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Top 10 Employment Liability Concerns Does your insurance protect you?

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All policies affording coverage for employment-related liabilities are not created equal. Knowing which liabilities are covered by which policies—and what to do when potential liability arises—is critical to maximizing your insurance recovery.

The best place to start is by understanding the different types of coverage:

[Commercial general liability](#) (CGL) coverage is a staple in many companies' insurance portfolios. But as broad as such coverage may be, most CGL policies afford only limited coverage for employment-related liabilities.

[Employment practices liability insurance](#) (EPLI) can bridge any gaps that might exist for claims brought by current or former employees.

[Directors and officers liability insurance](#) (D&O) protects the company as well as its individual directors and officers.

Below we outline 10 areas of potential employer liability and the considerations that come into play in determining what's covered by insurance.

1. Wage and Hour Claims

Violations of the [Fair Labor Standards Act](#) (FLSA)—and wage and hour claims in particular—are on the rise. Such claims may arise out of a variety of scenarios, such as when employers alter time records to avoid paying overtime, misclassify exempt and nonexempt employees and independent contractors, or fail to provide due rest and meal periods.

Defense costs for these lawsuits can be substantial, particularly if they become class actions. Consequently, many employment practices liability insurers now specifically exclude coverage for wage and hour claims, among other types of FLSA violations. Nevertheless, as with whistle-blower and retaliation claims, wage and hour claims may still be entitled to the cost of their defense under many EPLI policies' broad "duty to defend" language. Likewise, the wage and hour claim may implicate coverage where the claim is itself based on a generally unfair business practice that is otherwise covered under the policy.

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2. Class Actions

Wage and hour and other claims have the potential to affect large groups of individuals and thus incur hundreds of millions of dollars in liability. Many earlier forms of EPLI specifically excluded coverage for class-type claims. However, as such claims have become more frequent, insurers have introduced endorsements designed to afford coverage for defense costs.

It is important for policyholders to know in advance whether their policy also affords indemnity coverage for any ultimate liability.

3. FMLA Violations

With an aging workforce and many employees deferring retirement, employers are seeing more requests for medical leave and more reasons for those requests. Some requests present clearly justifiable grounds for leave; others, not so much. Any denial of leave presents potential for a claim against the employer or, worse, the individual supervisor or HR professional.

In fact, many courts have ruled that individual liability attaches to those involved with [Family and Medical Leave Act](#) (FMLA) decisions that affected aggrieved employees based on the FMLA definition of “employer,” which allows for personal liability of managers and company officials. Insureds, therefore, should look to their EPLI and D&O coverages to respond to such claims.

4. Whistle-Blower Actions

The number of whistle-blower and retaliation claims continue to rise as workplace regulations intensify and whistle-blower protections multiply. Coverage for these claims, including the often-substantial cost of defense, is typically available under EPLI.

5. Data Breaches

With corporate data breaches becoming more common, employers and executives are increasingly taking the blame—and incurring the liability. Suits are diverse, ranging from shareholder derivative actions to ordinary lawsuits seeking consequential damages. Claims against corporate boards and executives should be covered under most D&O policies, which typically do not contain data-breach or cyber exclusions, whereas claims against negligent employers or supervisors may trigger ordinary CGL or EPLI coverages.

6. Social Media

As of September 2014, Facebook reported that it had some 864 million daily users. Instagram, Twitter and LinkedIn likewise have substantial numbers—and they’re only getting bigger.

What this means for employers is that a comment or post about an employee has the potential for “viral” proliferation. And more and more employees are using social media to defame, disparage or harass organizations and co-workers. EPLI does not cover disparaging or defamatory comments made by employees against one another. However, it may protect employers when an employee harasses or

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defames a co-worker and that co-worker sues the employer for failing to prevent such harassment. Likewise, EPLI will protect the employer when a manager is responsible for the inappropriate post, tweet or tag.

Protection may also be available under CGL policies if the alleged offense comes within the scope of the policy's personal injury coverage.

7. Alternative Work Arrangements

Alternative working arrangements, such as telecommuting, compressed workweeks and staggered schedules, continue to increase in popularity, particularly in urban areas.

The arrangements may give rise to a host of employer liabilities, from FLSA violations based on

nonexempt employees working longer days, to discrimination in the selection of employees to be afforded alternative work arrangements, to claims of missed promotion opportunities. Such claims may amount to "wrongful acts" entitling the employer to coverage under EPLI. Likewise, liability occurring offsite but within the scope of the employment relationship may implicate coverage under the employer's CGL policy.

8. Discrimination

The [Equal Employment Opportunity Commission](#) has changed the litigation landscape by filing the first two lawsuits in its history challenging transgender discrimination under the [1964 Civil Rights Act](#). EPLI policies typically cover claims alleging employment-related discrimination based on the violation of any federal, state or local law that prohibits discrimination on the basis of race, sexual orientation, color, marital status, creed, national origin, religion, gender, age, military service, disability or pregnancy.

Many EPLI policies also contain provisions that more generally extend coverage to "other protected classes." For example, a policy may afford coverage for claims based on nondescript "discrimination." D&O policies also may apply when the discrimination emanates from corporate mandates. CGL policies come into effect when the discrimination results in a form of personal injury.

9. Sexual Harassment

Claims alleging sexual harassment are typically covered under EPLI policies. The facts of each claim will determine whether the claim implicates CGL personal injury coverage. In addition, because these claims often include alleged failures at the corporate level regarding the enactment of workplace safeguards and policies, such claims may implicate D&O coverage as well.

10. Gender and Sexual Orientation Claims

The last couple of years have seen a rapid increase in the protections afforded to lesbian, gay, bisexual and transgender individuals. These additional discrimination protections could affect the scope of insurance covering employment discrimination claims. Indeed, with the demise of Section 3 of the federal Defense of Marriage Act in 2013, and with a steady increase in the number of states recognizing same-sex marriages,

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procuring insurance that covers such discrimination is increasingly important. Newer EPLI policies explicitly cover discrimination based on sexual preference or orientation.

Older policies may not be so clear. It is important, therefore, that policyholders continually review and update their EPLI and other insurance to ensure that it encompasses the organization's current risk portfolio.

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