

P&C RISK REVIEW

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The Basics Regarding Employment Practice Liabilities

This material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, confer with a qualified professional who can provide guidance that considers your unique circumstances.

A female designer at a civil engineering firm reported to her boss that she had been sexually harassed by one of the firm's clients. She asked to be taken off of the client's project, but her request was denied and the harassment continued. The designer filed a sexual harassment claim against her employer. Damages were awarded and defense costs incurred.

A drilling employee at a geotech firm filed a workers' compensation claim against his employer after being injured on the job. After the employee returned to work he was terminated for not being able to perform the essential duties of the job. The employee sued for age and disability discrimination. Damages were awarded and defense costs incurred.

A prime architect sent out RFPs for a big commercial project. A minority-owned design firm was turned down for a subconsulting position, despite offering the lowest bid. This sub claimed it was discriminated against because of the race of the owner. To back up its claim, the subconsultant revealed several racist emails and text messages it had been made aware of by an employee of the prime. Damages were awarded and defense costs incurred.

Scenarios like these (facts have been changed to protect the innocent) occur every work day, with many awards and settlements reaching six or even seven figures. And severities continue to increase.

How do you best protect your firm against employment practice liability (EPL)? You begin with clear direction to management and employees regarding proper employment practices. Then you secure sufficient Employment Practices Liability Insurance (EPLI) to provide protection should your firm be charged with discrimination, harassment or other wrongful acts.

The ABC's of EPL

Virtually any business owner who has employees or hires workers faces employment practice liabilities. Generally EPLs represent claims by former and current employees, as well as employment candidates and even independent contractors, that you have acted illegally regarding your employment relationship. More specifically, EPLs include claims of wrongful acts regarding:

- Discrimination (gender, age, race, religion, disability, sexual orientation, national origin and other protected classes)
- Sexual harassment
- Retaliation
- Wrongful discipline or termination
- Breach of employment contract
- Negligent evaluations
- Failure to hire or promote
- Bullying
- Infliction of emotional distress
- Invasion of privacy
- Mismanagement of employee benefit plan.

The best defense against employment practice liabilities is a sound human resource policy. Larger design firms often have in-house HR specialists or even attorneys to help them create such a policy. Smaller firms, however, are often at a disadvantage with principal designers often doing double duty as HR managers. Consider implementing these elements into your company HR policy:

- A comprehensive employee handbook that spells out your approved employment practices policy. Cover items such as hiring, firing, disciplining and employee complaint handling. Include an employment-at-will policy that gives you the right to terminate an employee for any or no reason, as well as an equal employment opportunity statement.
- Have a zero-tolerance policy regarding discrimination, harassment, retaliation and other wrongful employment practices. Some HR experts contend that all managers and employees should be required to sign such a zero-tolerance policy. Post the policy throughout the workplace.
- Develop a formal recruitment, screening and hiring policy. Have all job candidates complete a written job application. Make sure the application does not

require information that reveals the applicant's age, gender, race, religion or other protected class.

- Create detailed job descriptions for each company position. Include all of the required or recommended skills, education and training. Salary ranges can be included but be prepared to justify any compensation offers outside of that range. Consider conducting background checks on all candidates who you judge to be a viable option.
- Conduct regular performance reviews for all employees. Make sure they are applied uniformly.
- Provide an open-door policy and complaint procedure that encourages employees to report inappropriate employment practices. Give employees a resource other than their immediate supervisor to register a complaint.
- Document all complaints that allege unlawful employment practices or violations of employee rights. Demonstrate company efforts to address the allegations and outline steps that have been taken to alleviate any wrongful acts.

Unfortunately, no employee practice policy, regardless of how thorough, can protect a company 100% from a claim by an employee, past employee or job applicant of discrimination, harassment or other wrongful acts. That's where Employment Practice Liability Insurance comes in.

EPL Insurance

As the name implies, Employee Practice Liability Insurance (EPLI) is designed to provide financial protection to business owners who face charges of wrongful acts regarding its employment practices. Like errors and omissions insurance, EPLI policies are mostly written on a claims-made basis. This means claims, to be covered, must be made and reported to the insurer during the policy year. With appropriate tail coverage, the alleged wrongful act could have occurred in a previous year and still be covered, as long as the policy's retro date is prior to the date of the act.

EPLI policy dedicated limits are generally in the \$50,000 to \$1 million range, but larger limits of \$5 million or more may be available. Defense costs (win or lose) as well as awards and settlements are included in the coverage limits. Policies do not generally cover punitive damages, civil/criminal fines, intentional dishonest acts, bodily injury, property damage, or liabilities covered by other policies (such as workers compensation). Cost varies, depending on the size and type of your business, number of employees, claims history, quality of employment practices and policies, and the appetite of the insurance industry to write such coverage.

EPL coverage is available as a standalone policy. However, smaller design firms may find it more economical to purchase such coverage as part of a business owner policy (BOP). Regardless, look for the following coverage language in your EPLI policy:

- A broad definition of insured potentially including owners, executives, managers, directors, employees, seasonal workers and independent contractors hired by the firm
- A broad definition of employment practices wrongful acts
- A broad definition of damages
- Third-party coverage for claims from non-employees
- Dedicated limits separate from your professional liability limits.

In addition to securing adequate coverage, you want to look for loss prevention services from your EPLI insurer that will reduce the chances of being sued in the first place. These might include:

- A sample human resource manual or policy, including employment forms, that you and your attorney may modify to fit your particular situation
- An EPL risk management newsletter or Website resource
- An employee and management EPL training program
- An EPL loss prevention hotline (free or discounted) with access to a qualified attorney who can help you address sticky situations.

Above all, you want your EPLI to come from an insurer with strong claims services who understands the intricacies of EPL claims and strengthens your legal defense if you are sued. This includes experienced claims counsel and technical experts who can help you counteract claims by employees, former employees and job applicants who complain that their legal rights have been violated.

Give Us a Call

Proper employment practices and adequate EPL insurance are key to protecting your company's assets, its reputation, its recruitment efforts and employee morale. Give us a call to address your potential employment practice liabilities and explore options to limit your vulnerabilities.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.