



Information for Insurance Professionals In the Know

Is your Insured Driving a State-of-the-Art EPL policy?

Are you up on the latest and greatest offerings from the leading EPL carriers?

I recently reviewed an EPL policy for one of my agents, and was appalled at how outdated and draconian the coverage was, so knowing that such beasts are still on the street, this is a good time to give you the low-down on the very least your insured should be enjoying in its EPL policy.

1. The Big Four causes of action: Sexual (or other) Harassment; Discrimination; Wrongful Termination, and Retaliation. Retaliation is one of two claim categories that is actually still *growing* with the EEOC. Very important that there is an affirmative coverage grant for it, and that it be generously defined, not just a carveback to work comp or other exclusions.
2. Lots of Torts. The tort causes of action are the "negligent"; "wrongful" handful of causes of loss you'll find defined as Employment Practices Wrongful Acts. The more, the better, or the broader the better. There is only one market right now that does not pre-define those causes of loss, but rather says "any violation.." So, until there are other carriers following suit, we cannot use this as a benchmark, but keep an eye out for as many causes of loss as you can possibly find.
3. Third party coverage. If not included in the form, should at least be offered for a small but reasonable additional premium. The more public interaction your insured has, the more important this is. It should not be used as a substitute for proper professional liability coverage, but it can cover acts of discrimination against potential clients, against vendors, or others. It also covers harassment (think -- the insured's receptionist harassing the UPS person).
4. Softened hammer. Since we're dealing mostly with duty to defend policies, the carrier controls settlement, but generally will not settle without the insured's consent (make sure of that, while you're at it!). In order to "encourage" the insured to agree to settlement, most carrier use a "hammer clause" that says if the insured refuses the settlement offer, the carrier's responsibility to pay loss, or to pay a settlement in excess of the proposed amount stops at the moment of refusal. A softened hammer allows for continued participation by the carrier. I've seen anywhere from 50% to 80%.
5. Most favorable jurisdiction wording. Punitive damages are frequently covered in EPL policies. The State-of-the-Art policy will also include "most favorable jurisdiction" wording. This wording provides that of the jurisdictions that can reasonably be applied to interpretation of the policy regarding the given claim, the carrier will pay punitives based on the rules of the jurisdiction that are most favorable to such payment.
6. No downsizing exclusion. Downsizing exclusions are very rare these days, but some carriers sneak them in. Unless your insured has had a layoff that is driving the exclusion being added to the policy, and there are no attractive alternatives, you do not want a policy with this exclusion.



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7. No penalties for organic growth. I actually saw a policy that required the insured to report organic growth of more than 20% and have it subject to a premium change. The vast majority of policies allow the insured to grow however they do during the policy year with no reporting requirement or potential additional charge. The policies are not auditable, so the carrier is hoping to pick up the additional premium for that increased exposure upon renewal. Anything more intrusive or money-grubbing than that is unacceptable.

8. Subsidiaries automatically covered. All subsidiaries in existence at the time coverage is bound should be covered (and their employees should be included in the head count). Newly created or acquired subsidiaries should be automatically covered for some time period pending notification to the underwriters, depending on how large they are.

9. Wage and hour coverage. The leading policies are including some coverage for wage and hour claims (unpaid overtime, misclassification of exempt v. non-exempt). Wage and hour is *the* most common claim brought against employers, so it's well worth having coverage for this exposure. Most carriers provide only a minimal defense sublimit. Some provide up to 25%, and one provides not only defense, but coverage for settlement as well. Your insured may decide to go with another carrier that has better pricing or deductible, rather than going with a carrier that provides a 100k - 250k defense sublimit. But, let it be their considered business decision, rather than you not being aware.

10. Defense in addition. Most carriers are offering some kind of additional defense for less than what it would cost to increase the regular limit of liability. Some have unlimited defense in addition. Most cap the defense in addition to the same limit as the limit of liability. (for example: 1mm limit purchased, you can get 1mm additional defense.) Some provide this for free on their premier forms. Others charge a reasonable a/p for it.

11. Definition of employees. May include independent contractors, or they may be available by endorsement. If your insured uses them, make sure they're included (and try to avoid wording that defines them as insured only if they work exclusively for the insured. "independent" and "exclusive" frequently do not go together, and if they do, the insured has other problems). Leased employees is also a type of employee that can fall through the cracks. Some carriers include in the definition, others don't.

Use these highlights as a rudimentary checklist to rule out old-fashioned policies. You may not be able to reasonably get all the features you want rolled into one policy, or if you can, the pricing may not be as attractive as other options. But with guidelines at hand, at least you and your insured will know where you stand in comparison to the best the market has to offer.

10/2/08 and 10/9/08 Knowledge Nuggets

****Breaking news**** 5/09

Some carriers are starting to offer coverage for employee identity theft. One carrier includes it as a cause of loss. Others provide by endorsement at a sublimit.