

EMPLOYMENT PRACTICES LIABILITY AMID SURGING SEXUAL HARASSMENT CLAIMS



From Hollywood to the federal government to Wall Street, a recent surge of sexual harassment claims have affected many organizations. Victims of sexual harassment are emboldened to speak up, and mobile devices have made it easier for employees to document questionable behavior. In turn — and in astounding numbers — business leaders in many industries are being called out for alleged bad behavior and forced to step down.

No industry is immune from this risk. Sexual harassment is a significant employment issue in corporate America today, but related issues of discrimination, hostile work environment, retaliation, and allegations of sexual assault are also challenging employers in an increasingly complex legal and regulatory environment. However, a comprehensive employment practices liability (EPL) insurance program can help companies better protect themselves from potential liability for these and other workplace exposures.

COVERAGE SPECIFICALLY FOR EMPLOYMENT RISKS

EPL insurance is designed to protect employers against third-party liability claims for wrongful acts arising from the

employment process. The EPL market is mature, with approximately \$600 million in capacity, and standalone policies have been available for more than two decades. In that time, underwriters have paid substantial losses for single and multi-plaintiff claims brought by past, present, and prospective employees alleging:

- Discrimination.
- Harassment.
- Wrongful termination.
- Retaliation.
- A variety of employment-related torts such as invasion of privacy; infliction of emotional distress; negligent supervision, hiring, and retention; and employment-related misrepresentation.

Who it's for

- CEOs, CFOs, risk managers, and human resources directors.
- In-house employment law counsel.

What you get

- Broad policy language, enhanced through Marsh's exclusive Global Leaders and Leaders Preferred endorsements with the majority of leading insurers.
- Alternative program structure options to evaluate, such as a standalone EPL policy with dedicated limits for EPL exposures, or a blended program with wage and hour (W&H) coverage for claims that are otherwise explicitly excluded in EPL policies. Private and non-profit companies may include broad EPL coverage within their directors and officers (D&O) liability insurance program.
- Claims advocates with expertise and knowledge in EPL exposures and coverage issues.

EPL programs also have evolved to address emerging exposures such as workplace bullying and risks associated with criminal background checks, as well as invasion of privacy involving the Fair Credit Reporting Act (FCRA) and Health Insurance Portability and Accountability Act (HIPAA), among others.

EPL coverage features include:

- A definition of “Claim” that typically includes the receipt of a lawsuit, administrative charge, demand for arbitration, and demand for monetary or non-monetary relief. “Claim” also includes actions brought directly by the US Equal Employment Opportunity Commission (EEOC).
- Coverage for the organization and its subsidiaries, directors and officers, and employees.
- Third-party liability coverage for discrimination and harassment claims brought by non-employees such as customers or vendors.
- A definition of “Loss” that includes defense costs, settlements, and judgments.
- A non-duty to defend policy, which can allow insureds to select their own counsel.

NEW RISKS CONTINUE TO EMERGE

In addition to the more traditional exposures of discrimination and harassment, employers should also be aware of:

- More aggressive pay equity laws at the state level.
- Increased claims alleging sexual orientation and transgender discrimination.

- Expanding scope of the Americans with Disabilities Act (ADA), including alleged lack of accessibility of company websites.
- An increase in medical marijuana discrimination claims.
- An increase in invasion of privacy claims due to company use of biometric data for timekeeping purposes.

EPL UNDERWRITING FOCUS

As part of the insurance renewal process, it has become increasingly important for organizations to conduct in-person underwriting meetings or conference calls. In light of recent sexual harassment claims, insurers are focusing on high-level executive oversight (even board level for certain industries), training, reporting, and complaint resolution processes, and safeguards against retaliatory treatment of employees who assert harassment claims.

Companies’ best policies are typically only as effective as the education around them and their consistent messaging and implementation. Employers often look to rote training and acknowledgments as a way to tick an item off the risk management checklist rather than deeply engaging with these important issues. We anticipate underwriters will delve deeper into corporate culture to discern whether there may be an organizational-wide problem not apparent from a review of a company’s loss run. Your Marsh team can help you understand insurers’ areas of interest and concern, and are ready to assist you with preparation for the underwriting process.

MARSH’S EPL/W&H PRACTICE

Marsh’s EPL/W&H Practice works with employers to protect against employment practices risk exposures, including wage and hour; workplace harassment; wrongful termination; discrimination; and a host of other new and evolving claims by employees. Marsh’s team of FINPRO professionals analyzes a company’s exposure to a broad array of employment practices and wage and hour risks to help develop a thorough risk management plan.

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