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Panel Counsel Considerations in Employment Practices Liability

By Margaret Grisdela

Highlights of this Article

- Employment defense law firms face a special challenge in regard to EPL panels
- Proactive measures can protect your client relationship
- Average value of an employment-related claim is $640,477

The Challenge of Employment Practices Liability Defense

Imagine not being able to defend your own client. This is the situation many insurance defense law firms find themselves in when one of their corporate clients, insured by an employment practices liability (EPL) policy, is named as a defendant in employment litigation.

The first reaction on the part of the law firm is likely to be surprise, or even disbelief.

> *How can this happen? Our law firm has a five year history of successful service with this employer. We certainly should be able to represent our client in an important employment litigation matter.*
> *-- Typical response from a managing partner or practice group chair*

Frequently, the insured employer is required under the EPL policy to be represented by panel counsel. If the employer's law firm of choice is not on the panel, the law firm loses the right to represent their own client. Since litigation is typically one of the most lucrative actions in employment law, the loss hurts financially as well as from a client relationship perspective.

Seeking EPL Panel Recognition

Being a pre-approved panel member with the carrier that provides EPL coverage to a client is clearly an ideal situation. Getting on an employment practices liability panel can be quite difficult, however, and may or may not be an option.

One way to minimize this risk is to try to get named as counsel of choice in the client's EPLI policy. This process is frequently known as an "accommodation," and is typically handled by the insurance agent or broker. If the accommodation is approved and the law firm's name is recorded in the policy, it is likely to apply only to that client and is not the same as being on the EPL panel.

The best time to be named in a client's EPL policy is:

1) When the policy is initially bound
2) When the policy is up for renewal

The absolute worst time to seek panel appointment is after litigation has been initiated. Starting the request for approval process in advance of a claim gives the carrier sufficient time to review law firm credentials and educate the firm on applicable litigation guidelines.

Employment defense law firms are advised to informally survey all employer clients to identify the status of EPL coverage. Create a simple Excel file that lists all your employment clients, and record if they have insurance (see Table 1 below). If they do have an EPL policy, record the name of the carrier and the policy renewal date. Record notes to help you track the next steps relevant to each client.

Table 1. Sample Analysis of Client EPL Coverage

Client	EPL Yes/No	Policy Start	Policy Renewal	Carrier	Broker	Note
ABC Co.	Yes	1/1/2013	1/1/2014	CNA	City Insurance Group	Try to get named in renewal
XYZ Co.	No	NA	NA	--	--	May purchase in 2013

This back door route to EPL policy inclusion can be time consuming but effective. Start soon to maximize your client representation opportunities.

Traditional Legal Marketing Channels for EPL Visibility

Insurance defense law firms that demonstrate thought leadership in regard to situations that might trigger an EPLI claim will strengthen their chances for panel approval. Successful marketing campaigns can include:

- Speaking engagements
- Article publication
- Blog posts
- Social media coverage (especially LinkedIn)
- Videos
- Website content
- Webinars

As you survey clients in regard to their EPL carriers and brokers, patterns will begin to emerge in regard to the leading local providers. Use the insight you gain to seek out EPL seminar partners from local insurance carriers and/or agencies. On a related note, you can also partner with a local accounting firm to offer their corporate clients educational seminars on employment-related legal issues.

Average Employment-Related Claim is $640,477

Jury Verdict Research reports that the average award for all types of employment-related cases was $640,477 for the time period 2003 to 2010.

According to the Chubb 2010 Private Company Risk Survey, 36% of private company executives said an employment practices liability lawsuit would cause the most financial damage to their company. Despite the fact that 21% of the companies surveyed by Chubb experienced an EPL

claim or lawsuit in the previous five years, only 1 in 4 private companies actually acquire the protection of an EPL policy.

An early 2013 EEOC analysis underscores the magnitude and frequency of employment claims. The agency reportedly received 99,412 private sector workplace discrimination charges during fiscal year 2012. The most common complaints included:

- Retaliation (37,836)
- Racial discrimination (33,512)
- Sexual discrimination (30,356)

The EEOC obtained $365.4 million in settlements from private sector and state and local government employers in 2012, the largest amount of monetary recovery in the EEOC's history.

A full list of EEOC 2012 charges and settlement actions is available at:
http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm

Recent Large EPL Settlements and Judgments

eBossWatch recently published the top 25 largest workplace harassment/discrimination lawsuit settlements and judgments from a 12-month period during 2011-2012. Here are the top 10:

1. Mercy General Hospital (Sacramento, CA) will pay $168 million in a sexual harassment lawsuit judgment.
2. ArcelorMittal (Buffalo, NY) will pay $25 million in a race discrimination lawsuit judgment.
3. Dr Pepper Snapple Group (Chicago, IL) will pay $18.3 million in an age discrimination lawsuit judgment.
4. YRC/Yellow Transportation (Chicago Ridge, IL) will pay $11 million to settle an EEOC race harassment and discrimination lawsuit.
5. Tesoro Refining and Marketing Company (Los Angeles, CA) will pay $8.5 million in a disability discrimination lawsuit judgment.
6. Cook County (Chicago, IL) will pay $7.6 million in a race discrimination lawsuit judgment.
7. Lennox Industries (Richardson, TX) will pay $6.2 million to settle an age discrimination lawsuit.
8. Aaron's Inc. (Fairview Heights, IL) will pay $6 million to settle a sexual harassment lawsuit.
9. Sears (Sacramento, CA) will pay $5.2 million in a race discrimination lawsuit judgment.
10. AT&T (Kansas City, MO) will pay $5 million in a religious discrimination lawsuit judgment.

Sexual harassment was the most common type of workplace complaint that led to the employer paying a sizable settlement or jury award, according to the eBossWatch report.

Click on the link to read the full eBossWatch report.

Background on the Insured Market for EPL Coverage

Employee-intensive industries are most likely to purchase EPL policies, including:

- Construction
- Hotels
- Manufacturers
- Medical groups
- PEOs and employee leasing firms
- Professional services (law, accounting, etc.)
- Restaurants
- Staffing agencies
- Transportation

Some industry sectors—such as gambling casinos, churches, or schools—may be excluded from EPL coverage offered by certain carriers.

Common Causes of EPL Claims

EPLI coverage protects an employer from claims filed by a current, past, or prospective employee. Situations that typically trigger an EPL claim include but are not limited to:

- Breach of an employment agreement
- Discrimination (age, sex, race, disability, etc.)
- Failure or refusal to create or enforce adequate employment policies
- Negligent hiring, supervision, training, or retention
- Retaliation
- Sexual harassment
- Violation of the Family Medical Leave Act (FMLA)
- Workplace harassment
- Wrongful termination, discipline, or demotion

Directors and officers are typically included under an EPL policy, recognizing that this remains separate from D&O coverage. Features can vary however, and every employer (and employment defense law firm) should understand what is included or excluded in a particular policy.

EPL claims can come in the form of a letter from an employee to the company, an EEOC or state agency action, or notification of a lawsuit.

In Summary

Start early. Marketing for insurance defense success is a long-term process that benefits from a continuous focus on high visibility business development campaigns.

The current administration is moving aggressively to update major aspects of labor, employment and workplace law. The Office of Federal Contract Compliance, for example, recently replaced long-standing guidelines with a more expansive view of pay discrimination actions. Employment defense law firms that are serious about growing market share will want to get ahead of these regulatory trends.

Legal Marketing Strategies

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About the Author: Insurance defense marketing consultant Margaret Grisdela is president of Legal Expert Connections, Inc. and the author of *Courting Your Clients: the Essential Guide to Legal Marketing*.

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Remember, never stop marketing! The author invites your questions and comments. She can be reached at mg@legalexpertconnections.com.

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