

# ***SPECIAL REPORT SERIES***

---

## ***EMPLOYMENT PRACTICES LIABILITY: Understanding the Exposure and Preventing Claims***

*“It is almost impossible to reach the golden shores of compliance.”*

– Walter Olson, *The Excuse Factory*

Claims stemming from sexual harassment, discrimination, the ADA (Americans with Disabilities Act), the FMLA (Family and Medical Leave Act), wrongful termination and the like continue to be filed in record numbers. Employment lawsuits are not only an inefficient means of conflict resolution but they also cause the loss of productivity while eroding trust and morale in the workplace. According to author Walter Olson, these laws have created a great “Excuse Factory.” Given the circumstances, significant challenges lie ahead for companies in addressing these exposures and preventing claims.

This report examines the reasons why employee lawsuits are filed, discusses the traps companies fall into that cause employment claims, and explores workplace trends that will affect future risk-control decisions. The report concludes by providing a universal approach that can be used to build powerful workplace relationships—which will not only reduce employment claims but also generate bottom-line results for insurance companies and insureds alike.

### ***THE CURRENT STATE OF EMPLOYMENT LAWSUITS IN THE UNITED STATES***

- There are currently more than 25 federal and state laws and hundreds of regulations that apply to almost every relationship in the workplace.
- According to the Society for Human Resource Management, three out of five companies are sued by former employees every year.
- According to a survey by the California Chamber of Commerce, 80% of all companies that were sued felt they were the victims of unfair or frivolous lawsuits.
- According to the same survey, half of those companies sued spent in excess of \$50,000, and one-third spent more than \$100,000 defending against these claims—and that does not include the cost of settlement or verdict.
- According to *USA Today*, more than 450 employment lawsuits are filed in the United States every day.
- The fastest-growing categories of workplace discrimination claims are those of retaliation, sexual harassment and disability law violations.
- The number of employment discrimination cases filed has doubled over the past ten years.
- The average annual caseload for EEOC (Equal Employment Opportunity Commission) investigators has tripled since 1992.
- The EEOC currently has an 18-month backlog for resolution of discrimination cases.

***EMPLOYMENT PRACTICES LIABILITY:  
UNDERSTANDING THE EXPOSURE AND PREVENTING CLAIMS***

---

- The average case takes two years to go to trial and may end up on appeal for longer than that.
- Of all cases tried, roughly two-thirds result in verdicts for the plaintiff (employee)—a rate for tort lawsuits exceeded only by automobile cases.
- The average plaintiff’s verdict in employment law cases exceeds \$250,000 with 15% of all verdicts exceeding \$1 million.
- Approximately one-third of all wrongful termination verdicts contain a punitive damage award equal to or exceeding the compensatory award.
- The largest number of employee lawsuits is filed in Texas, California, Florida and Illinois.
- The most common targets for federal discrimination claims are private employers with between 15 and 100 employees (41.5%); second are private companies with an excess of 500 employees (23.9%); and third are private companies with between 100 and 500 employees (18%).

While there is a great deal of publicity surrounding employee verdicts, very little is said about those employees who lose at trial—and the devastation they suffer as a result.

***15 TYPICAL EMPLOYMENT LAW HEADLINES***

1. “Former Employee Fired For Helping Company Competitors Is Awarded \$1.2 Million In Age Discrimination Case”
2. “Questions To Judicial Appointees About Physical Or Mental Illness, Disabilities, Addictions Or Current State Of Health Violate ADA”
3. “Fired Architect Complains About State Purchasing Guidelines And Collects \$13.8 Million Verdict”
4. “Supervisors Held Personally Liable For Not Preventing Sex Harassment By Their Subordinates”
5. “Legal Secretary Employed For Three Months Gets \$6.9 Million Sex Harassment Verdict”
6. “Employers Can Be Sued For Positive And Negative References”
7. “Jury Awards \$1.65 Million In Sex Harassment Case Between Heterosexual Males”
8. “Federal Court Says ‘It’s A Bad System’ For Employer And Employee”
9. “Bias In The Workplace: More Claims, More Backlog”

***EMPLOYMENT PRACTICES LIABILITY:  
UNDERSTANDING THE EXPOSURE AND PREVENTING CLAIMS***

---

10. “ADA Covers Hostile, Tardy, Sleepy And Distracted Workers”
11. “Employee Awarded \$500,000 For Being Forced To Relocate”
12. “Restaurant Chain To The EEOC: Get A Grip! No Hooters Guys!—Hooters Plans To Fight EEOC Mandate To Hire Male Waiters”
13. “Depressed Employee Who Calls Boss A ‘Bitch’ And Threatens To Kill Her Is Protected From Termination By The ADA”
14. “Age-Bias Cases Gush From Fountain Of Youth Culture”
15. “Don’t Make Texaco’s \$175 Million Mistake!”

***WHY DO EMPLOYEES FILE LAWSUITS?***

There is surprisingly little statistical analysis of employee lawsuits. We know the number of lawsuits filed, the categories in which they are filed, against whom they are filed and where they are filed. We know the verdict and arbitration results of many of these cases but nothing about mediation attempts or settlement amounts.

Most significant, there remains very little analysis as to the root cause of employment lawsuits. Why do employees sue their bosses? Why does New Mexico have the highest rate of lawsuits filed per employee? Why was California ranked in a USA Today study close to the bottom in suits filed (43<sup>rd</sup> out of 50) despite the image that it is an unfriendly, litigious business environment? Are sexual harassment lawsuits more prevalent in one industry or locality and, if so, why? Do older, more mature industries have more age discrimination claims than do start-up companies? Does a union tradition in a locality affect the number of non-union claims filed? To what extent do plaintiffs’ expectations of recovery change with their age? What is the average cost of a defense verdict? What approach has been the most effective way to settle employee claims: Mediation? Arbitration? Trial? What percentage of employees attempted to use grievance systems before filing a lawsuit? What was the human relationship failure that led to the filing of the lawsuit? How did legal or other advice affect the lawsuit outcome? So many variables.

As long as verdicts continue to approach the stratosphere, there will be plaintiff and defense counsel willing to bathe in the blood of employment litigation. For many a lawyer, employees, companies and clients come and go. It seems as if it is the fight the lawyers are after! Today’s risk managers and insurance professionals must find new ways to resolve problems in spite of the financial incentives for lawyers—who keep more than half of every dollar distributed in the legal system.

It is a fact that only a small percentage of claimants in employment cases end up with benefits of any lasting value. Like lottery winners and personal injury claimants, most employment claimants usually go through the money they obtain in three to five years. Most plaintiffs find it impossible to advance in their personal or professional lives while participating

***EMPLOYMENT PRACTICES LIABILITY:  
UNDERSTANDING THE EXPOSURE AND PREVENTING CLAIMS***

---

in a lawsuit, and roughly a third of them end up losers at trial. At the same time, companies shy away from hiring new employees and firing poor performers for fear of getting sued. It is a system that is in many ways out of control.

***SEVENTEEN WORKPLACE TRENDS THAT WILL AFFECT EPL RISK MANAGEMENT:***

The evolving structure of the workplace will greatly affect EPL (employment practices liability) risk management. When designing risk management strategies, these 17 workplace trends and others should be kept in mind.

**1. Globalization**

Globalization has expanded the territory of the workplace to foreign countries. U.S. companies can expect to see American employment laws apply to their foreign operations. What is the exposure to American companies whose employees are working in France where sexual harassment laws are struck down because flirtation is considered a national pastime? How will they manage in countries with male-dominated cultures, such as those in the Middle East, which also do not recognize sexual discrimination? Will U.S. employment laws apply to foreign operations? Currently, some EPLI policies only cover U.S. states and territories; others cover the whole world.

We can expect to see more discrimination-based claims with the influence of foreign cultures. We have already seen how Japanese management culture has had its problems with American employment laws. With the blending of cultures, there will be continued exposure to discrimination suits. Perhaps New Mexico has the highest percentage of claims because of an influx of Easterners and Latinos. If that's the case, what can be done about it?

**2. The Aging Baby Boomers**

The number of Americans subject to the ADA will increase, as the population grows older. At the same time, management experts such as Tom Peters say we need to focus on hiring youth to keep our companies innovative and energetic. Expect to see more ADA, age discrimination and pension-related claims in the coming years. Companies will be challenged to keep their older workers focused on adding value rather than looking towards retirement. Getting some older workers to adapt to and embrace new technologies will be particularly challenging.

**3. Reengineering of the Workplace**

Reengineering emphasizes reduced levels of supervision and a team approach to project management. Reengineering changes traditional workplace communication and power structures. One result is that it becomes harder to press grievances up through the ranks—because there aren't any. This factor will force corporations to identify a handful of well-trained individuals responsible for receiving and managing workplace grievances. It will also create an increase in co-worker harassment and discrimination claims as opposed to the traditional supervisor/subordinate-type claims. Lastly, the fact that we are doing away with the concept of promotion up the corporate ladder will place new twists on denial of opportunity claims.

**4. The Shift of HR Departments to Administrative/Value-Added Departments**

Traditionally, HR (human resource) departments have been relegated to a staff function. They give little input into risk management. With the renewed emphasis on human relations in the workplace, HR departments will be looked to for adding value. They will have larger discretionary budgets and greater bottom-line responsibilities. Corporate profitability demands will affect everything from hiring to training to termination.

This also means there will be a great deal of consulting room available for risk managers, consultants and attorneys for advice on integrating sound management principles, compliance strategies and risk management analysis.

**5. Telecommuting and Home Workers**

Technology is expanding the definition of the workplace. California leads the nation in telecommuters, a trend that will continue across the country through the next millennium, raising novel legal issues that won't be decided for years. What obligation does a company have to provide a safe home workplace or to prevent incidences of sexual harassment that may take place at a worker's home? How will employers control a home worker's wage and hour obligations? Which state laws will apply to telecommuters working out of state?

Risk managers will be called upon to design audits and other tools to assess and reduce the incidence of claims emanating from nontraditional workplace environments.

**6. Growth of the Contingent Workforce**

Temporary, leased and other contingent workers are growing at rates of up to 30% per year. People now work side-by-side in functional teams with different employers, benefit plans, employee handbooks, grievance mechanisms and other personnel policies and practices. The definition of who is a "covered employee" varies with the legislative intent of the different acts. A worker may be an employee for Workers' Compensation purposes, IRS purposes and unemployment coverage purposes but not for respondent superior liability, discrimination claims or wage and hour obligations. The right to control

a worker's activities remains the number one factor in defining whether or not a worker will be considered an employee.

Risk managers will be assigned the task of developing indemnity guidelines and obligations between contingent workers and clients' companies. Until then, many will shy away from insuring these workers (see our [Special Report: Contingent Workers: New Rules and Strategies for Profit and Protection](#)).

## **7. The Impact of Technology on Privacy and Other Issues**

New technology opens new venues for sexual harassment, discrimination and other liability exposures. Programs and policies limiting Internet access and e-mail use will supplement similar policies related to phone and mail use. The issue of job accommodation takes on a new twist with new technologies. Is it a reasonable accommodation to give a secretary with carpal tunnel syndrome voice recognition software?

We now have monitoring devices for every form of communication. Whether it's an e-mail monitor, video camera, metal detector, employee locator or pre-hire drug and medical test, there will be greater potential for intrusion into privacy rights than ever before. Genetic testing is just down the block. Expectations of privacy, consent to intrusion and business necessity will be the major issues litigated in this area. Companies should have legitimate business reasons for any intrusion into privacy and should seriously consider notifying their employees of any monitoring.

## **8. The Rate of Change**

We are spinning through business cycles faster than ever. In the last five years, we have produced more patents than in all the time before that. The workplace is in chaos and we'd better get used to it. People's careers will be changing with much greater frequency. We can expect to average three different careers and ten different employers in our lifetimes. This means there will be less focus on job security and loyalty and greater emphasis on skills building and value-added services. Because of greater employee turnover, there will be more opportunity for negligent hiring, wrongful termination and discrimination-type suits, but less opportunity for implied contract claims based on longevity of employment. Damage claims will also be diminished accordingly.

Chaos implies loss of control. Risk managers will be challenged to improve compliance monitoring in a time when the law is less responsive than ever before.

## **9. Mergers and Acquisitions**

The continued trend toward mergers and acquisitions will lead to employment claims. New corporate relationships will prompt glass ceiling, age discrimination, breach of contract and race discrimination claims due to the clashing of corporate cultures. According to management expert Peter Drucker, three out of five corporate mergers are

doomed due to human relations failures. Companies that do not address the soft side of mergers will be particularly high-risk areas.

**10. Heightened Sensitivity Due to Media Coverage**

The media loves victims, lawyers and lawsuits. Trials are watched as if they were sporting events. Pain is celebrated and glorified. The media focuses on the worst we have to offer—and it's not a pretty sight!

As a result of the Clarence Thomas/Anita Hill testimony, heightened sensitivity to sexual harassment claims led to thousands of filings. The same thing happened again as a result of the claims against President Clinton. Also expect to see even more nationwide class action employment claims such as those litigated against Home Depot and Sears. This will result in incredible settlements and verdicts—just look at Texaco's \$175 million dollar race discrimination settlement!

**11. Greater Separations of Wealth**

The compensation differential between the highest-paid executives and rank-and-file employees continues to widen. Managers and owners can get away with this in good times, but in bad times they will be portrayed as robber barons, prompting employees to strike back. Risk managers are well advised to look for significant compensation differentials as a potential source of resentment, turnover, union activity and lawsuits.

**12. The Economic Downturn Ahead**

Much of today's chaotic yet blissful economic picture is due to the baby boomer generation entering their peak earning and spending years. According to "boomeromics," this will only last for a few more years. After that, many forecast an economic downturn. If spending on the lottery goes up during bad times, you can bet the filing of employment lawsuits does too. Companies will have to think in terms of sustainability—i.e., doing more with less—to counter this trend. In this environment, the values of job flexibility, employee ownership and attitude at work will gain in importance.

**13. Continued Job Flexibility**

To survive in today's competitive environment, companies must be flexible and open to change. In part, this means breaking free from traditional notions of job duties. Management experts Tom Peters and Peter Drucker suggest that companies should abandon job descriptions all together. Yet lawyer after lawyer advise companies to make sure they have well-defined job descriptions prepared, especially for ADA compliance purposes. The ADA is a perfect example of the law placing inefficient controls on the way business is done.

One way to manage this dilemma is to have employees involved in defining their job functions and expectations. They must share the responsibility for their job descriptions,

performance appraisals, promotions and terminations. They can't be left to point the finger at an "unfair" manager.

#### **14. Sustainability**

Many corporations, including such giants as Hewlett Packard, Johnson & Johnson and Monsanto have redesigned their business systems with the concept of sustainability in mind. Their vision and mission statements are tied into the reality that we can't simply continue to produce more and more "stuff"—at the current toll to our environment and our lives. These companies use intelligence instead of physical resources to reach their desired goals. For example, Monsanto discontinued manufacturing one of its pesticides because its scientists created a genetically engineered potato that was resistant to infestation. This is a perfect example of a corporation thinking in terms of sustainability.

What will trying to do more with less mean? How much longer can we continue to offer bigger salaries, pension and benefit plans? Tomorrow's companies will have to help employees enjoy what they already have, more than they enjoy it now. In this environment, the quality of work will become a bigger issue than ever. Employees will have rising expectations as to what they perceive as fairness in the workplace. The sustainability question becomes "How can we increase fairness and opportunity in the workplace—while using fewer resources in the process?"

#### **15. Strained Race Relations**

Race relations issues will be a never-ending problem. If there remains a battle in the media or in our neighborhoods, there's also one in the workplace. Unfortunately, we still don't seem to understand. Expect race discrimination claims to continue being filed by the thousands. Diversity training is an absolute must in today's workplace, but we must be alert for divisiveness as an unintended byproduct. Employment decisions must be based on objective standards wherever possible to avoid claims of favoritism and discrimination.

#### **16. Working Parents**

More women will bear children while in their thirties, forties and even fifties, resulting in more pregnancy discrimination and FMLA claims. The reasonable accommodation of both mothers and fathers in the workplace will be an ongoing challenge for human resource professionals. In large part, the accommodations required by the FMLA and ADA can be met by establishing a strong relationship with a temporary or leased employment agency.

#### **17. Continued Influx of New Attorneys**

According to the American Bar Association, 33,000 new lawyers enter the legal community every year. Most of them have been told that employment litigation is a lucrative field in which to practice. These new graduates will come out of school more

than \$50,000 in debt and looking for courtroom battles to fund their careers. Don't be surprised to see a continued increase in the filing of marginal and frivolous lawsuits. The legal community will be challenged to educate these young lawyers in professional ethics and giving sound advice.

**NINE COMMON MANAGEMENT FAILURES THAT LEAD TO EMPLOYMENT PRACTICES CLAIMS:**

There are at least nine common traps that lead to employment claims. Whether we're talking about sexual harassment, discrimination, disability or other claims, the way in which companies manage employees and claims of unfair conduct will usually determine whether a lawsuit will be filed.

**1. Hiring the Wrong Person**

Legal compliance and organizational trust begin with the hiring process. It can be argued that half of all employee lawsuits are a direct result of hiring the wrong person. Even companies with elaborate personnel policies and procedures hire the wrong people. They do so for the same reasons that any of us enter into failed personal relationships—we are either desperate, lazy or infatuated. To avoid hiring in haste, companies must plan ahead; use temporary agencies and cross-train employees. To avoid laziness, they must challenge themselves to make hiring a priority. To avoid infatuation, they must engage in dialogue with candidates, drop personal baggage and interview those candidates thoroughly.

The fact is, most interviewers fall in love with a candidate within the first 10 minutes of an interview—and then seek to rationalize their hiring decision for the next 50 minutes. We do this when buying a car and we do it at work. It will be important for risk managers to demand that insured's adhere to sound hiring practices that include skills testing, background checks, extensive interviews, drug testing and co-worker input.

Another big risk area is that of fraud or misrepresentation in the hiring process—i.e., promising more than you can deliver. It will be particularly important to audit growth companies in this area.

**2. Failing to Have Protective Legal Documents**

Despite the publicity garnered by large discrimination verdicts, many companies still fail to establish at-will employment, sexual harassment policies, the right to arbitration, grievance policies, etc. Start-up companies are especially vulnerable in this area. Many of them look at the human resource function as something they will address "when they get the chance." These companies are so focused on product and service development that they often forget the human resources equation altogether. When they do draft legal documents they often are "borrowed" from other companies, or based on out-of-date or poor quality do-it-yourself materials. To help prevent claims of fraud, misrepresentation,

implied contacts and trade secret theft, all exempt employees should have employment agreements that specifically define promises and expectations.

One of the most important legal documents is the employment application. It should be thorough, in compliance with EEOC concerns and complete with a wide range of legal protections, including at-will disclaimers, reference and testing releases, EEO policies, etc.

### **3. Failing to Train Managers, Supervisors and Employees in Human Relations**

Employee lawsuits are not about 25 laws and hundreds of regulations—they are about human relationship failures. Few of us have ever been provided the tools we need to build powerful relationships. We come to work with a wide range of differing beliefs, values, priorities, personal baggage and prejudice.

This means the entire workforce needs to be trained in trust-building and communication skills. Failure to do so will leave the workforce ill equipped to deal with harassment, discrimination and other types of conduct that could lead to expensive, emotional and time-consuming employee complaints and lawsuits. It will also leave it unable to compete in today's rapidly changing knowledge-based economy.

### **4. Misusing Performance Evaluations and Other Personnel Procedures**

As if out of a Dilbert cartoon strip, most managers fail to give timely performance evaluations and, when they do, they seem to circle the number three on a one-to-five scale over and over again. These managers don't want to deliver bad news and lower morale, nor do they want to deliver good news and heighten expectations for a promotion or raise.

The performance appraisal system used by most companies today is a vestige of domination-and-control management. It simply doesn't work in a time of reengineered companies that emphasize teams, empowerment and innovation. Out-of-date performance appraisal systems lead to misdirection, mistrust and de-motivation, and little if any is learned in the process. It is generally not until a manager wants to get rid of someone that the archaic performance appraisal receives real attention, and then it is often used as a tool for justifying and documenting the intended employee termination.

Keeping a well-documented file and using out-of-date procedures to defend against lawsuits is nothing short of insanity. Inconsistency in this area—and there remains a lot of it—is fuel for plaintiff's lawyers.

### **5. Failing to Ask If There Is a Problem**

All too many companies first find out about a claim of harassment or discrimination months after an employee quit or was fired. "They never knew" there was a problem. Time and time again attorneys ask employees, "Why didn't you say something? Why

didn't you use the company grievance procedure?" and the answer is the same: "I was afraid to."

The fear of speaking up renders even the best-designed personnel processes ineffective. We have developed a "culture of silence" in the workplace where "victims" and witnesses fail to speak up in the face of illegal or unethical behavior. All too many employees look to the legal system as their savior, or they simply look the other way. To combat the culture of silence, companies should distribute compliance surveys that ask in a few questions, "Do we have a problem here?" Don't wait for problems to come to you; go to the source of potential problems. Break past the culture of silence. Like a stitch in time or an ounce of prevention, taking a front-end approach to risk management will provide a profitable return on any day.

## **6. Ignoring Smoke Signals**

In case after case, the "signs were there." There was the thief who always seemed to work late, the supervisor who always went to lunch with his secretary, and the new employee who complained of discrimination on the first day of employment. Many times companies will ignore workplace smoke signals with the hope they will somehow go away of their own accord. The fact is, if we don't acknowledge problems at the moment they surface, they can fester, become cancerous and spin out of control.

The best time to deal with any problem is on the front end of that problem. It is better to risk the embarrassment of asking premature questions or the cost of a wasted investigation than suffer the fate of after-the-fact litigation.

## **7. Stepping on Employee Privacy**

Company after company makes the mistake of monitoring or accessing information that is private in nature and of little value to the company. This only leads to a lack of trust, resentment and claims for breach of privacy and defamation. In this regard, personnel practices, such as those relating to hiring, testing, record maintenance, e-mail, references, medical issues and post-termination practices, need to be audited to assure they don't step on privacy concerns. Monitoring or other intrusion into areas of privacy should be avoided unless there is legitimate business justification and the company has obtained employee consent or acknowledgment for the intrusion.

## **8. Failing to Get Help**

Legal compliance is tricky business—even for seasoned employment lawyers. Many managers and business owners make snap decisions or fall into legal traps—even when trying to do the right thing. This is particularly true when it comes to discrimination, disability and family leave claims. Plenty of assistance can be gathered from government agencies, publishers, nonprofit organizations, consultants or attorneys who will help you avoid these claims. Successful risk management entails making these resources both required and readily available.

## **9. Thinking the Problem Is With the System**

Many of today's personnel systems are in desperate need of reengineering. We have focused on manufacturing, distribution and customer service. Now it's time for the human equation. Whether the issue is turnover, absenteeism, a layoff or termination, chances are that the company's human resource system is at fault—as much as the particular employee or manager subject to that system. Failing to correct for system variations and instead focusing on the immediate personalities will inevitably lead to repeat exposures. Risk management and legal compliance must be viewed as a process—not an event.

### ***BUILDING POWERFUL WORKPLACE RELATIONSHIPS FOR PROFIT AND PROTECTION***

Despite the proliferation of employee-rights books, few employees are armed with an understanding of their rights in the workplace. Generally when they see an attorney, it is because they believe they have been treated unfairly at work. Prior to the passage of the Civil Rights Act in 1964, “fairness” was a distinction adopted by both the collective bargaining and civil service systems. After passage of the act, the concept of unfairness took on new definition. Conduct became “unfair” because it was either discriminatory, harassing or in violation of one of 25 or more laws and regulations.

Even if we were to eliminate all the laws, the roots of the problem remain. When someone feels unfairly treated, there is a human relations failure first and a legal problem second. Half of all of today's marriages fail for the same reason that workplace relationships fail: there is a breakdown in either trust, direction, communication or commitment. Addressing these factors in a systemic and front-end manner is by far the most effective way of avoiding today's employee lawsuits.

### ***TRUST***

Trust is the highest human virtue. On every American coin and bill is the phrase “In God We Trust.” Make no mistake—trust is “on the money.” It is very hard to maintain trust in the workplace when the media glorifies pain and mistrust, when seven out of ten people who use drugs have jobs, when there is a widening income gap and when layoffs are rampant.

If you want trusting organizations, you need trustworthy people. That means hiring trust. It means hiring character, competency and credibility. It means not hiring out of laziness, desperation or infatuation.

To millions of workers, not trusting management is known as the “Dilbert factor.” It is the biggest reason why management programs fail and compliance policies are rendered useless. You can't place at-will disclaimers in the President's welcome letter; this only destroys trust.

***EMPLOYMENT PRACTICES LIABILITY:  
UNDERSTANDING THE EXPOSURE AND PREVENTING CLAIMS***

---

In analyzing the risk potential of any organization, the most important question is not whether it has an EEO policy or grievance mechanism but what is the level of trust within the organization? Remember, people who trust each other don't sue each other!

***DIRECTION***

As the Sioux proverb goes, "If you don't know where you're going, any road will get you there." Many workplace relationships fail because management and employees are headed in separate directions. For example, new company management may want to take risks, break down traditional structures and hire young, innovative employees. Many older workers, whose priorities are stability and security, may find themselves unable to adapt to the company's new direction—causing conflict and uncertainty at best, and discrimination suits at worst. Likewise, many companies focused on reengineering or best practices find themselves facing resistance from employees who prefer the status quo. This resistance will lead to business failure and possible lawsuits if not properly managed.

Risk managers should identify the degree to which a company has shared its vision, mission and goals with its employees. Focused employees, fueled by a shared direction, seldom file lawsuits.

***COMMUNICATION***

We all know of personal and business relationships that failed due to a lack of communication. Today's workplace communication tools include organizational charts, job applications, performance appraisals, disciplinary reports, exit interviews and the like. Unfortunately, too many of today's communication tools are out of touch with business reality. Most of them were created at a time when domination and control was the preferred management style. With today's move toward flattened organizations, letting go of control and a team approach, many of yesterday's communication tools make little sense. Using out-of-date methods can cause frustration and communication breakdowns.

We also tend to confuse technology and information with communication. It is very difficult to engage in the most powerful form of communication—dialogue—when we are so oriented to technology. If we want to create powerful relationships at work or at home, we need to slow down and listen attentively. This is true in every type of communication, including the interview process, surveying employees, performance appraisal, and claims investigation.

Fear is the biggest blockage to communication. Break down the culture of silence that fear creates and wrongdoing will be exposed before anyone feels the need to see a lawyer.

### ***COMMITMENT***

The final factor in building powerful workplace relationships is commitment. It is the glue of relationships. Zig Ziglar's definition of commitment is "doing the things you said you were going to do, long after the mood you said them in has passed." Today's insureds and their lawyers have to be committed to legal compliance, not to burying facts and denying obvious wrongdoing. A large number of employee lawsuits could have been avoided had the company acknowledged the wrongdoing of one of its employees and made good on its commitment to eradicate wrongful conduct. There is nothing more damaging in trial than a company that tries to bury wrongful conduct. Sooner or later the truth comes to light with dire consequences for those who chose to ignore it. How committed are you? Who and what are you committed to? How committed is your entire workplace to breaking down the barriers of ignorance, silence and fear?

### ***CONCLUSION***

To contain today's employment law claims, risk managers should audit and survey companies for their levels of trust, direction, communication and commitment. Plenty of businesses with these factors firmly in place never suffer the fate of an employee lawsuit—even though they may lack up-to-date legal compliance policies and procedures. Just as a prenuptial agreement can't prevent a divorce between two people whose relationship has soured, a grievance and investigation procedure can't prevent the pain and cost of an employee lawsuit in an environment that lacks trust, direction, communication and commitment.

Today's business owners and risk managers have the opportunity and challenge to help build powerful workplace relationships. They need to take into account the Seventeen Workplace Trends and Nine Common Management Failures. By doing so, they will drive the education and training needed for workplace compliance and a profitable bottom line.

Attached is a worksheet to help you analyze the scope of EPLI coverages—an essential part of lawsuit protection.

# EMPLOYMENT PRACTICES LIABILITY INSURANCE WORKSHEET

---

## Policy Type:

- o Stand-Alone EPL Policy
- Coverage via Endorsement to:
  - o - D&O Policy
  - o - CGL Policy
  - o - E&O/Professional Liability Policy
  - o - Umbrella Liability 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
- 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
- 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
  - 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?

**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

**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 with CGL**

#### **Pros:**

- ease of program administration
- cost-effective

#### **Cons:**

- non-concurrent coverage triggers (i.e., EPL: claims-made; CGL: occurrence)
- lack of coverage breadth

### **EPL combined with Umbrella**

#### **Pros & Cons:**

- same as EPL with CGL

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

#### **Pros:**

- none

#### **Cons:**

- typical complications resulting from overlapping policies
- added administration, given need to address primacy issues

## **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.