

Playing Defense

Liability Coverage Is Critical to a Company's Insurance Planning

By COREY MURPHY, CIC

Running a business is an endless challenge to gain and keep customers, control expenses, outwit the competition, and keep a productive and efficient workforce. You also have to prepare for ordinary but potentially critical threats to your company's survival: physical losses to your building, equipment, or cars; an injury to one of your workers; and, of course, the possibility of someone suing your company, alleging that an employee did something wrong or was negligent in some way.

Fortunately, much of the impact of these ordinary but very real risks can be reduced or mitigated through the use of an insurance program that includes a general-liability policy and a property-insurance policy. Additionally, Massachusetts requires that corporations purchase workers' compensation insurance, and also requires all automobiles to have liability insurance.

With this full insurance planning in place, a business may be financially protected from the impact of most risks it faces. However, this 'insur-

ance confidence' may be premature. The company still faces the critical exposure of a lawsuit brought on by an employee. In fact, statistics show that an employer is more likely to have an employment claim than a property or general-liability claim. And, unfortunately, a standard general-liability policy specifically excludes employer's liability.

It might be easy to think some types of 'discrimination' lawsuits happen only in large companies. Past results show this not to be accurate. A surprising 41% of all employment-practices liability claims are brought against small businesses consisting of 15 to 100 employees. However, many employers reason that they 'know' all their employees and this would not happen in their company. However, they do not know everyone they interview for a job, and those applicants can certainly claim discrimination.

Necessary Measures

Many business owners may believe that their general-liability policy will

respond to any lawsuit brought against them. This is not the case. In order to have insurance coverage for this exposure, an employer needs to purchase an employment-practices liability-insurance (EPLI) policy.

The EPLI policy has been developing over the past 10 years. It has grown to be more than a policy regarding sexual harassment. When evaluating a proposed EPLI policy, it is important to review the key elements to determine which are more favorable to your situation. The key elements of this type of policy are the acts that are covered, the types of damages covered, and the specifics of your defense.

Insurance carriers that offer EPLI cover what are considered traditional wrongful-employment practices, such as discrimination, harassment, and wrongful termination. However, employment-practices law has evolved rapidly, and creation of additional causes of action can outpace the development of some insurance policies. Other covered acts to look for include failure to provide equal-employment opportunities, retaliatory

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discharge, employment-related misrepresentation, wrongful deprivation of career opportunity, wrongful failure to hire, and termination in breach of an implied contract.

It is common for the EPLI policy to pay for compensatory damages. However, in these types of cases, any ruling of guilty can include fines, penalties, and punitive damages. You should be clear on the types of damages that are covered under the policy before you accept the proposal. You want to be sure that the policy will reimburse you for all the costs to defend the case, regardless of whether you win or lose. In the event the employee wins the suit, you want to be reimbursed for the judgment and settlement costs.

It is probably true that the majority of employment practices claims are settled out of court. However, that does not mean that the legal costs to dispute a case are insignificant. It is reported that the average defense cost for an EPLI case is over \$45,000.

Because defense costs can be such a significant portion of the claim, it is important to understand how those costs impact the limits of the policy. In some cases there could be a separate limit for defense costs. Other carriers

may include defense, judgment, and settlement costs all within one limit.

Other Issues

Another issue in regard to the defense of your employment-practices claim is your right to influence the defense attorney and that individual's strategy. It is important to understand your ability to select or the input you have in the selection of the attorney defending your case. Under some policies, the attorney may be designated entirely by the insurance carrier.

Another critical element of the defense is the settlement conditions. Some policies may require you to consent to the recommended settlement offer or you will forfeit the coverage provided. Other policies may impose a dramatic increase to your co-insurance percent.

An employment-practices liability-insurance policy has many critical details that will make a real difference when a claim comes your way. In order to exercise the most influence over the many issues discussed here, you could purchase an EPLI 'standalone' policy. This would allow you greater flexibility over the terms of your

policy. However, for those business owners whose insurance program consists of a business owner's policy, many insurance companies now offer some optional EPLI coverage that may be added.

It is important to discuss what options are available with your independent insurance agent. While it may be a little difficult now to work through the details of such an involved insurance policy, it will be time well-spent in the likely event of an employment-practices claim.

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