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**Does My Business Need Employment Practices Liability Insurance?**

**By: William T. MacMinn, Esquire**

The patchwork quilt of state and federal anti-discrimination and labor laws creates ample opportunity for employers to err in their employment decision making. How often does this occur? The U.S. Equal Employment Opportunity Commission (EEOC) recently announced that for the fiscal year ending September 2011, it received a total of 99,947 charges of discrimination; the highest ever in its 46 year history. The EEOC enforces Title VII (prohibiting discrimination based on race, gender, religion and national origin), the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA) and the Equal Pay Act (EPA). The Department of Labor, the agency charged with enforcement of two of the other major employment laws, the Fair Labor Standards Act (FLSA) and the Family Medical Leave Act (FMLA) reported 23,845 complaints alleging a violation of FLSA and 1,889 complaints alleging a violation of FMLA<sup>1</sup>. Most states have anti-discrimination laws enforced by state agencies. In Pennsylvania, that agency is the Pennsylvania Human Relations Commission (PaHRC). In the latest year for which statistics are available, 2009-2010, PaHRC reported 3,922 new complaints.

What is the financial consequence to employers of those errors? In 2011, enforcement actions by EEOC resulted in payments by employers in the amount of \$364,600,000. Enforcements by the Department of Labor resulted in payments by employers of \$185,287,827, not including verdicts handed down by Federal Court juries in cases which do not resolve at the agency level! In 2009-2010, Pennsylvania employers paid \$8,488,000 to resolve claims brought against them at the PaHRC.

In total, these three agencies reported 129,603 claims with almost \$558,000,000 in employer paid claims! What can you do to protect against financial exposure to your business?

The starting place, of course, is to make sure your HR policies and procedures are in place, comply with applicable laws and are uniformly enforced. In addition to avoiding claims, keeping your HR house in order usually helps you defend against claims when they arise. As we all know, even the best preparation cannot eliminate all risk. Just as your Commercial Property Liability Insurance (CPL) policy insures your business against the risk of fire, for example, you should consider insuring it against employment law claims. You may not know that your CPL policy does not provide protection for most

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<sup>1</sup> This information is for 2008, the latest year available.

such claims. The insurance product that does is Employment Practices Liability Insurance (EPLI).

#### Who Does EPLI Insure?

A good EPLI policy should cover claims brought against the company, any subsidiaries (if applicable), its directors, officers and employees. Make sure that coverage extends to part-time, temporary, leased and seasonal employees and independent contractors as applicable to your business. Some carriers will provide very limited coverage for EPLI under their General Liability forms, but a stand-alone policy is preferred as they typically provide the broadest coverage.

#### What Claims Does EPLI Cover?

As you might expect, EPLI policies cover claims of wrongful termination of employment, workplace harassment and discrimination under state and federal employment laws. Some go further, offering coverage against claims of negligent hiring/supervision/evaluations, invasion of privacy, defamation and intentional infliction of emotional distress. Your CPL policy may also provide some coverage for these latter types of claims.

If someone slipped and fell on your business property (a traditional “negligence” claim), your CPL policy would provide coverage as soon as the claim was reported to the insurer and continue through any litigation that might ensue. So too will an EPLI policy. However, employment law claims are most often resolved in arbitration or at administrative proceedings held before the EEOC or the PaHRC. Make sure that the EPLI policy you purchase covers such proceedings which all take place before the filing of a traditional lawsuit. You should notify the insurer when you receive a written demand asserting an employment law claim and coverage should begin at that point.

#### Whose Claims are Insured Against?

All EPLI policies cover claims brought by current full-time employees. Make sure that the EPLI policy you purchase applies to claims brought by current part-time, temporary and seasonal employees, applicants for employment and former employees (full-time, part-time, temporary and seasonal), as applicable to your business.

The EEOC and PaHRC are empowered to bring claims alleging violations of the statutes they enforce “on behalf of” affected employees. Care should be taken to make sure such claims are within the coverage provided by the policy. In a recent case involving the Cracker Barrel restaurant, its insurer, Cincinnati Insurance refused to provide coverage because the case was brought by the EEOC and not the employee. In a decision costing Cracker Barrel several million dollars, the Court determined that under the language of that particular policy, for claims to be covered they must be brought by an employee.

#### What Practices or Acts are Excluded From Coverage?

Like your CPL policy, EPLI policies will exclude coverage for criminal acts, fraud, illegal profit or advantage, intentional violation of law, wrongful acts committed with

actual knowledge of their wrongful nature or with intent to cause damage and other egregious conduct. Punitive damages claims cannot be covered as a matter of public policy.

In addition, EPLI policies generally do not provide coverage for claims alleging violations of the Fair Labor Standards Acts (with the possible exception of Equal Pay Act provisions), the National Labor Relations Act, the Worker Adjustment and Retraining Notification Act (WARN), and claims arising out of downsizing, layoffs, workforce restructurings, plant closures or strikes; the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA); the Employee Retirement Income Security Act (ERISA); the Occupational Safety and Health Act (OSHA).

In some cases a resolution of the claim may involve more than the payment of money. For example, in a claim alleging a violation of the ADA, a resolution might include modifying your facilities to make them accessible to the disabled. The costs incurred to do so would not be covered.

#### Do EPLI Policies Provide a Legal Defense?

Yes, if a covered employment law claim is made, virtually all EPLI policies will provide a legal defense. The top EPLI insurers provide assistance to help avoid claims usually in the form of a toll-free hotline to provide advice with HR issues.

Coverage varies, so determine whether your policy: 1) requires your company to pay the cost of the defense until the deductible is met; or 2) reduces the amount available to pay the claim by the amount paid in the cost of defending it (known as “costs inside limits”).

Where the insurer is providing a legal defense, it generally has the right to choose the attorney who provides that defense. Carriers maintain a list of “panel” counsel, or their own “in-house” attorneys or “captive” law firms for this purpose. These attorneys generally do a wide variety of cases and are likely to be less experienced than your regular employment law attorney. More importantly, such counsel will not know the history of your organization, its culture, or the issues and considerations that are of paramount importance to the company. For these reasons you should, if possible, seek the right to require the insurer to utilize your counsel in the event of a claim and memorialize that right in a “special handling” endorsement to the policy. If this proves to be impossible or cost prohibitive, your regular employment law counsel should work closely with appointed defense counsel in the event of a claim.

#### What Factors Affect EPLI Premiums?

Doylestown insurance agent, Rick Millham, Jr. of Millham Companies, Inc. says EPLI is not as expensive as you might think. Insurers consider a number of factors in setting the price point, including the number of your company’s employees, its industry segment, the frequency of turnover and the longevity of the workforce. Coverage proposals are based on these exposures and then tailored to take into account your company’s experience. Always do your “due diligence” and obtain a proposal specific to your business.

Does your business need EPLI insurance?

The increase in the number of charges filed and the increase in monetary recovery reported by the EEOC, suggests that the answer is yes. A discrimination, sexual harassment or wrongful discharge claim brought under state or federal law claim can be a debilitating experience causing serious disruption and long term damage to your business. Providing coverage for such claims, EPLI is a supplement to, but not a substitute for, sound HR practices and procedures. Antheil Maslow & MacMinn, LLP (AMM) can assist your business in complying with your employment law issues, including evaluating EPLI coverage. Please contact the author, or your AMM attorney to discuss any issues facing your business.

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