EPLI INSURANCE COVERAGE - AN OVERVIEW

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Employment Practice Liability Insurance ("EPLI") is available in a number of different forms, most particularly in stand alone EPLI policies and by way of endorsements to Directors & Officers coverages. EPLI policies are broad-based forms which are widely available and cover virtually any tort which might arise in the employment context, including wrongful termination, discrimination and sexual harassment.

CLAIMS-MADE FORMAT

Most all of the EPLI products available today are in claims-made formats, which contrast sharply from the occurrence-based coverages generally afforded in commercial general liability policies. Standard CGL policies will cover any occurrence which causes damage during the policy period. So for example, a claim of property damage made today regarding damage to tangible property which occurred 10 years ago will be covered in the CGL policy in effect 10 years ago, even though the claim is made 10 years later!

In order to circumscribe the potential risks, the EPLI claims-made policy will only cover those claims of which the insured knew or should have known and for

which the insured promptly provides notice during the policy period. That is, once the insured is aware of facts and circumstances which might lead to a claim, the insured must give notice to the carrier immediately.

Most policies contain retroactive date limitations which will preclude coverage for claims arising from wrongful acts occurring prior to a stipulated date. Without such a stipulated date and without other limiting language, a policy may provide full prior acts coverage; that is, as long as the claim when made is tendered to the carrier during the policy period, the wrongful acts will be covered even if they occurred well prior to the inception of the policy.

Because these are claims-made forms, it is critical for an insured to present a claim when the insured becomes aware of facts or circumstances which might lead to a claim. Thus, at the end of a given policy period, it is appropriate to consider what potential claims are out there and to “laundry-list” such claims to the expiring policy in order to lock in coverage in the event one of these circumstances eventually evolves into a claim.

Failing to “laundry-list” a claim can result in a declination of coverage if the insured knew or should have known of such facts and circumstances and did not notify the carrier. Generally speaking in a claims-made policy, prompt notice at the time such circumstances become known to the insured is in essence a condition of coverage, a condition precedent. This contrasts sharply with occurrence-based

coverages which are generally subject to the “notice prejudice”

rule, that is, unless a carrier can establish that it was truly prejudiced by late notice, a late notice of a claim will not have a negative impact on coverage.

Some policy forms contain extended reporting period provisions, which allow insureds to report facts and circumstances of claims first made after the policy expiration, as long as the wrongful acts occur on or after the policy’s retroactive date, but before the expiration or cancellation. This also allows some extended reporting. Such provisions are negotiable, and thus, a proactive, knowledgeable broker is a definite advantage. Coverage counseling may also be of great benefit when coordinating these EPLI coverages into an overall program.

LIMITS – SHRINKING?

While there are some EPLI policies available that are in the standard duty to defend format, in which there are limits for indemnity, but unlimited defense available, most EPLI policies are subject to a single policy aggregate limit of liability covering both defense and indemnity. What that means is if there is a claim which is covered under the policy, for which the insured provides timely notice and the carrier agrees to defend, the defense expenditures will erode the limits available to ultimately settle the claim or pay a judgment. Insureds who anticipate a high exposure to claims

might be well-advised to buy either high limits or perhaps as a more economical move, a substantial EPLI policy and an umbrella policy to provide additional coverages.

Most EPLI policies do contain deductible or retention clauses and given the plethora of nuisance-level claims, it is probably appropriate and economical for most insureds to assume a fairly high deductible. Again, coverage counseling may be invaluable.

DEFENSE PROVISIONS

Most EPLI policies contain a fairly standard promise to defend the insured and work in a similar fashion to CGL policies in that the defense will be provided through panel counsel. These panel counsel will be those firms the carrier has determined are qualified and experienced and can defend a wide variety of EPLI claims.

If the EPLI coverage is an endorsement on a D&O policy, however, there is no standard obligation to defend, but rather a promise to indemnify a claim, sometimes coupled with an advancement of defense costs. Under those policies, the insured has the right to select its own counsel, with the carrier retaining a right to consent (such a consent cannot be unreasonably withheld). Since these are sometimes corporately sensitive claims, the panel counsel offered should be carefully

considered. If there is any doubt as to coverage, coverage counsel should be consulted as soon as possible to ensure all rights to independent counsel are exercised and protected.

EXCLUSIONS AND LIMITATIONS

There is a generally standard list of exclusions in most EPLI policies, which will of course include the risks that are generally covered by other policies including CGL policies, so for example, bodily injury claims, personal injury claims and property damage claims will be excluded.

Certain kinds of intentional conduct may be excluded as well, such as assault & battery and criminal conduct.

Failure to provide benefits are a common exclusion in almost all EPLI policies because these kinds of risks are generally assumed in fiduciary liability policies.

Some EPLI policies will attempt to exclude those claims which purport to violate public policy, but more common exclusions are those that are directed to specific federal and state laws, such as claims arising from OSHA violations, violation of pollution laws, RICO, securities violations or violations of the WARN Act.

Fines, penalties and punitive damages are generally excluded. If not excluded specifically or expressly, “willful” violation of law would probably not be

covered as a matter of law, certainly in California pursuant to Insurance Code § 533 and many states have similar statutory provisions.

Some EPLI policies attempt to limit exposure to common kinds of claims, so for example, where there are claims arising from a plant closing or a reduction-in-force above a certain level, such as where an insured within a 30-day period lays off more than 5% of its total number of employees, such claims may be excluded. Claims which arise after a merger and acquisition, where layoffs follow are sometimes excluded as well. These are the times when it is statistically predictable that a claim will arise and thus carriers try to limit their exposure. Since these exclusions are not in all policies, the breadth of available coverage differs substantially.

Because there is such a wide variety in the forms available, insureds should consult coverage counsel to carefully review the exclusion and limitation provisions of proposed EPLI policies to ensure a reasonable match between the risks and costs. Carriers constantly refine their forms to ensure the narrowest exposure and thus, knowledgeable insureds are well-advised to shop coverages and consult with insurance professionals. Coverage counsel and brokers can negotiate a good match between the underwriters risk avoidance and the insureds' hope to shift insurable risks to its insurance carrier.

CONCLUSION

EPLI policies are a practical and important, as well as generally affordable coverage for any business employing a large enough workforce to be concerned with the evermore common claims of discrimination, harassment or wrongful termination. These are very expensive claims to defend and will generally not be covered by CGL policies or other coverages.

Most modern CGL forms specifically exclude any claims arising out of employment practices. Even Directors & Officers policies often now contain an exclusion which requires the insured to separately purchase an employment practices liability endorsement or a stand-alone policy. While some Employer's liability portions of Workers' Compensation policies might afford a defense, certainly there would be no indemnity coverage.

Thus, the only realistic option for shifting the risk of employment-related tort claims to a Company's insurance program, is to purchase EPLI coverage either as an endorsement in another policy, or as a stand-alone policy. The wide variety of available coverages invite comparison analysis and negotiation. The high cost of the booming field of employment litigation can be shared with a company's insurance carrier, but only if appropriate coverages are in place, and the insureds are well informed of their notice obligations.

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