Bloomberg Law Insights

Sexual Harassment

Sexual Harassment Insurance Coverage

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In the wake of the ongoing outpouring of reports of workplace harassment and discrimination, employers are likely to see a significant uptick in claims from the victims of such misconduct. While the hope is that all employers will become better corporate citizens and root out the culture that enabled rampant workplace malfeasance to occur in the first instance, employers can also choose to protect themselves by purchasing insurance coverage against claims of sexual harassment through Employment Practices Liability Insurance ("EPLI").

EPLI coverage will not prevent harassment and is not without its critics. In fact, some commentators believe that EPLI fosters a culture of silence, See Danielle Paquette, *More Companies Are Buying Insurance to Cover Executives Who Sexually Harass Employees*, Washington Post, Nov. 3, 2017 (available at https://www.washingtonpost.com/business/economy/more-companies-are-buying-insurance-against-sexual-harassment-complaints/2017/11/02/a7297f9a-bd69-11e7-959c-fe2b598d8c00_story.html?utm_term=.27ed28bd7fb6). However, others believe EPLI helps victims by making it easier for companies to provide compensation to workers that suffer harassment. *See Am. Mgmt. Ass'n v. Atl. Mut. Ins. Co.*, 641 N.Y.S.2d 802, 808 (Sup. Ct.) (noting, in permitting coverage for discrimination claims, the New York "Insurance Department concludes that the strong public policy against discrimination of any kind is, in fact, furthered by permitting coverage of the kinds described. By bringing to employers' attention practices that can potentially result in unlawful discrimination, insurers' loss prevention programs and underwriting standards should discourage such practices. Any employer who does not diligently attempt to modify employment procedures accordingly may well be denied insurance coverage. When unlawful acts of discrimination occur nonetheless, coverage will help ensure just compensation for victims."), *aff'd*, 651 N.Y.S.2d 301 (App. Div. 1996).

What is clear is that EPLI coverage for sexual harassment is growing, with U.S. companies spending "an estimated $2.2 billion last year on insurance policies covering the legal fallout from sexual harassment, racial discrimination and unfair-dismissal accusations," with a projected growth to "$2.7 billion by 2019, according to MarketStance, a research firm that tracks insurance trends." See Paquette, *More Companies Are Buying Insurance to Cover Executives Who Sexually Harass Employees*. Thus, in addition to enacting policies aimed at eliminating instances of sexual harassment in the workplace, employers would be wise to become familiar with the intricacies of EPLI coverage, particularly as it pertains to sexual harassment.

A. Basic Coverage The most basic description of EPLI is that EPLI policies provide coverage for a wide range of workplace misconduct. In particular, employers facing a wide variety of claims (such as claims for racial discrimination, wrongful termination, and sexual harassment) may be able to secure insurance coverage to cover the costs of defending and, if necessary, paying settlements and judgments involving workplace misconduct.

Although the terms of EPLI policies vary from insurer to insurer, most policies contain substantially similar coverage terms. The basic insuring agreement for an EPLI policy provides coverage for "**Loss** for any **Employment Claim** . . . for a **Wrongful Employment Practice**." Travelers Specimen Form, available at https://www.travelers.com/iw-documents/apps-forms/epl/epl-3001.pdf. "Wrongful Employment Practice" is typically defined to include "Sexual Harassment." *Id.* The covered "Insured" under an EPLI policy is typically the company and also employees, members of the board of directors, officers, partners, or other equivalent titles.

B. Notice Issues EPLI policies are almost always "claims made" policies, which means that an EPLI policy is triggered by the receipt of a "Claim" by the employer. What constitutes a claim can vary from policy to policy, and insured employers must pay close attention to how its EPLI policy defines "Claim," as the failure to provide notice may impact an ability to seek coverage. Almost uniformly, "Claim" will include a "written demand for money" or a "civil proceeding."

The issue of notice of a "Claim" takes on importance when claimants file charges with the Equal Employment Opportunity Commission. Employers must pay particularly close attention to the definition of "Claim" when the employer receives notification that an employee has filed charges with the EEOC, because a court may find that the filing of a charge with the EEOC satisfies the requirement of a "Claim" in the EPLI context. For example, in *LA Weight Loss Centers, Inc. v. Lexington Insurance Co.*, No. 1560, 2006 Phila. Ct. Com. Pl. LEXIS 127, 2006 WL 689109 (Pa. Ct. C.P. 2006), an employee filed a charge with the EEOC prior to the beginning of the policy period, which eventually led to a class action lawsuit filed by the EEOC during

the policy period. The Philadelphia Court of Common Pleas held that the EEOC lawsuit was not a claim first made during the policy period under the EPLI policy at issue, which had defined "claim" as including "an administrative proceeding . . . " *Id.* at *4. A similar result was reached in *Cracker Barrel Old Country Store v. Cincinnati Insurance Co.*, in which the Sixth Circuit found a claim was made prior to the start of the policy period because the insured received notice that charges had been filed with the EEOC prior to the policy period.

In short, whether to notify an insurance company of a "Claim" will depend on the language used in the EPLI policy and the facts presented. However, policyholders should err on the side of caution and give notice of all potential claims.

C. Common Policy Provisions And The Potential Impact On Coverage EPLI policies also contain a litany of provisions and exclusions which may serve to eliminate coverage for an otherwise covered claim. Policyholders should therefore review their EPLI policies and the exclusions included therein closely—when purchasing the EPLI policy, as well as when situations potentially triggering coverage arise. In the context of sexual harassment, there are a few exclusions to which policyholders should pay particular attention.

First, an EPLI policy may contain a "retroactive date," that is, a date that eliminates coverage for wrongful acts that took place prior to a specified date—even if the claim is first made during the policy period. Such a provision may impact coverage if the harassment occurred for many years. For example, in *Manganella v. Evanston Insurance Company*, 702 F.3d 68 (1st Cir. 2012), the First Circuit found there to be an issue of material fact as to whether the underlying sexual harassment charges began prior to the retroactive date on the policy. Specifically, the employer purchased a policy from Evanston that had a retroactive date of April 1999 and required that the wrongful employment practice have happened in its "entirety" during the policy period or after the retroactive date. *Id.* at 69. In March 2007, a former employee who had been the insured employer's HR manager from 1997 to 2006 filed a charge of discrimination with the Massachusetts Commission Against Discrimination, alleging that she had been subjected to physical and verbal sexual harassment throughout her employment. *Id.* The evidence in the underlying case indicated that the perpetrator made offensive comments in 1997, which made the victim feel uncomfortable, but not threatened, at the time. *Id.* at 72-73. Such evidence, according to the First Circuit, created an issue of fact as to the timing of the alleged harassment.

Similarly, employers need to be aware of the "prior knowledge" exclusion generally found in EPLI polices. This exclusion potentially bars coverage for a claim arising out of any fact, circumstance, or situation of which the insured was aware prior to the inception of the EPLI policy. The wording may vary amongst EPLI policies, but the typical language states that the insurance company is not liable for "any Claim for any fact, circumstance, situation, or event that is or reasonably would be regarded as the basis for a claim about which [defined people] had knowledge prior to the applicable [date]."

Several issues are raised by the "prior knowledge" exclusion. First, what is the requisite level of knowledge? An example of how little knowledge may actually be necessary to trigger a prior knowledge exclusion can be found in *First Bancshares, Inc. v. St. Paul Mercury Insurance Co.*, No. 10-3370-CV-S-RED, 2011 BL 238403 (W.D. Mo. Sept. 16, 2011), aff'd sub nom. *Division of Employment Security v. St. Paul Mercury Insurance Co.*, 477 F. App'x 428 (8th Cir. 2012). In *First Bancshares*, the EPLI policy contained a prior knowledge exclusion that excluded coverage for "any claim any claim arising from any such fact, circumstance, or situation to the extent the claim is against an Insured who knew of such fact, circumstance or situation prior to issuance of the proposed policy." *Id.* at *2. Prior to the policy's inception, the insured terminated an employee, who then filed an application for unemployment benefits, which were not awarded to the employee. *Id.* The terminated employee then filed a wrongful discharge lawsuit during the policy period. Id. The insurer denied coverage, asserting that the insured knew of facts, circumstances or situations that could have reasonably given rise to the claim and the district court agreed. *Id.* The district court found that, even though the terminated employee never gave any indication that she intended to file suit, and the insured prevailed in the unemployment proceedings, the fact that the employee claimed she had been subjected to retaliation in the unemployment proceedings was sufficient to suggest that the facts could reasonably give rise to a claim. *Id.*

Relatedly, the "prior knowledge" exclusion will dictate who must possess the knowledge to trigger the exclusion. For example, a Travelers form provides that Travelers "will not be liable for Loss for any Claim for any fact, circumstance, situation, or event that is or reasonably would be regarded as the basis for a claim about which any Executive Officer had knowledge prior to the applicable Continuity Date . . . ." (Travelers Specimen Form, available at https://www.travelers.com/iw-documents/apps-forms/epl/epl-3001.pdf). The Travelers form defines "Executive Officer" as "an officer, member of the board of directors, natural person partner, principal, risk manager, LLC Manager, in-house general counsel, member of the staff of the human resources department of the Insured Organization or a functional equivalent thereof." *Id.* This broad definition potentially could implicate a wide range of people and thus requires real corporate vigilance in order to protect coverage.

Finally, employers should be aware that EPLI policies typically limit recovery of punitive damages. Some EPLI policies provide that a "Loss" does not include punitive damages, while other EPLI policies will provide coverage for punitive damages only if such damages are insurable under the applicable state's law. Many states do not permit the insurability of punitive damages, while other states find that punitive damages are insurable. Compare *Pub. Serv. Mut. Insurance Co. v. Goldfarb*, 425 N.E.2d 810 (N.Y. 1981) (not insurable), with *Whalen v. On-Deck, Inc.*, 514 A.2d 1072 (Del. 1986) (insurable).

Conclusion Today's environment calls on employers to be vigilant in eradicating sexual harassment in the workplace. Employers can and should make progress in this area by utilizing sound human resources practices and educating their employees about proper workplace behavior. In the meantime, employers can take solace

DLR ISSN 0418-2693

in the fact that EPLI coverage is available to potentially protect them and compensate harassed workers. In the unfortunate event that a harassment claim is lodged, employers should consult with experienced coverage counsel to make sure that EPLI benefits are realized.

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