

What is Employment Practices Liability (EPL) Coverage?

EPL is written to:

- Protect the company against damages for events relating to their workforce, including but not limited to; wrongful terminations, harassment, discrimination, defamation and unfair hiring/firing practices; and
- Provide defense costs associated with responding to employment related lawsuits.

Why Private Companies Should Consider Buying EPL Liability Coverage?

- Employers are facing increasing legal obligations while managing their workforces;
- Increased awareness and visibility of employment related lawsuits;
- Settlements can have a significant impact on the company's financial stability;
- Cost to defend against employment suits is high regardless of the outcome;
- An employment lawsuit, if not handled properly, can cause irreparable harm to a company's reputation;
- Lawsuits based on language in employee handbooks and other written policies and procedures are increasingly common;
- Compliance with laws in the workplace is costly, requires expertise, monitoring and training; and
- Commercial General Liability policies are not adequate to respond to EPL Matters.

EPL Filed Complaints and Charge Receipt Statistics (EEOC Data)

- In 2000, claimants filed 79,896 charges with the EEOC; a 16% increase over 1999;
- The number of settlements increased by 42%;
- The amount of monetary benefits increased by 16%; and
- The largest area of resolved complaints is merit resolutions. Merit resolutions are charges with outcomes favorable to the charging party.
- For further information, check out the [EEOC](#) website directly.

EPL Charge Statistics (EEOC Data)

<u>Charge Filed</u>	<u>% of Total</u>
Race	36.2%
Sex	31.5%
Retaliation	27.1%
National Origin	9.8%
Religion	2.4%

What are the Sources of EPL Claims?

- **Race and Sex Discrimination**
- **Employees, former employees and employment applicants:**
 - Wrongful termination
 - Invasion of Privacy
 - Emotional Distress
 - Breach of contract
 - Discharge in Violation of Public Policy
 - Assault and Battery
 - Harassment / Discrimination
 - Defamation
- **Regulatory Violations and Government Investigations:**
 - Equal Employment Opportunity Commission (EEOC)
 - Department of Labor (DOL)
 - Age Discrimination in Employment Act (ADEA)
 - Fair Labor Standards Act (FLSA)
 - Equal Pay Act (EPA)
 - Title VII
 - Americans with Disabilities Act (ADA)
 - Family Medical Leave Act (FMLA)
- **Federal, State, City and County Statutes**
- **Customers, clients and consumer groups**

Sample EPL Claims

EPL claim examples are for illustrative purposes only. They are to aid in the understanding of the products and services offered by E-Risk Services. These examples are not intended to provide legal advice or to be relied upon in any dispute. Every claim is unique and bound by all terms, conditions, declarations, exclusions, and endorsements specific to each Insured's policy.

Retaliation: The plaintiff alleges that she had her employment terminated because she testified on behalf of another worker who brought a separate action against the company. Plaintiff alleges that this is a violation of her employment contract which provides that she can only be terminated for good cause. Plaintiff asserts causes of action for wrongful termination, breach of contract and retaliation.

Total defense and settlement exceeded \$120,000.

False Representations: In a cross-complaint a doctor alleges a breach of his employment agreement. Specifically, he alleges that the company failed to provide him an adequate patient load, office space, the support staff needed to perform his job duties and failed to pay wages. The doctor asserts causes of action for breach of contract, misrepresentation, unfair competition and failure to pay wages.

Total defense costs and settlement exceeded \$350,000.

Intentional Misrepresentation: An employee is given a percentage of the partnership in an effort to convince him to stay with the company. Subsequently, the employee demands for a distribution of the partnership's profits and is told that there are no profits. The employee then asks for a bonus based on his partnership shares and is told since he does not share in the "financial risk" that he is not entitled to a bonus. The employee asserts causes of action for: (1) intentional misrepresentation; and (2) tortious breach of the covenant of good faith and fair dealing.

Total defense costs and settlement exceeded \$750,000.

Whistleblower: Executives of a company receive documentation from an employee that provides details on the company's non-compliance with the Food and Drug Administration (FDA) regulations. The plaintiff alleges that he was improperly terminated because they notified the company executives that FDA regulations were being violated. The plaintiff asserts that the company fabricated allegations regarding their "misconduct" and "deficient performance" and used the false allegations as pretext for termination.

This claim is currently being defended.

Wrongful Termination: An executive of a manufacturing company files suit against the company for wrongful termination and intentional infliction of emotional distress. The plaintiff, a former Chief Operating Officer, makes statements that the company improperly failed to pay an employee overtime and terminated the employee for filing a complaint. The plaintiff alleges that although the company advised him that his termination was due to performance problems, he was actually terminated in retaliation for his honest statements he made in connection with a fellow employee's termination.

Total defense costs and settlement exceeded \$750,000.

Sexual Harassment/Retaliation: A female employee working for a service company alleges that several employees made inappropriate sexual comments towards her, including suggestions that she was having a sexual relationship with another employee. In addition, she also alleges that her boss and co-workers asked her inappropriate questions concerning her personal life. The plaintiff alleges that after she complained, her manager engaged in a practice of retaliation. She contends that she was excluded from certain meetings, taken off certain projects and assignments, treated rudely and received a negative evaluation.

The parties participated in non-binding arbitration and consented to a settlement of \$250,000.

Wrongful Termination in Violation of Public Policy: An employee is fired two hours after he informed his supervisor that he was just involved in a car accident and would not be able to report to work

and perform his job. The employee was informed that he was being fired because of a slow down in business. The claimant filed a charge against the company with the EEOC. The claimant asserts that the explanation of his termination was false and he was terminated because of his national origin and his disability. The complaint was comprised of two causes of action for wrongful termination in violation of public policy and state code; and discrimination.

Although this matter settled out of court, the defense cost and settlement payments exceeded \$25,000.

Discrimination Based on Disability: The plaintiff in this case was terminated while out on leave medical leave due to an injury that occurred at work. The plaintiff asserts that he was the victim of numerous discriminatory and harassing actions and remarks regarding his disability. The plaintiff alleges he was advised that if he filed a workers' compensation claim he would be terminated. The plaintiff was in fact terminated without disability benefits after he filed a workers' compensation claim. The complaint was comprised of three causes of action; including: discrimination based on physical disability; tortious termination; and specific violation of state laws.

The defense and settlement exceeded \$75,000.

Illegal Employment Practices: An employee of a small publishing company filed a charge with the EEOC against her former employer. The claimant alleges that she resigned from her position as office manager because the company engaged in illegal employment practices which made her work environment intolerable. She alleges that the company refused to hire or even consider males for the receptionist position. The claimant also alleges that the owner made degrading comments to a male employee that sat at the receptionist's desk. The claimant alleges she has been discriminated against on the basis of her gender.

Although the parties settled out of court, the total cost of this claim was in excess of \$100,000.

Defamation: The plaintiff alleges that her prior company has taken steps to damage her reputation and improperly interfered with her ability to obtain other employment. In particular the plaintiff alleges that the company spoke with several competitors and disclosed the reasons for her termination. The complaint is comprised of several causes of action including: tortious interference; defamation and wrongful interference with the plaintiffs' livelihood and reputation; and violation of privacy.

The plaintiff agreed to settle out of court for \$125,000 and defense costs exceeded \$25,000.

Hostile Work Environment: A service company receives a formal complaint from an employee alleging that he was subjected to a hostile work environment and sexual orientation discrimination during his employment. The plaintiff alleges his supervisor made hostile comments about gay people. The plaintiff contends that his supervisor reduced his stock options and sales territory and was treated in a hostile manner during sales meetings. The plaintiff reported these incidents to the President, but that person refused to look into the matter and take any action. The plaintiff was constructively discharged immediately after he complained. The plaintiff alleges six causes of action: hostile work environment, discrimination based on sexual orientation, retaliation, intentional infliction of emotional distress, failure to pay commission and wages, defamation and negligent training and supervision.

The defense and settlement of this case exceeded \$300,000.

Wrongful Termination: An employee alleges wrongful termination because she shaved her head. The employee contends that all of her performance evaluations were positive and that she was given a salary increase shortly before she shaved her head. The claimant seeks general damages, punitive damages, attorney's fees and costs.

Total defense costs and settlement exceeded \$250,000.

Wrongful Termination: An electrician files a complaint against his former employer for wrongful termination. The company instructs him to bill for time for employees that were not actually at the job site. The employee objects to these illegal billing practices. The plaintiff asserts cause of action based upon wrongful termination in violation of public policy.

Total defense costs and settlement exceeded \$150,000.

Sexual Harassment: While on a company retreat, an employee claims that he is being stalked and harassed by a company executive. The plaintiff alleges that during the company retreat the executive grabbed his groin and pulled him towards her while in the kitchen area. The claimant alleges that she pinned him against the oven and forcibly kissed him.

The defense and settlement of this case exceeded \$400,000.

Sexual Harassment: An employee files a complaint with her company that she was subjected to sexual harassment by her manager. The employee alleges that her manager telephones her after work to talk about sex, sent her pictures of himself and propositioned her for sex both during and after working hours.

The defense and settlement of this case exceeded \$250,000.

Significant Employment Statutes

Title VII of Civil Rights Act of 1964 (Title VII) This statute is a common source of employment litigation. This Federal statute makes it unlawful for an employer to refuse to hire or terminate any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of race, color, religion, sex, including sexual harassment, national origin, and pregnancy, childbirth, or related medical conditions. These cases are initially processed by the Equal Employment Opportunity Commission (EEOC). A charge alleging violation of Title VII must be filed within 300 days of the alleged act. The right to sue letter is issued after the case is dismissed by the claimant or the EEOC has made a determination. A lawsuit must be filed within 90 days after receipt of the notice of right-to-sue letter from the EEOC.

Equal Pay Act This act deals specifically with unlawful differentials in compensation based on sex. The Equal Pay Act makes it unlawful to pay employees at rates less than the rate applicable to employees of the opposite sex for equal work for jobs requiring equal skill, equal effort, equal responsibility, and where the work is performed in similar working conditions. The statute of limitations is two years for these type of claims and can be up to three years if the act is willful. These allegations may be brought directly to federal court or may be filed through the EEOC.

Americans with Disability Act (ADA) The ADA prohibits discrimination on the basis of disability against a qualified prospective or current employee, defined as an individual with a disability who, with or without reasonable accommodations can perform his or her essential duties of the employment position for which the person desires or holds. Many states also have statutes that place additional requirements upon employers.

Age Discrimination in Employment Act (ADEA) The ADEA applies to employees who are age 40 or over and makes it unlawful for an employer to fail or refuse to hire or terminate any employee or otherwise discriminate against any individual with respect to his or her compensation, terms, conditions, or privileges of employment because of their age. ADEA cases are processed through the EEOC. Many states apply ADEA to all ages prohibiting age discrimination of any kind.

Fair Labor Standards Act (FLSA) The FLSA sets the minimum wage and maximum hour/overtime requirements. The Wage and Hour Division of the Department of Labor manages the administration of the FLSA.

Family Medical Leave Act (FMLA) The FMLA offers certain employees with up to 12 weeks of unpaid, job protected leave a year, and requires health benefits to be maintained during leave as if the employee continued to work instead of taking the leave. This statute is the responsibility of the Department of Labor (DOL).

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EPL Terms and Definitions

- **"At-Will" employment Doctrine:**

Provides that an employee without a contract is free to quit his or her job at anytime, and an employer may also terminate an employee for any reason, at any time, and without notice.

- **Constructive discharge:**

Employee is compelled to resign because of intolerable working conditions or the company creates a hostile work environment to force the employee to leave.

- **Retaliation:**

Employee is terminated from the company because a) the employee has declined to perform an illegal act, b) the employee has filed a complaint with a governmental agency, or c) the employee has testified against the employer.

Loss Prevention Check List

- **Hiring Process**

- Develop an employment application.
- Require all applicants to complete and sign the application form.
- Develop and update job descriptions.
- The interview process must only support questions that are job-related.

- Exercise caution in reference checking.
- Provide a written offer of employment.

• **Personnel Policies / Employee Handbooks**

- Written material should contain a clear disclaimer of any promise of job security.
- Make it clear that the handbook and other written policies are not intended to be an employment contract.
- An employment "at-will" statement should be clearly defined, if the employer maintains an at-will employment relationship.
- Use clear and concise language.
- Specifically allow for flexibility and modification.
- Include a handbook acknowledgment form.
- Periodically review, update and distribute to employees.
- Be alert of any changes in law that may affect any handbook provisions.
- All written materials should be reviewed by an attorney.

• **Employee Evaluations**

- Conduct regularly scheduled performance evaluations.
- Promote meaningful evaluations to help avoid future surprises.
- Focus of the evaluation should be a motivation tool.
- Conduct supervisor training to reinforce familiarity and importance with the evaluation process.
- All evaluations should be reviewed by another manager to prevent bias.
- Implement a uniform rating system that is job-related.
- Give the employee an opportunity to respond to the evaluation.
- Require supervisors to identify specific performance goals as part of the evaluation process.

• **Disciplinary Action**

- Properly drafted documentation is critical.
- Assume that all documentation can end up in the courtroom.
- Tell the whole story and state expectations for future performance.
- Clearly state consequences of future violations or not meeting performance expectations.
- All documentation should be labeled "confidential".
- Adhere to disciplinary standards and apply them uniformly; oral warnings, written warnings, suspension and termination.

• **Termination**

- Adopt a well thought out termination policy with a focus on fairness and consistency.
- Respect employee's dignity throughout the termination process.
- Use common sense – "on the spot" decisions/actions do have good outcomes.
- All termination decisions should be reviewed by a single person in the company.
- Post-termination conduct can lead to defamation, emotional distress or deliberate interference with the employee's pursuit to become gainfully employed.

• **Layoffs**

- Document all aspects of the layoff, including criteria used during each phase of the process.
- Reduction goals should be stated in numbers not in savings
- Decision-making should be made by two or more management personnel.
- Assume that all communication regarding the layoff is discoverable.
- Reductions should apply across the board and should not favor certain types of employees.
- Review all handbook, written policies/procedures, employee benefit information and appropriate laws to ensure smooth handling of all issues relating to the layoffs.