

# ***SPECIAL REPORT SERIES***

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## ***PURCHASING EMPLOYMENT PRACTICES LIABILITY INSURANCE: A PRIMER & COVERAGE CHECKLIST***

Dozens of carriers are involved in this area and coverage can differ widely. Perhaps the key point to recognize is that there is no “standard” EPL policy form. Thus, each policy must be individually analyzed and compared, on a provision-by-provision basis, to other policy forms. This approach will assist a company in selecting the policy providing the broadest available coverage terms based upon with the quoted premium.

### **The CEO’s Role in Employment Practice Liability Coverage:**

The CEO should understand the basic terminology and ramifications of various sorts of coverage. He/she should read through this Success Check to become familiar with the concepts, then ask the project leader to go through it carefully and come back with recommendations for a Request for Proposal.

### **The Project Leader’s Role:**

The project leader is either the company’s risk manager or human resource executive. His or her role is to:

1. Identify existing policies (if any) that address employment practices liability.
2. Identify and assess any coverage gaps in the policies.
3. Initiate a request for proposal to at least 3 different agents/carriers. To either obtain coverage or fill in the gaps.
4. Identify and assess the cost/benefit of the various policies offered.
5. Seek professional advice if necessary from a coverage or underwriting expert.
6. Obtain coverage.

### **What amount of policy limits should we consider?**

The average verdict is in the \$200,000 to \$300,000 range. The most common policies sold offer 1 to 10 million in coverage. There is no “rule of thumb” (based upon annual sales, number of employees, industry) as to what constitutes a “correct” limit of employment practices liability (EPL) coverage for a given company. Moreover, there are no statistics available that provide the specific EPL policy limits purchased by various firms. That kind of confidential information is clearly not something companies are willing to circulate to the world-at-large. Accordingly, it may be beneficial to discuss this issue with colleagues at other, similar organizations. Another viable approach is to obtain premium quotations for a number of *different* limits and then

purchase the highest limit that the company can “reasonably” afford.

**Consider potential defense costs, since they reduce policy limits if expended in defending a claim.**

There is yet another important fact to consider when attempting to select appropriate EPL policy limits. In addition to settlements and judgments associated with employment claims, defense costs (i.e., legal fees, adjusting expenses, court costs) that must be paid to settle and defend these claims, are also covered by EPL policies. However, payment of defense costs reduces the available limits under an EPL policy. In many claim situations, defense costs can far exceed the actual settlement figure or judgment against an insured. For example, a company might decide to contest a claim rather than settle it. Litigation continues for many years until a jury eventually rules in favor of the company. Despite the absence of a court-directed judgment or out-of-court settlement, the company in this example expended hundreds of thousands of dollars in defense costs. Therefore, in addition to potential judgments and settlements, consideration should be given to likely defense costs, when attempting to select an appropriate limit of coverage under an EPL policy form. From personal experience, defense costs associated with settling a claim pre-trial are in the \$10,000 to \$75,000 range. Defense costs associated with a case that goes through the trial process start at \$50,00 and can eventually exceed \$200,000 if the claim is tried to a verdict.

Policy Limit:

- Per Claim \_\_\_\_\_  
(This the maximum amount that a policy will pay on a single claim)
- Annual Aggregate \_\_\_\_\_  
(This is the maximum amount that a policy will pay in a single policy year)

**What policy deductible amount is appropriate?**

The purpose of any type of insurance is to cover large, unpredictable claims rather than small claims that a company that it can “comfortably” absorb from its working capital. The fact that a larger deductible results in a lower premium provides additional incentive to select the highest deductible an organization can reasonably afford. Most deductibles are in the \$2,000 - \$5,000 range, although even a small business that is well-capitalized could conceivably select a \$25,000 or even \$50,000 deductible.

Policy Deductible:

- Deductible Amount \_\_\_\_\_  
(This is the deductible that is applied to each claim.)
- Annual Aggregate Deductible \_\_\_\_\_

(This is the maximum deductible that applies in a single policy year; if a company received a number of claims in a single year, an annual aggregate deductible would place a “cap” on the deductible amount that could be applied.)

### **What Type Of Policy Do We Need?**

A “stand-alone” EPL policy (one written to cover *only* employment-related claims) provides the broadest possible protection. In contrast, EPL coverage is also available as an endorsement to other types of policies (most often under Directors & Officers Liability Insurance). The drawback of obtaining coverage via endorsement is that the scope of coverage is not as comprehensive as provided under stand-alone forms. However, the disadvantage of “stand-alone” forms is that they are a more costly means of obtaining EPL protection. Virtually every business organization faces an exposure to employment related-claims. Thus, at very least, EPL coverage should be obtained by means of an endorsement. (Unfortunately, for firms that do not buy D&O coverage, this option is not usually available.) The question of whether the additional cost of a “stand-alone” policy is justified is an issue that should be discussed with a company’s insurance agent or broker.

#### Policy Type:

- Stand-Alone EPL Policy (a policy covering *only* employment practices liability claims) or,
- EPL Coverage via Endorsement to:
  - D&O (Directors & Officers) Liability Policy

### **What Are The “Covered Acts” Under A Policy?**

All EPL policies cover four major types of claims: (1) wrongful termination, (2) sexual harassment, (3) discrimination, and (4) retaliation. (It is estimated that 80 to 90% of all claims contain one or more of these 4 allegations.) In addition, EPL policies cover what are known as “workplace torts.” It is with respect to the scope of coverage for “workplace torts” that the policies differ considerably. The broadest policies cover the largest number of the following “workplace torts.”

#### Workplace Torts (check those which are (or should be) covered)

- Breach of Oral/Written Employment Contract
- Employment-Related Misrepresentation
- Wrongful Failure to Employ
- Wrongful Failure to Promote
- Wrongful Discipline
- Wrongful Deprivation of a Career Opportunity
- Failure to Grant Tenure/Partner

- Negligent Evaluation
  - Negligent Supervision
  - Invasion of Privacy
  - Coercion
  - Libel, Slander
  - Employment-Related Defamation
  - Employment-Related Emotional Distress
  - Constructive Discharge
  - False Arrest
  - Retaliatory Actions (including/excluding lockouts)
  - Whistleblower Claims
  - Wrongful Hiring
  - Mental Anguish, Humiliation, Emotional Distress
  - \* Negligent retention
  - \* Assault and battery
  - \* Fraud, Misrepresentation
  - \* Claims from electronic exposures/social media
  - \* Discrimination based on current employment status
  - Other Workplace Torts Not Indicated Above
- (List) \_\_\_\_\_

### **Which People In Our Company Should Be Covered?**

It is important for an EPL policy to provide the broadest possible definition of covered “employees.” This is especially true given the current trend toward alternative employment arrangements, in which businesses are making increased use of the so-called “contingent workforce” (e.g., leased, temporary, part-time, seasonal workers). Many, but not all EPL policies cover all of the types of employees noted below.

#### Covered Employees (check those that apply):

- Definition of Covered “Employees”
  - Leased
  - Seasonal
  - Part-Time
  - Temporary
  - Managerial/Supervisory Employees
  - \* Interns
  - Former Employees (i.e., persons no longer working for the company, but for whose acts the company remains responsible, even after these employees have left the company, provided the acts were committed while these individuals were still employed by the company)

Depending upon the individual EPL policy, some or all of the following categories of persons may or may not be covered.

Definition of Other Covered Persons (check those that apply):

- Directors and Officers
- Partners
- Shareholders
- Volunteers
- Independent Contractors
- Others (List) \_\_\_\_\_

**Which Organizations Should Be Covered Under The Policy?**

In addition to covering the liability of various *individuals*, nearly all EPL policies cover the liability of the corporate entity. For example, if a lawsuit were to name “John Smith and ABC Corporation,” a policy covering *both* the corporate entity *and* the various types of individuals noted above would be required to fully respond to the claim. A policy not providing such coverage should be rejected.

Most, but not all EPL policies provide “automatic” coverage for newly-acquired and newly-formed entities. Automatic coverage is immediately applicable, even before the insurance company’s underwriter receives information about the new entity. The period of time during which such coverage applies varies from 30 to 90 days. (The longer the period during which automatic coverage applies the better.) After this period, the insurer requires submission of information about the new company as well as additional premium, if coverage is to continue.

Covered Organizations (check those that apply):

- Coverage for Corporate Entity
- Automatic Coverage Provided for:
  - Newly Acquired Entities
  - Newly Created Entities
  - Length of Automatic Coverage Provided \_\_\_\_\_

**Which Type of Defense Provisions Should We Have?**

EPL policies are written with two types of defense provisions. A *duty to defend* provision places the responsibility for managing the defense of claims with the insurance company. In contrast, a *non-duty to defend* provision places this responsibility upon the insured. Under the latter form, the insurer’s only duty is to pay defense costs and claim settlements/judgments. A duty to defend form is advantageous for an insured because most firms are inexperienced in managing the complex litigation associated with employment-related claims. However, the drawback of duty to defend policies is that they place most of the control over claims resolution within the insurer’s discretion. This is not always favorable, especially when precedent-setting, employment-related claim issues are involved. For example, if a company decides to settle a

discrimination claim---rather than taking it to trial---other employees may perceive that the company is an “easy mark” and a flood of subsequent claims may follow. In contrast, a non-duty to defend policy gives the insured---rather than an insurer---control over the claim management process. However, this is not necessarily beneficial, especially if an insured is relatively experienced in managing the complexities of employment-related litigation. Ultimately, the decision as to which of these two defense provisions to select within an EPL policy is a company-specific choice; one that should be determined in conjunction with an insured’s in-house counsel and the firm’s insurance agent/broker.

Defense Provision (check which applies):

- Duty to Defend Defense Provision?
- Non-Duty to Defend Defense Provision?

**Should We Purchase a Policy Allowing Us to Select Our Own Claim Counsel?**

Under some EPL policies, the insured has the right to select defense counsel, subject to the insurer’s approval. Under others, the insurer has this right to choose defense counsel, subject to the insured’s approval. Although the former provisions are preferable to the latter, any EPL policy that allows the insured some degree of input in selecting counsel is generally favorable for the insured. The non-duty to defend policy costs the insured somewhat more because all of the defense costs are provided for both covered and non-covered claims. In contrast, under a duty-to-defend policy, the carrier only has to reimburse the insured for the defense of covered claims. For example, most carriers do not cover wage and hour claims. If a salesman is fired and claims both wrongful termination and non-payment of commissions (i.e., a wage and hour claim) a non-duty to defend policy would not cover the cost of defending the wage and hour component, whereas under a duty to defend policy, it would make such payment. Bottom line: you pay a premium for having control over the defense of a claim.

Although insurers are entitled to select defense counsel under duty-to-defend policies, some insurers will allow insureds to make this selection. This is especially true if the request is made prior to a claim. However, the ideal time to negotiate for the insured’s right to select claims counsel is prior to the inception of a new policy.

Counsel Selection Provision

- Counsel Selection Provision Included?
  - Insured Chooses Counsel
  - Insured Approves Counsel
  - None Included

**Do We Need ‘Third Party Liability Coverage?’**

Third-party liability coverage applies to claims made by non-employees (e.g., customers, vendors, clients) against the insured company, that arise from acts committed by employees. Most often, such claims allege some form of discrimination or harassment. Among the most newsworthy third-party claims have been those made by minority groups against Denny’s, the national restaurant chain Denny’s.

Only a few EPL policies cover third party claims. This is because when they were originally designed, EPL forms were intended to cover only claims made by employees---not those by third-parties. However, given the expansion of this exposure in recent years, most insurers will add third party coverage by endorsement. Depending upon the extent of its exposure to such claims, third party coverage may or may not require additional premium, although 10% additional premium is about average. Firms in customer-intensive businesses (e.g., restaurants, air lines, auto rental agencies, hotels), especially those with a national presence, are particularly susceptible to third party claims. Accordingly, such companies should strongly consider purchasing a third party coverage endorsement to an EPL policy, even if additional premium is required. In addition, it is important to check the actual scope of coverage provided by a third party coverage endorsement. The breadth of coverage varies significantly from insurer-to-insurer. Some third-party endorsements exclude coverage for class-action (i.e., multiple plaintiff) lawsuits. Such coverage should be rejected because class-action lawsuits by customers have, in recent years, proven to be the most costly type of third-party claim.

Third Party Liability Coverage Aspects:

- Third Party Coverage Available Within Policy
- Third Party Coverage Available by Endorsement
- Coverage Provided for: (check those which apply):
  - Harassment
  - Sexual Harassment
  - Discrimination
  - Other Acts (list) \_\_\_\_\_
- Class-Action Lawsuits Excluded?:
  - Yes?
  - No?

**Should Coverage for Punitive Damages Be Included In The Policy?**

Most, although not all EPL policies exclude coverage for punitive damages. However, since a high percentage of jury awards involving employment cases include an award of punitive damages, and the amount of these awards often exceed \$1 million, such coverage is highly recommended and attempts should be made to obtain it.

Punitive Damages Coverage (check items that apply):

- Punitive Damages Excluded
- Punitive Damages Covered
- Punitive Damages Coverage Available by Endorsement (for additional premium)
- Punitive Damages Coverage Provided Subject to a Sub-Limit (usually 25% of the policy's annual aggregate limit)

**Do We Need Coverage for 'Front Pay?'**

Another issue involving the scope of covered damages under an EPL policy is whether or not a policy covers or excludes "front pay." This term refers to damages claimed by a former employee and represents future wages and benefits that would have been paid had the former employee not been terminated. Given the frequency with which jury awards include monies for "front pay," coupled with the potential magnitude of such awards (a wrongfully terminated 50-year-old ex-employee could conceivably receive 15 to 20 years of front pay!), coverage for this element of damages is highly desirable.

Coverage of Front Pay (check which applies):

- Front Pay Excluded
- Front Pay Not Excluded

**What About Coverage of Wage & Hour Claims?**

Claims alleging wage & hour violations under the Fair Labor Standards Act (FLSA) have become the single most costly type of employment practices liability claim in the past decade. Wage & hour actions generally fall within one of two types: (1) claims alleging failure to pay overtime wages to "non-exempt" employees (i.e., those workers who are not exempt—and therefore entitled to—overtime pay) and (2) claims alleging failure to pay workers for rest and meal breaks. Although the damages alleged by any single employee-plaintiff are typically less than \$10,000, what makes such lawsuits so costly is the fact that they are usually filed in the form of a class action; a fact that has produced numerous, extreme judgments and settlements—A number of which have exceeded \$25 million!

There is currently no commercial insurer offering coverage for damages associated with wage & hour claims. In fact, virtually every EPL policy explicitly excludes coverage for wage & hour claims. However, a handful of companies provide *defense coverage* to wage & hour actions, with sub-limits of either \$100,000 or \$250,000 per policy. Interestingly, these insurers do not require additional premium for such coverage. Therefore, insureds should request wage & hour defense when negotiating renewals or in soliciting proposals for coverage.

Coverage of Wage & Hour Defense

- Provided?
- Limits? (\$100,000, \$250,000, other)

Regardless of whether an insured obtains coverage for defending wage & hour claims, consideration should be given to conducting a wage & hour claim audit, if a business feels it may have an exposure in this area. Such audits are normally offered by employment law firms that have expertise in interpreting the complexities of employment statutes. Outside reviews of this type can be a highly cost-effective tool in avoiding the huge expenses associated with wage & hour lawsuits.

## **Exclusions**

All EPL policies contain so-called “standard” exclusions for what are considered uninsurable exposures. For instance, all forms exclude coverage for: intentional or criminal acts, claims resulting from labor disputes, and bodily injury (which is covered under Commercial General Liability, CGL, policies). In addition, there are a few “nonstandard” exclusions, which appear in some, but not all EPL policies. Since the broadest policies do not contain these “nonstandard” exclusions, insurers should be asked to remove any of the following exclusions, if they appear in an EPL policy.

### Exclusions (check any exclusions in the policy):

- Back Pay (i.e., coverage for pay accruing from the time an employee is terminated up to the time in which a claim is settled or a judgment is rendered)
- Class Action Lawsuits
- Downsizing and Lay Offs
- Front Pay
- Claims arising from Mergers and Acquisitions
- Personal Injury (e.g., libel, slander, false arrest; perils covered by CGL forms)
- Claims Arising from Retaliatory Acts of the Employer (e.g., claims that arise when an employee discloses an employer’s illegal activities---also called “whistleblower” claims---and the employee is punished or sanctioned in retaliation)

## **Covered Territory**

A few EPL policies require that for coverage to apply, *both* the act giving rise to a claim *and* the lawsuit be filed in the United States. Other forms require that only the lawsuit be filed in the United States; the wrongful act can occur anywhere in the world. The broadest policies contain no territorial restrictions; that is, coverage applies regardless of where the act giving rise to a claim occurs and where the lawsuit is brought. Considering the increasingly globalized nature of business, it is advantageous if an EPL policy is written on the latter basis; that is, without territorial restrictions. This is especially true considering the speed with which the Internet has been removing barriers to international commerce. A policy without territorial restrictions is essential for firms doing business abroad. Such a policy would cover claims, even if the act giving rise to the claim (e.g., sexual harassment) took place outside the United States *and* the lawsuit is filed overseas, as well.

Coverage Territory (check which applies):

- Act must occur and lawsuit be brought in U.S.
- Lawsuit must be brought in U.S; act can occur anywhere in the world
- Act and lawsuit can occur anywhere in the world

**Which Type of Settlement Provision Is Desirable For Our Policy?**

Most EPL forms contain what is known as a “hammer clause.” Such provisions come into play when an insurer suggests that an insured settle a claim for a specific amount. However, if the insured does not give its consent and the claim is eventually settled for a higher figure or if a court judgment is received for a larger amount, the insurer is obligated to pay no more than the amount it originally recommended. (Nor is the insurer responsible for additional defense costs incurred from the point of the insured’s refusal to settle.) Clearly, the “hammer clause” places insureds in a difficult position. However, an even less favorable type of settlement provision allows an insurer to unilaterally settle all claims, without even requesting the insured’s consent. Policies containing such provisions should always be avoided, especially given the precedent-setting nature of employment cases.

Settlement Provision (check which applies):

- Unilateral Insurer Discretion
- Standard “Hammer Clause”

**Are Mandatory Arbitration Provisions Necessary?**

When insureds become engaged in a dispute with their insurers (e.g., concerning the application of coverage, as respects premiums due), so-called “mandatory arbitration” provisions require these disputes to be submitted to binding arbitration. Unfortunately, binding arbitration precludes the traditional court system in which a jury would hear the case. Since arbitrators are more favorably disposed toward insurers than juries, mandatory arbitration clauses favor insurers. Accordingly, EPL forms containing mandatory arbitration clauses should be avoided if possible.

Mandatory Arbitration Provision (check which applies)

- Mandatory arbitration clause included?
- Mandatory arbitration clause not included?

**Do We Need an ‘Other Insurance’ Provision?**

An “other insurance” provision in an EPL policy is needed if EPL coverage is also available under another insurance policy. The purpose of “other insurance” clauses is to determine the order of priority for payment of claims in multiple policy situations. Generally, it is best if EPL

claims are paid under the EPL policy first, when other insurance is also available. This may happen if an insured has a stand-alone EPL policy and has also purchased EPL coverage by means of an endorsement to a D&O liability policy. By attaching an endorsement making the EPL policy primary (and the D&O policy excess) the D&O policy's limits are "protected."

Other Insurance Provision (check which applies):

Provision/Endorsement to Indicate EPL Policy is Primary

- Yes
- No

**What Kind Of Notice Of Cancellation Or Non-Renewal Provision Is Found In The Policy?**

In virtually all states, the law requires that an insured be given 30 days prior notice before an insurer is permitted to cancel an EPL policy. However, some insurers' EPL forms require the insurer to provide 60 (and in a few instances 90) days notification prior to canceling a policy.

Although no state requires that an insured be given advance notice prior to an insurer's decision to *non-renew* a policy, a few EPL insurers' forms require the insurer to provide such advance notification. This, of course, is favorable for an insured.

Notice of Cancellation (check one)

- 30 Days
- 60 Days
- 90 Days

Notice of Non-Renewal (check one)

- 30 Days
- 60 Days
- 90 Days
- None

**How Does A 'Claims Made' Provision Affect Our Policy?**

EPL policies are written on what are known as a "claims-made" basis, which requires that two conditions be met, for coverage to apply. First, the claim must be "made" against the insured during the policy term, for coverage to apply. In addition, coverage applies only if the act giving rise to a claim takes place on or after the policy's "retroactive date." The purpose of a retroactive date is twofold; first, to eliminate coverage for claims that took place far in the past and second, to preclude coverage for claims about which the insured was already aware (a fact which could provide the motivation for buying EPL insurance). If an insured is replacing an existing EPL policy, it is important that the existing policy's retroactive date NOT be later in time than the one found in the expiring policy. "Retroactive date advancement" could produce a gap in coverage. On the other hand, if an insured is a first-time purchaser of EPL policy, it is advantageous if the retroactive date within the new policy is as far back in time as possible. The earlier the retroactive date on such a policy, the greater the number of potential "prior acts" the policy will cover. Ideally, an EPL policy will contain no retroactive date, although this is unusual. (NOTE: retroactive date and prior acts coverage issues are complex matters. Insurance agents/brokers should be consulted concerning these coverage aspects of an EPL policy.)

Replacement Policy:

- Is retroactive date the same (or earlier) than contained in the policy being replaced?
  - Yes?
  - No?

First-Time EPL Policy:

- Retroactive Date? \_\_\_\_\_

**How Do We Prevent Gaps In Coverage When We Cancel A Policy or Change Insurers?**

If an insured cancels or non-renews an EPL policy, unless a replacement policy is purchased that contains a retroactive date that is the same as (or earlier than) the policy being cancelled or non-renewed, there will be a gap in coverage. To prevent such a gap, an insured can purchase an “extended reporting period endorsement” (ERP). An ERP covers claims that took place during the expired or cancelled policy. The ERP does not, however, cover claims that took place during the ERP itself; it only covers claims reported during the ERP. (Again, it should be emphasized, that ERP-related issues are complex and should be discussed with an experienced insurance agent/broker.)

Some insurers forms allow the insured to buy an ERP only if the *insurer* decides to cancel/non-renew the policy (this is known as a one-way tail). Others, allow the insured to buy an ERP even if the *insured* decides to cancel/non-renew, which is known as a two-way tail. Of course, a two way ERP provision is preferable.

ERP Provision (check which applies):

- One-way ERP
- Two-way ERP

Depending upon the individual policy, insurers normally allow the insured either 30 or 60 days in which to make the decision to buy the ERP (following cancellation/non-renewal). After that period, the insured is barred from buying an ERP. Clearly, a 60 day purchase window is preferable.

ERP Purchase “Window” (check which applies):

- 30 days
- 60 days

Again, depending upon the insurer, the length of the ERP can vary from 1 year to 3 years. The longer the ERP, the more favorable.

ERP Length (check which applies):

- 1 year
- 2 years
- 3 years

Finally, the premium cost of an ERP can vary considerably. The cost for a 1 year ERP typically ranges from 50 to 125% of the expiring policy premium. However, under some EPL forms, the policy does not provide a specific premium amount for the ERP. This, of course, is unfavorable for the insured because it puts the insured at the insurer's mercy at the time the insured must purchase the ERP.

ERP Price:

- 50% of expiring premium
- 75% of expiring premium
- 100% of expiring premium
- 125% of expiring premium
- Other \_\_\_\_\_
  - Not stated

**What Sort of 'Value-Added Provisions' Can We Hope To Receive In Exchange For Buying Coverage From A Given Insurer?**

Depending on the insurance underwriter or agency, EPL policies often come with "value-added" services attached. Their purpose is to reduce the threat of employment-related claims being made against your firm. This only makes sense: insurance companies make more money if you don't get sued.

Just as the various insurers' forms vary considerably with respect to the scope of coverage, there is a correspondingly wide range of possible "value-added" services available. These services include: a free compliance audit conducted by an attorney or human resource professional; the supplying of personnel forms, software for creating employee handbooks, and other policies and procedures; the supplying of training materials in print or online format; and continuing education workshops aimed at presenting approaches that reduce and control claims. Some insurers also provide access to "hotline services" manned by employment law attorneys or human resource specialists. Hotlines can be an especially valuable service because they can assist in managing on-the-spot compliance issues, problems, and disputes, which can often prevent a claim from happening. Depending upon the individual insurer, these "value-added" services are provided at no-cost or significantly reduced cost to their EPL policyholders.

Value-Added Services (check all that apply):

- Personnel Law Compliance Audit
- Personnel Forms, Policies, and Procedures
- In-Print or Online Training Materials
- Attendance at Compliance Training Workshops
- Access to "Hotline Services"

### **Where Do We Find An Insurance Company?**

Attached is a list of insurance companies offering coverage.

### **Next Steps**

As you can see, purchasing insurance coverage to protect and defend against employment practices claims can be a complicated task. By using this checklist in conjunction with your in-house attorney and/or insurance agent/broker, you can help make a wise coverage decision. Use the attached Request for Proposal template to solicit coverage. Should you have any questions about your employment practices liability exposure or the purchase of insurance please do not hesitate to give us a call.

*Portions of this report were prepared in cooperation with Don Phin's EPLiC co-editor Bob Bregman CPCU, ARM from the International Risk Management Institute ([www.irmi.com](http://www.irmi.com)). The checklist may be reproduced with our permission so long as it is done with credit given to the authors.*

Date:

Re: Request for Proposal for Employment Practices Liability Coverage

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Dear [Name],

Please consider this memo a request for proposal for employment practices liability coverage. [Attached please find a copy of our current general liability policy, directors and officers policy, etc. which already provides some measure of EPL coverage.] We are a \_\_\_\_\_ (type of business) employing \_\_\_\_\_ (full time workers as well as (temporary, leased, part time, independent contractors, etc.) The named insured should read as follows: \_\_\_\_\_

\_\_\_\_\_. We would like coverage to be effective no later than \_\_\_\_\_ . Any policy quoted should contain the following the specifications:

1. **Limits:** Policy limit of \_\_\_\_\_ per claim with an annual aggregate of \_\_\_\_\_.
2. **Deductible:** Policy's deductible of \_\_\_\_\_ with an annual aggregate deductible of \_\_\_\_\_.
3. **Policy Type:** We are interested in a [stand-alone EPL policy or EPL coverage via endorsement to a D&O, a CGL policy, E&O policy or umbrella policy].
4. **Scope of Coverage:** We would like the covered acts under this policy to include, but not be limited to the broadest possible coverage for wrongful termination, sexual harassment and discrimination, as well as the broadest possible coverage for "workplace torts", including but not limited to breach of employment contract (oral or written), constructive discharge, employment-related misrepresentation, wrongful failure to employ or promote, wrongful discipline, wrongful deprivation of a career opportunity, failure to grant tenure, negligent evaluation, invasion of privacy, employment-related defamation, and employment-related emotional distress. We would like to acquire a policy which has coverage in the event of a [class action lawsuit, downsizing or layoff, merger or acquisition, and claims arising from the retaliatory acts of the employer.]
5. **Persons Covered:** We would like this policy to cover a wide-definition of "employees" including contingent workers (i.e. leased, temporary, part-time, seasonal, etc.). We would also like any definition of "covered persons" to include [directors and officers, partners, share holders, volunteers, independent contractors, others.]
6. **Selection of Counsel:** We would like the policy to be a [duty to defend/non-duty to defend policy and we would like the right to select defense counsel, subject to the insurers approval.

7. **Consent to Settle:** Please include a “consent to settlement” provision specifying that claims may be settled by the insurer only with the consent of the insured.
8. **Third Party Coverage:** Any policy quoted should have third party liability coverage [including coverage for class action type lawsuits].
9. **Wage & Hour Claim Defense Coverage:** the policy should provide defense coverage for claims alleging wage & hour violations. Minimum limit: \$100,000. \$250,000 is preferable.
10. **Damages Covered:** We are interested in obtaining a policy that covers [punitive damages, front pay, back pay, etc.]
11. **Territory:** We request that any policy quoted contain territory coverage for any claims brought within or outside of the United States.
12. **Sixty-Day Reporting “Window”:** If the policy is written on a claims-made and reported basis, please include a provision allowing the insured to report claims made during the policy period for up to 60 days following expiration of the policy.
13. **Discovery Provision:** Please include a discovery provision (or awareness/notices of potential claim provision) so that incidents reported to the insurer during the policy period, which eventually give rise to a claim, will be considered claims made against the insured and reported to the insurer during the policy period.
14. **Extended Reporting Period (ERP) Options:** Please provide 1-, 2-, and 3-year ERP options (including premium amounts) that the insured may elect to purchase in the event of cancellation or non-renewal by either the insurer or the insured.
15. **Supplemental Extended Reporting Period:** We request the policy include, at no additional premium charge, a supplemental ERP that permits the insured to report claims for up to 60 days, if the insurer cancels or non-renews the policy.
16. **Sixty Days’ Notice of Cancellation:** Please endorse the policy to provide 60-days’ notice of cancellation, material policy change, or intent not to renew.
17. **Value Added Services:** Lastly, we are interested in value-added services including audits, policies and procedures, training, and hotline services available with any policy quoted.

18. **Requested Services:**

**Copy of Form:** Please attach a copy of the proposed form and all proposed endorsements to your proposal.

**Insurer's Best Rating:** Please include the insurers' Best Rating in your proposal.

**References:** Please include in your proposal the names and phone numbers of three insured's who have filed claims with the insurer that we may contact.

Please provide the above information no later than \_\_\_\_\_. I look forward to receiving your response to this request for proposal.

Very truly yours,  
[Signature]  
[Name], [Title]

# EMPLOYMENT PRACTICES LIABILITY INSURANCE WORKSHEET

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## Policy Type:

- o Stand-Alone EPL Policy
- Coverage via Endorsement to:
  - o - D&O Policy

## Covered Acts (Check Exact Policy Definitions of Covered Perils):

- o Wrongful Termination
- o Sexual Harassment
- o Discrimination
- o Workplace Torts
- o Breach of Oral/Written Employment Contract
- o Employment-Related Misrepresentation
- o Wrongful Failure To Employ
- o Wrongful Failure To Promote
- o Wrongful Discipline
- o Wrongful Deprivation of a Career Opportunity
- o Failure To Grant Tenure
- o Negligent Evaluation
  - Negligent retention
- o Negligent Supervision
- o Invasion of Privacy
- o Coercion
- o Libel, Slander
- o Employment-Related Defamation
- o Employment-Related Emotional Distress
- o Constructive Discharge
- o False Arrest
  - Failure to provide training
- o Retaliatory Actions (including/excluding lockouts)
- o Whistleblower Claims
- o Wrongful Hiring
- o Mental Anguish, Humiliation, Emotional Distress
- o Other Torts (List)

**Covered Persons:**

- Employees
  - o -Leased
  - o -Seasonal
  - o -Part-Time
  - o -Temporary
  - o Managerial/Supervisory Employees
  - o Former Employees
  - o Directors and Officers
  - o Partners
  - o Shareholders
  - o Volunteers
  - o Independent Contractors
    - Interns
  - o Others (List)

**Covered Organizations:**

- o Corporate Entity
- Automatic Coverage or Notification Required for:
  - o Newly Acquired Entities
  - o Newly Created Entities
- o Length of Coverage Provided

**Defense Provisions:**

- o Duty to Defend?
- o Non-Duty to Defend?
- o Counsel Selection Endorsement Included?
  - o Insured/Insurer Chooses Counsel
  - o Insured/Insurer Approves Counsel
- o Claim Reporting Requirements?
  - Wage and Hour Claims?
    - Limits (\$100,000, \$250,000, other)

**Third Party Liability:**

- o Coverage Within Policy
- o Coverage Available by Endorsement
- Coverage for:
  - o Harassment
  - o Sexual Harassment
  - o Discrimination
  - o Other Acts (list)

**Limits, Retentions/Deductibles:**

- Policy Type:
  - o Working Layer
  - o Catastrophe Layer
- Policy Limit:
  - o Per Claim
  - o Annual Aggregate
- Defense Cost Coverage:
  - o Within Policy Limits
  - o In Addition to Policy Limits
- Deductible:
  - o Batch Clause Included?
  - o Deductible Applies/Does Not Apply to Defense Costs?
  - o Annual Aggregate Applicable?

**Definition of “Claim”:**

- o “Demand”
- o “Written Demand”
- o Notification of EEOC Proceedings
- o Notification of Other Administrative Proceeding
- o Arbitration Proceeding
- o “Incident” Reported to Insurer

**Definition of “Damages”:**

- Punitive Damages
  - o Exemplary Damages
  - o Multiplied Damages
- Fines/Penalties

- o Civil
- o Criminal
- o Front Pay
- o Back Pay
- o Liquidated Damages
- Punitive Damages
- o Excluded
- o Policy Silent
- o Sub-Limit Available?

**Exclusions:**

- o ADA Accommodation Expenses
- o Assault & Battery
- o Back Pay
- o Bodily Injury
- o Breach of Employment Contract
- o Class Action Lawsuits
- o Downsizing and Lay Offs
- o Front Pay
- o Intentional Acts
- o Mergers and Acquisitions
- o Personal Injury
- o Retaliatory Acts of Employer
  - Wage and Hour Claims

**Additional Considerations:**

- Covered Territory
  - o Suit in U.S.
  - o Act and Suit in U.S.
  - o Worldwide
- Settlement Provision
  - o Unilateral Insurer Discretion
  - o “Hammer Clause”
  - o Other
- o Mandatory Arbitration Provision Included?
- o Allocation Provision

Included?

- Other Insurance Provision Included?
  - o Provision to Indicate
  - o Coverage Under D&O
  - o Endorsement is Excess
  
- Extended Notice of Cancellation and Non-renewal Period
  - o 30 Days
  - o 60 Days
  - o 90 Days

**Claims-Made Provisions:**

Trigger Type

- o Pure Claims-Made
- o Claims-Made and Reported
- o Length of Post-Policy Reporting Window (if any)

o Prior Acts Coverage Available?

o Retroactive Date (If Any)

- Discovery/Awareness Provision
  - o Included
  - o Not Included
  - o Applicable during Extended Reporting Period (if purchased)?

- Extended Reporting Period (ERP)
  - o One-Way Tail
  - o Two-Way Tail

- ERP Charge
  - o Specified
  - o Not specified

- Time Required To Purchase ERP
  - o 10 Days
  - o 30 Days
  - o 60 Days
- ERP Length
  - o Stated
    - o 1 Year
    - o 3 Years

- o Other (Specify)
- Supplemental/Basic ERP
- o Conditions
- o Duration (Specify)
- o Limit Reinstatement?

## **Pros & Cons Of Combining EPL With Other Coverage Types**

### **EPL with D&O**

#### **Pros:**

- ease of program administration
- consistent defense provisions
- cost-effective

#### **Cons:**

- potential D&O limit exhaustion by non-D&O claims
- lack of coverage breadth

### **EPL combined with Multiple Policies**

#### **Pros:**

- premium savings
- unified claims management

#### **Cons:**

- typical complications resulting from overlapping policies

### **EPL on a Stand-Alone Basis**

#### **Pros:**

- broad scope of coverage
- insulates limits of insured's other policies
- availability of risk management and loss prevention services

#### **Cons:**

- additional policy adds complexity to administrative process
- higher cost compared to other alternatives

This checklist was prepared in cooperation with the International Risk Management Institute ([www.irmi.com](http://www.irmi.com)), publisher of the quarterly Employment Practices Liability Consultant.