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EMPLOYMENT & IMMIGRATION LAW

Knowing Your Policy Is The Best Policy

Business insurers often exclude certain types of claims

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If you are a lawyer who advises business entities, you have almost certainly been asked by a client at some point about a claim from an employee or former employee. (If it hasn't happened to you yet, believe me – it will.) And if you don't particularly focus your practice on employment law and/or litigation, you may have overlooked the fact that some types of employee claims, although not all such claims, are often covered by insurance. This article briefly reviews and discusses the spectrum of employment claims, with particular attention to those that generally are not insured.

In the first place, it is important to remember to ask your client about insurance coverage. Historically, businesses carried general liability policies that often provided coverage for employment-related claims. With the explosion in employment litigation since the 1970s, many carriers sought to reduce their exposure to such claims. Most general liability policies now exclude employment-related claims, but business entities often purchase Employment Practices Liability Insurance (EPLI) policies which provide coverage for many types of claims by employees. As with other types of liability insurance, however, failure to promptly notify the carrier of the existence of the claim may result in a denial of coverage.

Typically, EPLI provides coverage to the employer company, its executives, and its employees against claims for employment discrimination, retaliation and harassment,


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against claims for misrepresentation, defamation, invasion of privacy and negligent supervision arising in the employment context, and against claims for wrongful discharge, failure to promote and failure to hire. Some, but not all, EPLI policies provide protection against claims for breach of an employment contract. Any lawyer faced with an employment-related claim against a client would be well-advised to obtain a copy of the client's EPLI policy and read it carefully, in order to understand whether the claim should be covered and what notice requirements will apply.

Most, if not all, EPLI policies exclude claims for unemployment compensation. The employer that wants to contest an employee's claim for unemployment compensation will do so on its own dime.

Some policies allow the covered employer to select its own counsel to defend the claim, provided that counsel can negotiate a mutually agreeable rate with the carrier. On occasion the carrier will allow the insured to pay the difference between the carrier's permitted rate and a rate agreed between counsel and client. But most EPLI policies these days allow the carrier to designate defense counsel.

Excluded Claims

Certain common types of employment claims are generally excluded from coverage under EPLI policies. The lawyer whose client is faced with one of these claims must advise her client not to count on EPLI protection.

Most, if not all, EPLI policies exclude claims for unemployment compensation. The employer that wants to contest an employee's claim for unemployment compensation will do so on its own dime. Similarly, EPLI policies do not cover claims for workers' compensation, which are covered by (you guessed it) workers' compensation policies.

The EPLI exclusion of workers' comp claims can create an interesting situation when an employee makes a claim under Conn. Gen. Stat. Section 31-290a, which prohibits discrimination or retaliation against employees who make claims for workers' compensation. The workers' compensation carrier will not cover this type of claim, and may require the insured to hire separate counsel to defend it. It can be easy to overlook the fact that the claim may be covered as a discrimination or retaliation claim under an EPLI policy from the same or a different carrier.

Many EPLI policies exclude claims by independent contractors which would be covered if the contractors were classified as employees (*e.g.*, discrimination claims).

EPLI policies also often exclude claims for breach of the employer's agreement with an independent contractor.

Note as well that the misclassification as independent contractors of individuals who really are employees (as determined under tax law, employee benefits plans, or federal or state wage and hour laws, for example) can result in significant liability for an employer, which will not be covered by the EPLI policy. It's doubtful that the availability of EPLI coverage will be the determining factor when an employer considers whether to retain an individual in a "consultant" capacity or as an employee, but lawyers should advise clients considering such decisions that EPLI coverage may be affected. And when confronted with a claim, it will be important to determine whether the claimant was an independent contractor or an employee in order to assess whether the claim is covered.

EPLI policies also typically exclude claims brought under statutes that regulate wages and hours — i.e., the Fair Labor Standards Act and its state-law analogs. Claims that employees have been improperly classified as "exempt" — i.e., not eligible for overtime pay when they work more than 40 hours in a work week – are increasingly common and can carry significant exposure, including potential class claims and claims for punitive damages. Connecticut statutory claims under Conn. Gen. Stat. Section 32-72 for failure to pay wages or benefits when due also expose employers to the possibility of punitive damages, and are not covered under EPLI.

Similarly, claims by employees to enforce rights under ERISA, the WARN Act, COBRA, and Occupational Health and Safety Administration regulations, as well as the state-law analogs of each of these federal statutes, are usually excluded under EPLI policies. Grievances brought pursuant to collective bargaining agreements, and claims for violation of the National Labor Relations Act, are also excluded. If, as many expect, union organizing activity increases in coming years, employers (and their counsel) who have never been faced with NLRA claims may have to become familiar with them.

Some EPLI policies provide only defense costs, but no indemnification, for certain types of damages, such as benefits not associated with a termination of employment and the costs of providing a reasonable accommodation to a disability pursuant to the Americans With Disabilities Act. Similarly, an EPLI policy may provide only defense costs for claims resulting from the breach of a written employment contract. (Some policies exclude contract claims altogether.)

Affirmative Claims

Finally, there are affirmative claims that an employer may bring against a former employee that are not covered under EPLI policies. These include claims for misappropriation of trade secrets, violations of the Connecticut Unfair Trade Practices Act, and breaches of restrictive covenants that are often included in employment agreements, such as covenants to safeguard confidential employer information, covenants not to solicit customers or former coworkers, and covenants not to compete with the former employer.

While it may seem obvious that these claims would not be covered under EPLI, an employer faced with covered claims by a disgruntled ex-employee may want counsel to analyze the potential of such affirmative claims. These claims may also arise in a defensive context, as when a business hires an employee who is subject to restrictive covenants in her contract with her last employer. If the employee is sued for violating those restrictive covenants, the new employer may find itself a codefendant on a trade secrets claim, or accused of tortious interference with contract. EPLI generally will not provide a defense or indemnity in these situations. ■

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