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Employment Practices Liability Insurance



WHAT'S IT ALL ABOUT?

By Stephen Shore

Increasing workplace regulation, coupled with heightened employee awareness of workplace rights and entitlements, has exposed employers to an explosion of employment-related liability from current, past and prospective employees. Whether related to employment contracts, recruiting practices, human rights, employment standards, class action, privacy, wrongful dismissal, pay equity, workplace compensation, occupational health and safety or labour relations – the list continues to grow.

The most effective way to minimize an employer's risk is to have tailored and effective workplace policies and practices, administered by top-notch human resources professionals. However, while good HR practices can go a long way to mitigate exposure, they cannot eliminate them, nor can there be any guarantee a current, former or prospective employee will not launch a claim or make an allegation to which an employer must respond.

To further mitigate against the potential for legal risk, financial cost, brand damage and drain on resources caused by a legal claim, an employer may look to place employment practices liability (EPL) insurance. EPL insurance offers protection against frivolous

claims, as well as errors and omissions in the management and administration of human resources.


EPL INSURANCE – HOW DOES IT WORK?

WHAT TYPES OF CLAIMS ARE COVERED?

Depending on the policy, coverage may include damages for harassment, wrongful termination, breach of contract and vicarious liability claims brought by individuals against an organization. Other employment-related claims such as negligent pension or benefits administration are covered under more comprehensive plans. Regulatory proceedings relating to occupational health and safety charges or union issues (*i.e.*, an application for certification, grievances or unfair labour practices) are not typically covered.

WHAT COSTS ARE COVERED?

It's standard for an EPL policy to cover damage awards as well as the legal costs incurred or owing to another party. That said, it's possible to purchase insurance of legal costs only (not "damages"). A "legal costs only" policy may provide an organization with the



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leverage it needs to manage common employment claims and withstand pressure to settle for “business reasons.” However, with this type of policy, the monetary amount paid out in any settlement or award will still be borne by the organization.

WHO IS COVERED?

An EPL policy typically covers two classes of insureds: an individual and an organization. Where an individual is insured, coverage extends to the unlawful actions of the insured individual. Where an organization is insured, coverage captures a proceeding where an organization is directly implicated in the wrong alleged, as well as a proceeding where an organization's liability arises from the unlawful actions of an employee. This latter circumstance is known as “vicarious liability.”

WHO MAKES KEY DECISIONS?

Not unlike most insurance arrangements, the insurer – as the ultimate payer of a claim – generally retains a duty (and the right) to steer the response to a claim, including deciding which counsel to appoint, what investigations to conduct and whether to litigate or

settle. Some policies allow the insured to select counsel from a pre-approved roster set by the insurer.

WHEN DOES EPL MAKE SENSE?

In determining whether an EPL policy is right for an organization, the two key considerations tend to be frequency and size of claims, and internal resources.

An organization with a high frequency of employment related claims, whether because of industry norms, size or peculiarities tied to the organization's business model, may consider EPL a good investment. On the other hand, a smaller organization may look to EPL as a hedge against the risk of a complex or expensive claim (such as a class action or large wrongful dismissal), which can cause unsustainable damage.

Similarly, an organization with relatively few internal resources – for example, where there's a high ratio of front-line to managerial employees, or limited (if any) on-site senior-level HR support (*i.e.*, retail, hospitality) – the workplace may not be sufficiently equipped to appropriately address workplace issues as they arise. For this type of organization, EPL coverage may be just the right kind of “back-stop” should matters go awry.

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BEST PRACTICES TO REDUCE WORKPLACE RISK

Whether or not an organization places EPL coverage, many employment-related risks can be reduced with strong human resources practices and strategies.

WRITTEN EMPLOYMENT CONTRACTS

The relationship between an employer and employee is a contractual one – even in the absence of written terms. Although parties are free to enter into a written agreement, in the absence of written terms (or if the written terms are unenforceable), our courts impute contractual terms into the relationship through their own legal precedent (referred to as the common-law). For example, a court will imply the contract of employment to be of an indefinite length, and absent “just cause for termination,” an employer will be obligated to provide an employee with “reasonable notice” of termination of employment. “Reasonable notice” will almost always far exceed whatever minimum notice is required under employment standards legislation. A properly drafted employment contract can reduce or even eliminate common law obligations.

Although a termination clause is the principal reason for using an employment contract, it’s not the only reason. A written

employment contract clarifies obligations and entitlements during the course of the employment relationship, as well as after its conclusion. A well-prepared employment contract will set out remuneration, a probationary period, duties of employment, hours of work, vacation, confidentiality obligations, etc. It may also address any post-employment covenant such as one that restricts the solicitation of customers. For these reasons, a savvy employer will use an employment contract to significantly reduce employment-related risks and achieve important business objectives.

An employer that does not already have written contracts in place should not despair – it may not be too late. An enforceable employment contract can be introduced into an existing employment relationship under the rights conditions, and with the assistance of experienced employment counsel.

WORKPLACE VIOLENCE AND HARRASSMENT POLICY

Every organization is required to establish, implement and train employees on workplace violence and harassment to comply with health and safety and human rights law. However, the benefit of such a policy goes beyond avoiding sanction from a government regulator. An organization with a well-written policy will be better

prepared to respond to a claim of workplace abuse, whereas an organization without a policy may struggle to avoid expensive and potentially embarrassing litigation.

EMPLOYEE HANDBOOK

In the interest of consistency across an organization, some employers will have an “employee handbook” to address aspects of the employment relationship, such as core values, workplace rules and practices, hours of work, leaves, social media, use of confidential information and workplace conflict resolution, to name a few. This is especially important if these matters are not addressed in individual written employment contracts. A handbook should create clear expectations with the effect of minimizing misunderstandings or disagreements leading to claims.

FINAL THOUGHTS

While there are distinct advantages to EPL insurance coverage, the decision should be made based on an organization’s size, risk profile, management structure, public image and other unique circumstances impacting its ability to bear the cost, impact and management of employment-related claims.

That said, and whether or not insurance is purchased, there are several pro-active steps an organization can take to reduce its risks of employment-related claims. These are steps every organization can and should take to best position itself for conflict. While EPL insurance can be a good strategy for mitigating the risk of legal claims, it is not a substitute for robust workplace management. ■

Stephen Shore is a lawyer with Sherrard Kuzz LLP.

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