



**October 20-23, 2022 | Westin Boston Seaport District**

10/21/2022

**Adapting EPLI Insurance to Fit Emerging Exposures**

9:00 AM - 11:00 AM

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CEUs: 2

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# ADAPTING EPL INSURANCE TO FIT EMERGING EXPOSURES

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# Introduction

It's easy to complete and submit an EPLI application to a prospective insurer. What takes experience and skill is to

- ANALYZE the specific risk;
- DETERMINE THE BEST INSURER(S);
- KNOW THE EXTENSIONS AVAILABLE;
- OBTAIN QUOTES/INDICATIONS; and,
- DISCUSS THEM WITH THE CLIENT.

# Introduction

There are many current exposures and trends to consider, along with a number of statutory laws and regulations applicable. Unless all of the client's employees are confined to a single state, some knowledge of the nature of these various laws is imperative.

# How EPLI Has Evolved

- Originated in 1989, with availability only from a Los Angeles-based MGA, utilizing underwriters at Lloyds, London;
- Original policies were restrictive, expensive and with big per claim deductible amounts and a co-insurance clause (but it was a beginning);
- Little initial interest (until mid 1990s) from potential buyers;
- A long, slow learning curve ensued, with difficulty in understanding potential claims, but rather rapid claims evolution. Now, its essential insurance!;

# How EPLI Has Evolved

- There is no “universal” coverage language, so EPL insurance must be carefully negotiated and reviewed (this requires time and effort);
- Claims experience has steadily increased, but there remains significant market interest and capacity;
- The “trick” is to make EPLI as responsive to current claims trends as possible;
- New exposures: WCAG; “Ban the Box”; “silent cyber”; marijuana (still illegal under federal law), etc..

# Where EPLI is Going

- Claims (both frequency and severity) have been increasing; Unusual exposures have emerged;
- US Equal Employment Opportunity Commission (EEOC) data shows increases in employee complaints in almost every category of employment-related activity, over an extended period of time (see EEOC Statistics Exhibit);
- Some important coverage aspects are increasingly hard to find (“wage and hour” defense for CA employers, or for larger employers, for example).



# Where EPLI is Going

- Immigration Control Act (1985) Defense Expense is offered by only a few insurers for smaller risks only;
- Constantly emerging exposures: “WCAG”; marijuana usage; opioid issues, COVID, workplace diversity and inclusion;
- More services offered by insurers, such as consultation via toll-free telephone charges; training services and complimentary
- webinars; and, Employee Handbook review by legal counsel (VERY important).



# EMERGING EPL EXPOSURES

- Medical marijuana in the workplace
- (increasingly OK statutorily, not OK federally);
- "Ban the Box" (initial employment applications and initial interviews) [See [www.nelp.org](http://www.nelp.org)];
- Salary history questions;
- Website Content Accessibility Guidelines ("WCAG");
- Probable cyber exclusion;
- Is "screen addiction" a problem?;
- Remote employee exposures.

# Basic EPL Insurance

- Most policies contain a definition (listing) of covered Employment Practices Wrongful Acts:  
“..Employment Practices Wrongful Act means any actual or alleged:
  - violation of any common or statutory federal, state, or local law prohibiting any kind of employment-related discrimination;
  - harassment, including any type of sexual or gender harassment as well as racial, religious, sexual orientation, pregnancy, disability, age, or national origin-based harassment, or unlawful workplace harassment, including workplace harassment by any non-employee;

# Basic EPL Insurance

[Employment Practices Wrongful Act continued]:

- abusive or hostile work environment;
- wrongful discharge or termination of employment, whether actual or constructive;
- breach of an actual or implied employment contract;
- wrongful deprivation of a career opportunity, wrongful failure or refusal to employ or promote, or wrongful demotion;

# Basic EPL Insurance

[Employment Practices Wrongful Act continued]:

- employment-related defamation, libel, slander, disparagement, false imprisonment, misrepresentation, malicious prosecution, or invasion of privacy;
- wrongful failure or refusal to adopt or enforce workplace or employment practices, policies or procedures, solely as respects employment-related discrimination or harassment;
- wrongful discipline;
- employment-related wrongful infliction of emotional distress, mental anguish, or humiliation ...”

----BAM (E-Risk) Policy EK-D-1 (4-08)

# Basic EPL Insurance

- Not all excluded exposure is contained in policy exclusions (see definition of Loss for whether punitive damages are covered, for example);
- “..Loss means any amount which an insured becomes legally obligated to pay as a result of a claim, including punitive, exemplary or multiple damages in excess of actual damages (except where uninsurable by law), judgments, settlements, pre-judgment and post-judgment interest, and reasonable defense expenses; however, Loss does not include:

# Basic EPL Insurance

## [Definition of Loss continued]

- any unrepaid, unrecoverable or outstanding loan, lease or extension of credit;
- any costs incurred to comply with any injunctive or nonmonetary relief or any agreement to provide such relief; or
- matters uninsurable under the law pursuant to which this policy is construed;

Where an insured reasonably determines that punitive, exemplary or multiple damages are insurable under the applicable law, the Insurer shall not challenge that interpretation of insurability.

-- “StarNet” Mgmt. Liability Policy MLP DS 70 00  
0909

# Basic EPL Insurance

- Excluded exposure will vary, but will almost always include an exclusion for “bodily injury” (more about this later), as well as additionally excluded exposure;
- Endorsements are the norm: coverage extensions as well as restrictions are usually included. Just remember that you can potentially get what you can negotiate, coverage-wise, with the underwriter. (The more knowledgeable brokers obtain broader coverage provisions);
- Bacteria or pandemic exclusion on policy?



# Critical ASPECTS of EPL Insurance

- Inclusion of Third Party Discrimination and Harassment coverage (sometimes, only Harassment is provided) - VERY IMPORTANT;
- Inclusion of employment-related “breach of privacy” (or not, depending upon individual insurers);
- Broadly addressing the definition of Employment Practices Wrongful Act;
- Is coverage keeping pace with rapidly evolving exposures??

# Critical ASPECTS of EPL Insurance

“..Third-party harassment act means any actual or alleged:

- violation of any federal, state, provincial or local statutory law, common law or civil law prohibiting discrimination of any kind;
- harassment, including any type of sexual, religious, racial, sexual orientation, pregnancy, disability, age, or national origin-based harassment;

# Critical ASPECTS of EPL Insurance

[Third-party harassment act continued]

- defamation, libel, slander, disparagement or invasion of privacy;
- false arrest, false imprisonment or malicious prosecution; or
- Bullying of a natural person other than an employee, officer or director and other than as a part of a lending act..”

--”StarNet” Mgmt. Liability Policy MLP DS 70  
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# Critical ASPECTS of EPL Insurance

- Independent Contractors may or may not be covered as Insured Persons. Some insurers will cover, but usually require indemnification by the Insured Organization;
- It's important to have specific coverage for “humiliation”, “emotional distress”, “embarrassment” and “mental anguish”, BECAUSE of the usual bodily injury exclusion, and expected attorney allegations. (Maybe “built into” coverage form, or added by endorsement – should not be an issue).

# Critical ASPECTS of EPL Insurance

- Fair Labor Standards Act (“wage and hour”) defense expense is important, but increasing difficult to obtain (see exhibit). [Sub-limit most often available is \$100,000 - \$300,000.] New monoline policies are being offered by Lloyd’s and Bermuda underwriters but big retentions and large premiums apply;
- Immigration Control Act of 1985 defense expense (few insurers will cover). Generally, only a small limit applies;
- “Claims Made” vs. “Claims Made and Reported”;

# Overall Critical Management Liability Insurance STRATEGY

- If EPL is written in conjunction with D+O, then a good option is to have the limits truly apply separately, instead of one combined, aggregate policy limit for both coverages (always give the buyer choices). The cost to do this is amazingly small;
- It is important to understand the different meanings of Retroactive Date and Continuity Date (neither is a defined term in most individual policies);

# Overall Critical Management Liability Insurance STRATEGY

- EPL is usually easier for private company decision makers to grasp than D+O or Fiduciary Liability coverages. Packaging D+O, EP LI and Fiduciary liability coverages is very efficient, but breadth of coverage may be compromised;
- It is easier to train employees in customer relations, than to train customers in employee relations. Thus, Third Party EP LI coverage is of significant importance!



# Overall Critical Management Liability Insurance STRATEGY

- The policy definition of subsidiary is important (more than 50% ownership or control). Subsidiaries are usually automatically covered. Other related entities are not automatically covered. A Corporate Organizational Chart is VERY IMPORTANT;
- The policy definition of employee is important – are there independent contractors, or is a PEO involved? (the distinction is increasingly important);
- It is important to have an affirmative statement that punitive damages are covered, and with “most favorable jurisdiction” verbiage (see policy definitions);

# Overall Critical Management Liability Insurance STRATEGY

- Is it possible to obtain defense expense coverage outside policy limits? [Becoming less possible with each passing year.];
- Is there involvement by a PEO (Professional Employer Organization)? If so, understand the remaining importance of EPL insurance, even if there are technically no “owned employees” (the details of any contract with the PEO are extremely important – reviewing it is critical). This issue can also affect Fiduciary Liability insurance.

# Understanding the Three (3) Ways in Which Exclusions Are Presented within the Policy

- Absolute exclusions: “..arising from , involving , in consequence of, or in any way connected with ..”; [Identify on exhibit specimen];
  - “For” exclusions: “..for [bodily injury, property damage or personal injury..]; (Identify on exhibit specimen);
  - Exclusions with carveouts creating coverage :  
“..however, this exclusion shall not apply to any claim involving [mental anguish or emotional distress]..”, (sometimes used to provide coverage within a normal EPL policy exclusion for bodily injury, for example). (Identify on exhibit specimen).
- “For” exclusions are obviously better than “Absolute ”.....

# Significant Basic EPLI EXCLUSIONS

- Accommodation Expenses – construction expenses (but it's important that defense of discriminatory accommodation situations IS provided);
- Breach of employment contract (a few insurers will provide coverage for this exposure);
- Intentional acts (but protection important for Insured Persons not involved in the intentional acts, if not otherwise excluded);
- Retaliatory Acts (“retaliation” coverage can be included for coverage – it's either built into the language, or added by endorsement).  
Retaliation claims are increasing!

# ANCILLARY COVERAGES

## Remotely Related to EPLI

- Workplace Violence coverage;
- Cyber insurance and notification expenses;
- Group ID Theft insurance;
- Fiduciary Liability insurance – what's the difference??;
- Exposures under the Affordable Care Act;
- Assault and Battery Extension;
- D + O insurance;

# Difficult Risks for EPL

- Heavy CA exposure (some other states, as well);
- Concern for multiple plaintiff claims against large, brand-name employers;
- Employee leasing/temporary staffing firms;
- New and used automobile dealers; sports teams; municipal entities;
- Franchisors, because of the “joint employer” situation;
- Casinos; large law firms; religious organizations, and other risks.



# Distinguishing Between Insurers

- Retail agents must strike some sort of balance between “direct insurers” and wholesalers. Often, E+S insurers (utilized by wholesalers), offer better pricing and extensions than “direct insurers”, ESPECIALLY as respects EPL insurance, and will often do so consistently;
- Less commission from E+S insurers through wholesalers, but often a broader risk appetite, and good proprietary enhancements. E+S insurers know they must compete;
- Some insurers offer only “claims made and reported” coverage; some offer only “claims made” coverage. (The difference between the two is important);
- Comparing definitions, exclusions, policy conditions and services can yield an interesting contrast between insurers (See Richard Betterley/IRMI Annual analysis – December).



# What Underwriters Need in Order to Indicate/Quote

- For a non-binding broad indication, probably just employee count and distribution by state, annual revenues and a web site URL (there will likely be subjectivities in order to actually bind coverage);
- For a bindable quote, a completed application; copy of the latest EEO-1 Form (required, if more than 100 employees); some sort of claims/financial information; assurance that an Employee Handbook is in place; and, satisfaction of underwriter subjectivities;
- For previous claims, underwriters want to understand how many/how severe, and, what changes have been implemented, in order to avoid re-occurrence of similar situations.

# Quotations/Indications for Risks With Claims Activity

- If there has been claims activity, it's important to describe ways in which corrective action has been taken, or procedures adopted to minimize future claims potential;
- Be proactive in obtaining Loss Runs to send to the successful quoting underwriter;
- There are Loss Run services available which promise to obtain Loss Runs for a fee, if there is any problem in getting these directly from current or previous insurers.

# Useful Resources

- Charge statistics from US Equal Opportunity Employment Commission ([www.eeoc.gov](http://www.eeoc.gov)). Updated annually, usually in February;
- Rick Betterley's policy comparative analysis ("Employment Practices Liability Insurance Market Survey" – in December). [www.irmi.com](http://www.irmi.com);
- Individual insurers' anonymous claim examples. (These should be readily available for almost any business type);
- [www.lexology.com](http://www.lexology.com); and, [www.mondaq.com](http://www.mondaq.com);
- Hiscox "Guide to Employee Lawsuits" (2018).

# Giving Buyers Choices in Connection With EPL Insurance

- With increasing premiums, it is always important to offer buyers of EPL insurance some choices with respect to limits and coverage aspects;
- At each renewal, demonstrate that collective insurers' EPL claims experience is generally not very good, and if renewal premium increases are present, show ways in which the increases may be contained, via:
  - An increase in the per claim retention amount;
  - Removal of sub-limited coverages;
  - Alternative quotations/indications (demonstrate what the market has to offer);
  - Removal of variable coverage aspects (“What does the Insured have to do to the coverage to maintain the expiring premium amount?”)