

When Employee Relations Turn Sour

Insurance coverage for employment-related claims can soften the blow

BY MARY SCOTT

A number of sensational cases around the country illustrate the apparent trend toward more employee claims of discrimination, sexual harassment and wrongful termination against employers.

In response, the insurance industry now offers employment practices liability insurance, but many carriers consider law firms to be at high risk for employment-related claims. As a result, the already complex process of selecting EPLI coverage becomes an even more difficult task.

Traditional law practice structure, growing diversity in the profession, and pressures on firms to operate more profitably all contribute to increased employment practices liability.

Moreover, law firms generally have individuals involved in the recruitment process who are not trained in employment law, creating a high risk that someone will ask illegal questions regarding a prospective employee's age, marital status, living arrangements or availability for weekend work.

Work assignments also are sensitive because courts have held that law firms cannot acquiesce to clients' discriminatory preferences. This is a problem with both negative preferences and positive preferences, which may set up claims of reverse discrimination.

When it comes to career advancement, the basis for appropriate decisions is performance evaluations done according to established criteria that have been communicated to candidates.

But often law firm partners do not carefully document their advancement decisions. A claim by an attorney disgruntled at not receiving the partnership nod is notoriously difficult to defend because the decision-making process is so subjective and because each unsuccessful associate will likely have

supporters as well as detractors.

Then, too, law firms may seek to remove less-productive senior partners, which can lead to age discrimination charges. Bona fide part-



According to Mary Scott, lawyers reviewing EPLI policies need to pay special attention to their definitions and exclusions.

ners are not employees for the purpose of statutory federal discrimination protections, but if an older partner is first marginalized (losing a say in management and receiving a share of the firm's compensation partially based on individual performance), employee status may be found.

Meanwhile, in the context of law practice demands that often mean long hours, travel and close mentoring, sexual harassment allegations remain a big concern.

EPLI Spells Relief

Employment Practices Liability Insurance offers some relief from the potential dangers posed by lawsuits that can arise out of the work environment. At least 30 carriers currently sell EPLI. Unlike more standardized coverages, these policies vary widely in construction and scope of coverage. Also, since these policies are very new, none of the litigation has been tested in court.

A lawyer reviewing the language of an EPLI policy on behalf of a firm should pay attention to the insuring agreement, definitions and exclusions.

Much exclusionary language is found in the definitions. In some cases, you will not find certain exclusions because the policy has a restrictive insuring agreement and coverage was never there. An agent or broker may be able to assist with policy comparisons.

While many differences between policies can only be discovered by careful review, one key issue is whether there is an exclusion for intentional acts, and if so, is there severability so that innocent insureds still have coverage? Severability for warranties in the application also may be important.

A law firm considering EPLI coverage should also ask if the policy provides coverage for:

- Punitive damages in jurisdictions where they are insurable;
- A defense for injunctive or declaratory actions;
- Prior acts (those committed prior to the policy's effective date);
- So-called "workplace torts," such as negligent supervision, negligent infliction of emotional distress, defamation and invasion of privacy;
- Claims by third parties, including clients of the firm.

Also, does the policy have exclusions for downsizing, class actions, retaliation or claims arising from a lawyer's failure to make partner?

Law firms should review their own employment policies and procedures as well as partnership track and partnership documents. At the same time, purchasing an EPLI policy may be an effective way to protect against claims that will almost inevitably arise. ■

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