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Employment Practices Liability – Why Every Business Needs It

Employment Practice Liability Coverage – Why Every Business Needs It

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Sources of Employment-Related Claims

- Violation of Statutes
- Workplace Torts
- Breach of Contract

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Violation of Statutes

Federal Statute examples

Title VII of the Civil Rights Act of 1964 (Title VII)

- Title VII of the Civil Rights Act of 1964 (Title VII) and its amendments (The Civil Rights Act of 1991 and the Lily Ledbetter Fair Pay Act of 2009) prohibit employment discrimination based on race, color, religion, sex, and national origin. Title VII applies to employers with 15 or more employees.

The Age Discrimination in Employment Act of 1967 (ADEA)

- The Age Discrimination in Employment Act of 1967 (ADEA) and its amendments prohibit employment discrimination against persons 40 years of age or older. ADEA applies to employers with 20 or more employees.

State and/or local statutes may provide additional protections to those in the jurisdiction.

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Fair Employment Practices Law
General Laws, Part I, Title XXI, Chapter 151B, Section 4

It shall be an unlawful practice:

For an employer, by himself or his agent, because of the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, genetic information, pregnancy or a condition related to said pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child, ancestry or status as a veteran of any individual to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

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Workplace Torts

Examples

- Invasion of privacy
  - Social media
  - Background checks
  - Drug and alcohol screening
  - Computer and workstation monitoring
  - Telephone monitoring
  - Audio and video monitoring
- Defamation, libel, slander
- Negligent hiring practices
- Negligent supervision
- Negligent evaluation
- Wrongful discipline
- Wrongful deprivation of a career opportunity
- Bullying

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Breach of Contract

An employee could allege that an organization breached an express or implied contract.

- Implied contracts might include employment manuals, job offer letters and oral promises.

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Why is this Important?

- Many statutes do not apply to small businesses.
- Small businesses may be reluctant to purchase Employment Practices Liability Insurance (EPLI) if they don't understand that there are other ways claims can be made against them.
- Employment-at-will does not shield an employer from employment-related suits.
  - Employment-at-will means that an employer can terminate employment for any legal reason without proving a just cause.
  - This does NOT mean, though, that an employee can't file a claim alleging, for example, termination due to a legally protected characteristic.

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Insuring Agreement

- The insuring agreement includes the insurer's promises to the insured.
- EPLI policies promise to damages resulting from "wrongful acts" or "wrongful employment act" or another similar phrase.
  - The phrase used is less important than how it is defined. In most EPLI policies, a definition describes the types of acts covered by the policy.
- Most EPLI policies give the insurer the right and duty to defend insureds against losses covered by the policy.

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Discrimination

Examples of protected classes/characteristics

- Sex/gender
- Age
- Race
- National origin
- Marital status
- Medical conditions/disabilities
- Sexual orientation
- Religion
- Genetic information
- Military service

The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee.

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Harassment

Sexual harassment/Non-sexual harassment

The EEOC describes two types of sexual harassment.

- **Quid pro quo:** Submission to or rejection of unwelcome sexual conduct by an individual is used as the basis for employment decisions affecting such individual.
- **Hostile environment:** Unwelcome sexual conduct unreasonably interferes with an individual's job performance or creates an intimidating, hostile, or offensive working environment.

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Harassment

The EEOC describes harassment as unwelcome conduct that is based on a protected characteristic.

According to the EEOC, harassment becomes unlawful when

- Enduring the offensive conduct becomes a condition of continued employment, or
- The conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive

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Wrongful Termination

- **Actual/active termination** is when, from the perspective of the employee, employment is involuntarily terminated. The employee is fired.
- **Constructive termination/constructive discharge** is when an employer makes the conditions of employment so unbearable that the employee is forced to resign.

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Retaliation

U.S. Department of Labor defines retaliation as follows:

- Retaliation occurs when an employer…fires an employee or takes any other type of adverse action against an employee for engaging in protected activity. An adverse action is an action which would dissuade a reasonable employee from raising a concern about a possible violation or engaging in other related protected activity.

Retaliation is commonly alleged in employment-related cases. Even if the underlying claim is dismissed, the retaliation claim survives.

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"Employment Practices Wrongful Act" *shall mean any of the following acts related to employment, but only if alleged by or on behalf of a Claimant:*
(1) wrongful dismissal, discharge or termination of employment, whether actual or constructive;
(2) misrepresentation;
(3) violation of employment laws;
(4) sexual or workplace harassment;
(5) discrimination;
(6) wrongful failure to employ or promote;
(7) wrongful discipline;
(8) wrongful deprivation of career opportunity including a wrongful failure to hire or promote;
(9) failure to grant tenure;
(10) negligent employee evaluation;
(11) retaliation;
(12) failure to provide adequate workplace or employment policies or procedures;
(13) defamation (including libel and slander);
(14) invasion of privacy;
(15) wrongful demotion;
(16) negligent reassignment;
(17) violation of any federal, state or local civil rights laws;
(18) negligent hiring;
(19) negligent supervision;
(20) negligent training;
(21) negligent retention; or
(22) acts described in (1) through (21) above arising from the use of the Organization's or Subsidiary's Internet, e-mail, telecommunication or similar systems, including the failure to provide and enforce adequate policies and procedures relating to such use of the Organization's or Subsidiary's Internet, e-mail, telecommunication or similar systems.

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Third-Party Liability

- Third-party liability coverage may be included in the EPLI insuring agreement.
- There may be a separate insuring agreement for third-party liability coverage.
- Some policies may require an endorsement to add third-party liability coverage.
- Even if third-party liability coverage is included, an insurer may remove coverage for underwriting reasons. e.g. class of business

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Who is a Third Party?

- Ideally, anyone not meeting the definition of employee will be considered a third-party.
- Some forms limit the definition of third-party to certain individuals.

SAMPLE LANGUAGE

Third-Party shall mean any natural person(s) with whom an Insured, in their capacity as such, interacts. Third-Party shall not include Employees or an applicant for employment.

vs.

Third-Party means any natural person who is a customer, vendor, service provider or other business invitee of the Organization.

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Third Party

What offenses/wrongful acts are covered?

- Discrimination
- Sexual harassment
- Non-sexual harassment

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Website Accessibility Suits

- The Americans With Disabilities Act (ADA) is a federal law that prohibits discrimination against people with disabilities in several areas, including employment, transportation, public accommodations, and others. Most sections of ADA do not specifically reference websites, but many courts have ruled that websites are public accommodations subject to ADA.
- A place of public accommodation engages in unlawful discrimination if it fails to "take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services."

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Website Accessibility Suits

- There are web content accessibility guidelines (WCAG) that a business can follow to ensure that its website is ADA compliant.
- Absent an exclusion, third-party liability coverage with a broad third-party definition and discrimination as a covered offense will typically apply to a website accessibility suit.

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Common Exclusions

Violation of certain laws

- Most forms exclude claims for violation of certain laws such as Workers' Compensation, ERISA, Worker Adjustment and Retraining Notification (WARN) Act, etc.
- EPLI coverage does typically apply, though, for claims alleging retaliation against employees who exercise their rights under these laws.

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Retaliation Exception

Example

Jill's employee, Jack, has made numerous Workers' Compensation claims over the years. Jack has bad knees and regularly injures them on the job. Tired of the effect Jack's injuries are having on the company's experience modification factor, Jill fires Jack, citing poor work performance as the reason. Jack files a lawsuit alleging that he was wrongfully terminated and that the firing was retaliation for his having filed workers compensation claims. Workers compensation will respond to Jack's injury claims, but the EPLI policy will typically provide coverage for the retaliation claim.

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Wage and Hour Claims

SAMPLE LANGUAGE

Exclusions

The Insurer shall not be liable to pay any Loss in connection with any Claim:

for any actual or alleged violation of any of the responsibilities, obligations or duties imposed by the Fair Labor Standards Act (FLSA), as amended, or any other foreign, federal, state, or local law, whether statutory or common law, governing the classification of employees to determine their eligibility for compensation or the payment of wages, overtime, on-call time, rest periods or minimum wages;

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Wage and Hour Claims

Many insurers add back a small amount of coverage for claims involving these types of offenses.

- Coverage is usually for defense costs only, with only a few insurers covering the indemnity portion of the claim.
- Coverage is subject to a sublimit. e.g. $100,000

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Immigration Claims

Most insurers exclude claims involving violation of the Immigration Reform Control Act of 1986 and similar laws.

Many insurers, though, add a small amount of coverage for claims involving these types of offenses.

- Coverage is usually for defense costs only.
- Coverage is subject to a sublimit. e.g. $100,000

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Americans with Disabilities Act

- Under ADA, a business may need to make reasonable accommodations so that those with a disability can enjoy equal employment opportunities or access certain public spaces.
- EPLI policies do not cover losses involving an insured's failure to comply with accommodations or building modifications as required by ADA.
- A claim that an insured discriminated against a person with a disability, though, would typically be covered.
- Some policies provide defense coverage if there is a claim against the insured for failing to comply with ADA.

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Americans with Disabilities Act

Example:

Sally uses a wheelchair and attempts to access a public building. She is unable to enter the building because there is no wheelchair ramp as required by ADA. Sally files suit against the owner of the building, alleging discrimination and a violation of the Accessibility Guidelines for Buildings and Facilities section of the ADA.

The third-party liability coverage in the EPLI policy of the building owner will respond to Sally's discrimination claim, but the policy will not pay to make the necessary improvements to the building.

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Common Exclusions

Breach of an express written employment agreement

- Some forms do not cover breach of a written employment contract.
- Some forms that exclude breach of a written employment contract may provide defense coverage for such claims.

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Common Exclusions

Biometric Identifiers

- Many insureds use biometric identifiers such as fingerprints and facial scans for timekeeping and computer log in.
- Several states have laws that specifically address how companies collect, use, retain and disclose biometric data. In other states, privacy or data breach notification laws cover biometrics.
- Exclusions to specifically eliminate coverage for claims involving biometric data are becoming more common.

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Common Exclusions

Privacy Violations

- Many EPLI insurers have begun to exclude or limit coverage for claims involving an employee's personally identifiable information such as driver's license numbers, social security numbers and banking information.
- Note that these claims are different than invasion of privacy claims which are typically covered by an EPLI policy. Invasion of privacy could involve claims that an employer, for example, improperly listened to phone calls or that a locker was inappropriately searched.

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Privacy Violations

SAMPLE LANGUAGE

EXCLUSIONS

No coverage will be available under the EMPLOYMENT PRACTICES LIABILITY COVERAGE PART for Loss, other than Defense Expenses, on account of that portion of any Employment Claim alleging a Violation of Employee Privacy. Violation of Employee Privacy means a Company's failure to:

(i) secure an employee's Record (as defined below) from actual or potential unauthorized access by another person or by an organization which results in injury to such employee; or

(ii) provide notice as required by any state, federal or local statutory law or common law anywhere in the world to an employee whose Record was accessed or may have been accessed by an unauthorized person.

Thank You For Attending!

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