound your practices, companies need to understand what financial protection they have against employment practices lawsuits. This starts with selecting a financially stable insurance company a partner that is likely to be around and able to pay claims. You'll want to ask about the experience of the underwriting team and whether the insurer has a dedicated EPL team or uses underwriters that work with a variety of products. Is the Insurance Company committed to this product for the long term?

You'll also want to understand who within the Insurance Company handles claims. Are they attorneys? Are they experienced in the area of employment law?

An EPL claim can come from a past employee, a prospective employee whose application was rejected or a current employee. An employer need not have the severed an employment relationship to have a claim filed. In addition, temporary workers, leased workers and independent contractors may also bring employment claims.

Employee lawsuits can include but are not limited to claims of wrongful termination, unlawful discrimination, sexual harassment, and other forms of workplace harassment, retaliation, and hostile work environment. They also can include allegations of misrepresentation, failure to hire, failure to promote, invasion of privacy, wrongful discipline or demotion, negligent employment evaluation, employment-related defamation (including libel and slander), infliction of emotional distress, mental anguish and breach of an implied contract.

What is a claim?

A claim can include a written demand or notice for monetary or non-monetary relief. It also can include a civil proceeding that begins with the service of a complaint or similar pleading, or an arbitration or formal administrative or regulatory

proceeding before the Equal Employment Opportunity Commission, or similar federal, state or other governmental agency.

When evaluating an insurance policy, a company should determine whether the policy provides coverage for the portion of a loss consisting of reasonable and necessary fees including attorney's fees and expert fees and expense incurred in the defense or appeal of a claim. Ask if pre- and post-judgment interest and premiums for any appeal are covered.

The company should know what happens if a claim is made prior to the expiration but reported after the policy expires. Does the policy allow an Insured to report claims 30, 60 or 90 days after expiration without an extra expense? What happens if policyholder needs a longer period of time to report claims? Some policies allow you to purchase an additional discovery period.

You should ask if and under what circumstances the insurer can cancel the policy.

Punitive damages in most jurisdictions are unlimited, so it's important to ask if the policy provides coverage for punitive damages and how insurability is determined. Is it in the law of jurisdiction most favorable to the insurability of those damages?

Insurance companies can differ in how they settle claims. Among the questions to ask: Does the Insured need the Insurance Company's consent to settle claims within the self-insured retention or deductible? Can policyholders choose their own counsel? What happens if the policyholder does not wish to settle a claim and the Insurance Company recommends settlement?

And of course there's the final question a company should ask: What isn't covered under the policy?

The Employment Practices Liability landscape continues to evolve. Both underwriters and policyholders need to be aware of the law and claim trends and carefully form a partnership that protects everyone's assets.

