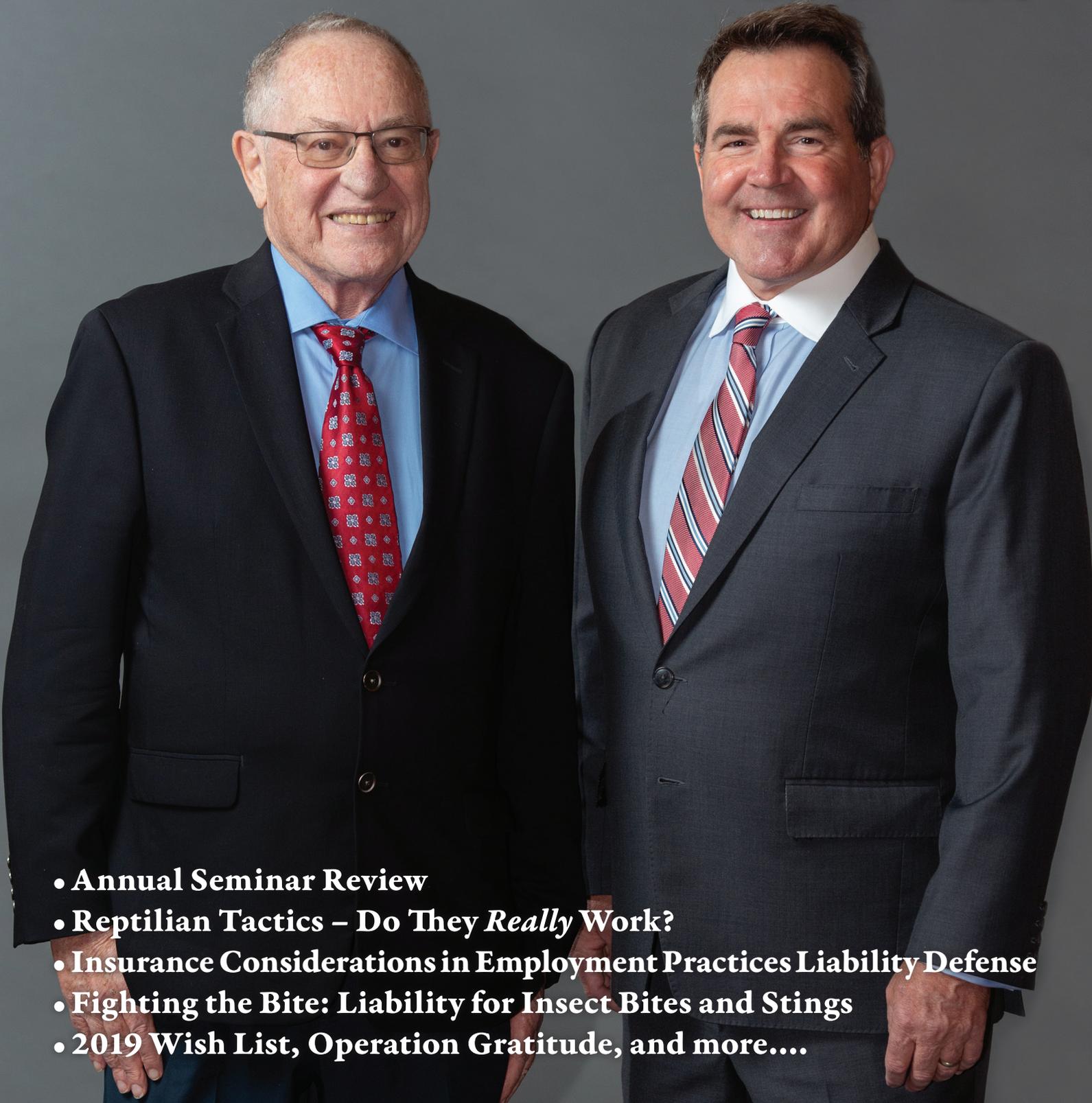


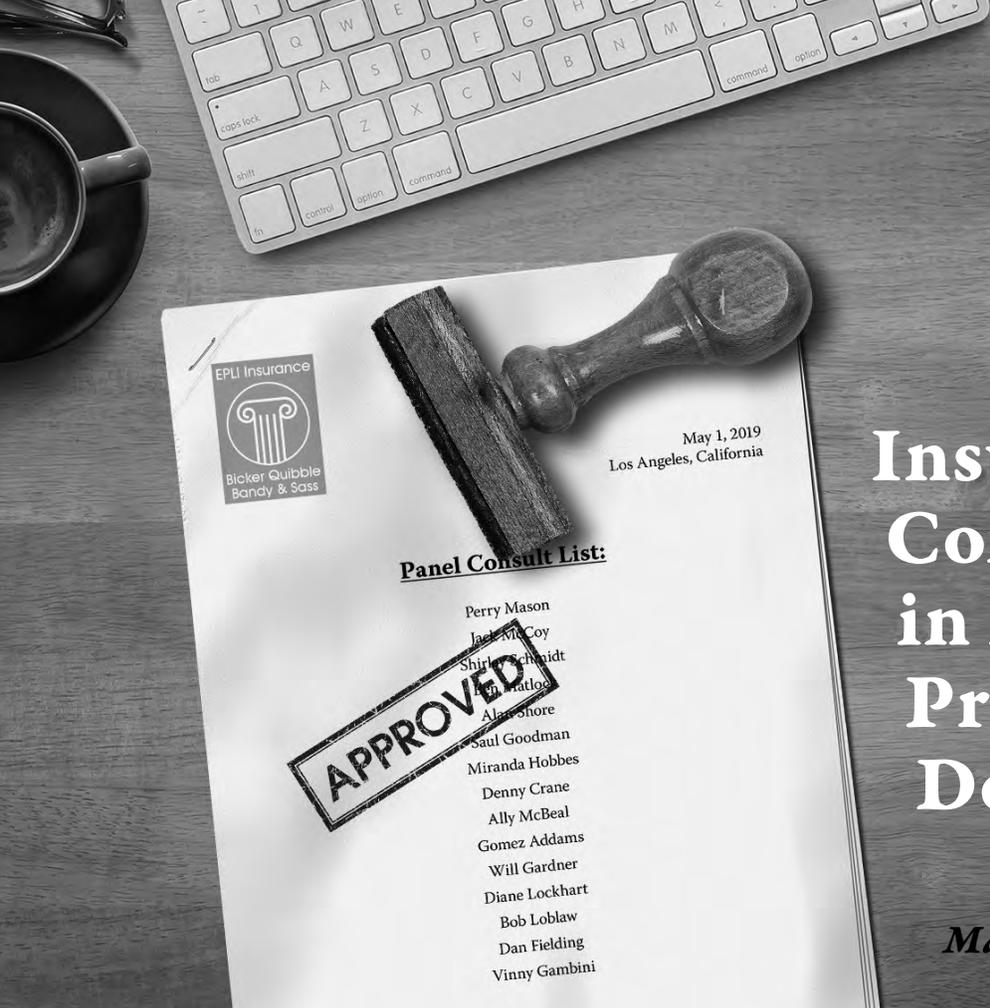
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Insurance Considerations in Employment Practices Liability Defense

Margaret Grisdela

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

Frequently, the insured employer is required under the EPLI policy to be represented by “panel” counsel, meaning an outside law firm that has been pre-approved by the insurance carrier to handle cases at a certain negotiated rate. If the employer’s law firm of choice is not on the insurer’s EPLI panel of pre-approved defense counsel, the law firm may lose the right to represent their own client.

Since litigation is typically one of the most lucrative actions in employment law, the loss hurts financially. Additionally, it is embarrassing and frustrating for the employer’s firm to have to turn the matter over to a competing law firm that may not handle the case as well.

Seeking EPLI Panel Recognition

Being a pre-approved panel member with the carrier that provides EPLI 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 be named as counsel of choice in the client’s EPLI policy. This is frequently accomplished through some type of endorsement to the policy and may require the insured to pay an additional fee. The benefit to the insured (the employer) is that they are then defended by the law firm that knows them well and understands their long-term strategies.

If a choice of counsel provision is not in place, the employer can also ask the insurer to appoint their employment defense law firm for a specific claim. This is often known as an “accommodation” and may be facilitated by the insurance agent or broker. Approval of an accommodation is at the discretion of the insurer and may be granted inconsistently. If an accommodation is approved, it is not the same as being on the EPLI panel.

Employment defense law firms, particularly those that are not traditional “insurance defense” firms, should be aware that an accommodation, endorsement, or panel appointment is subject to hourly rates that are negotiated by the insurance carrier. These rates are often significantly less than a law firm’s standard corporate rates, so an understanding of pricing practices in advance of the appointment is advised.

The best time to be named in a client’s EPLI policy is: a) when the policy is initially bound, or b) when the policy is up for renewal.

The 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.

In the author’s experience, very few employment defense law firms track the EPLI policies either in force or planned at employer clients. This back-door route to EPLI policy inclusion can be time consuming but effective.

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The primary reason law firms don't track this data may be simple lack of time and resources. In fairness, it can be a tedious process. A complicating factor can be that the person or department who purchases insurance within the client organization is removed from the law firm's contacts within the HR department. For example, a chief financial officer (CFO) or risk manager may coordinate insurance coverage without much input from the HR director and/or the law firm. An additional challenge can occur when an employer moves its EPL coverage to a new insurance company.

Starting to track client EPLI policies early can help a law firm to maximize EPLI representation opportunities within the client firm over time.

As you survey clients about their EPLI carriers and brokers, patterns will begin to emerge in regard to the leading local providers. Use the insight you gain to seek out EPLI seminar partners from local insurance carriers and/or agencies.

Traditional Legal Marketing Channels for EPLI Visibility

Insurance defense law firms that demonstrate thought leadership on topics and situations that might trigger an EPLI claim may strengthen their chances for panel approval. Successful marketing campaigns can include article publication, blog posts, client alerts, continuing education seminars, social media visibility (especially on LinkedIn), speaking engagements, videos, and website content.

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 \$160,000

Hiscox Insurance Company Inc. reports that the average cost of all types of employment-related cases resulting in a payment was \$160,000 in 2017. This number is up by \$35,000 since 2015. Hiscox also revealed that the average employment-related case takes nearly a year to resolve.

Similarly, Chubb reports that the average EPLI loss is \$102,915. These averages differ due to variation in exactly how a claim is measured, whether defense costs are included, and other factors.

According to the Chubb 2018 Private Company Survey, the majority of all employment-related claims stem from harassment, bullying, retaliation, and discrimination. Between 2015 and 2018, more than a quarter of respondents experienced an EPL loss, with sexual harassment being the most common issue. While 65% of respondents are covered by EPL insurance, 1/3 of those companies that were not covered incorrectly assumed their other insurance policies covered such claims.



According to EEOC data reviewed by the 2017 Hiscox Guide to Employment Lawsuits, charges of retaliation are made in half of all cases for sexual harassment or discrimination on some other basis, and retaliation is the most common finding of discrimination. More than 75 percent of all claims are unfounded and result in no payment by the insurance company. However, competent and careful representation is necessary to adequately help companies successfully reach the determination that a case is baseless.

An EEOC analysis underscores the magnitude and frequency of employment

claims. The agency received 84,254 private sector workplace discrimination charges during fiscal year 2017. The EEOC obtained \$355.6 million in settlements from private sector and state and local government employers in 2017.

Background on the Insured Market for EPLI Coverage

Employee-intensive industries are most likely to purchase EPLI policies, including construction, hospitality, manufacturing, healthcare, employee leasing, professional services, restaurants, and transportation.

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

Research conducted by Legal Expert Connections, Inc. indicates that more than 100 insurance carriers offer some form of employment practices liability insurance. Many of these include the expected national multi-line carriers, but regional and niche-oriented insurers also offer some form of EPLI coverage.

Directors and officers are often included under an EPLI 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.

In Summary

Start now! Marketing for employment defense success is a long-term process that benefits from a continuous focus on high visibility business development campaigns. 📌



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