

EMPLOYMENT PRACTICES LIABILITY SOCIETY OF PUBLIC INSURANCE ADMINISTRATORS OF ONTARIO (SPIAO)

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What is Employment Practices Liability (EPL)?

- Any liability resulting from actual or alleged harassment, discrimination, or wrongful termination of an employee, applicant or third-party
- Encompasses allegations related to:
 - Harassment
 - Discrimination
 - Wrongful termination (breach of employment contract, actual or constructive discharge)
 - Retaliation by employer
 - Libel, slander or humiliation
 - Wrongful discipline
 - Deprivation of a career opportunity – failure to:
 - Employ / hire
 - Grant tenure
 - Promote

Traditional Sources of Exposure

Legal Landscape

- Canada
 - The Canadian Human Rights Act
 - The Canada Labour Code
 - The Employment Equity Act
- United States
 - Fair Labour Standards Act
 - Occupational Safety and Health Act
 - Family and Medical Leave Act
 - American with Disabilities Act
 - Equal Pay Act
 - Title VII of the Civil Rights Act (1964)

Standalone EPL Policy

Purpose of the Standalone EPL Policy

- Provides coverage for the entity, directors and officers, and employees for any liability resulting from actual or alleged wrongful termination, harassment, discrimination or other employment related torts against a past, present or prospective employee.
- Covers “Loss” - Usually defined as damages, judgments, settlements, defense costs or other amount that the insured becomes legally obligated to pay.

Standalone EPL Policy

What is Not Covered?

- Salary or wages for services performed
- Future salary or benefits to an employee whose employment will continue or an increase to salary or benefits pursuant to a settlement
- Bodily injury
- Benefits due
- Fines and penalties

Standalone EPL Policy

Who is an Employee?

- Typically includes full-time, part-time, seasonal, temporary, leased employees and volunteers
- May include independent contractors

Standalone EPL Policy

Other Policy Considerations

- Settlement opportunity provision
- Acquired subsidiaries (automatic coverage?)
- Severability (application and exclusions)
- Claims-made coverage



Employment Practices Liability Policy Coverage Trigger – “Claims-Made”

- EPL insurance is written on a **CLAIMS-MADE** policy form
- Coverage is limited to liability for claims that are:
 - First made against an insured during the policy period or the discovery period/extended reporting period (if applicable); **and**
 - Reported to the insurers during the policy period.
 - Claims must be reported to insurers “as soon as practicable”
- Coverage must be in force for claims to be reported
- May necessitate the need for a “run-off” policy if the operations cease

Standalone EPL Policy

Advantages of the Standalone EPL Policy

- Dedicated limits
- Coverage includes loss control audit by employment law firm
- Reinforces corporate due diligence
- Help with stabilizing earnings and stock price
- May offer balance sheet protection
- Assistance in closing gaps in your insurance portfolio
- Coverage enhancements (e.g. punitive damages, third-party coverage)

Risk Profile Characteristics

Underwriting Criteria

- Employee Count
 - Typically the primary risk and rating factor for insurers
- Location
 - May be relevant if organization has any US based employees
- Employee Salary Levels
 - Large percentage of highly compensated employees could result in larger settlements and higher defence costs.
 - Large percentage of lower salaried employees could represent a potential class action exposure
- Human Resources Department
- Employee Handbook

Risk Profile Characteristics (Continued)

Underwriting Criteria

- Management Training
 - Anti-discrimination and harassment
 - Diversity and inclusion
 - Proper, well defined procedures
- Reductions in workforce / layoffs
- Loss / Claims History
- Industry
- Unionized Employees

The Current EPL Market

Key Markets

- Chubb
 - AIG
 - Travelers
 - Liberty
 - Encon
 - Great American
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- The current EPLI market for Canadian risks is competitive with generally stable rates for organizations with an average risk profile

Risk Management/Loss Prevention

Step 1 - Review Current Policies, Practices and Liability

- Employee Handbook
- Harassment Policy
- Termination Policy
- Job Application
- Evaluation Form
- Loss History

Risk Management/Loss Prevention

Step 2 - Plan a Strategy for Education, Awareness and Accessibility

- Policy statement barring discrimination and sexual harassment
- Widely distribute the policy and obtain signed acknowledgement statement
- Advertise “Zero Tolerance” Policy
- Develop and implement complaints protocol
- Train staff regularly
- Institute “Open Door” Policy
- Ensure compliance for reasonable accommodation of disabilities
- Develop effective interview practice

Risk Management/Loss Prevention

Step 3 - Plan a Strategy for Responding to the Crisis

- Most incident scenarios are likely to occur over time
- Preparations to deal with an incident with a timely and professional response can minimize a loss

Risk Management/Loss Prevention

Step 4 - Review Current Insurance Coverages

- General Liability
- Directors and Officers Liability
- WSIB

Risk Management/Loss Prevention

Step 4 - Review Insurance Coverages (continued)

General Liability

- Coverage deficiencies
 - Employment-Related Exclusions
e.g. Discrimination, Termination
 - “Intentional Acts” Exclusion
 - Exclusions for Employee Injuries or Claims

Risk Management/Loss Prevention

Step 4 - Review Insurance Coverages (continued)

Directors and Officers Liability

- Coverage deficiencies
 - May be no protection for “Entity”
 - May be no coverage for “punitive or exemplary” damages
 - Management and employees may not be insured
 - Exposing/eroding the limit for true D&O claims
 - May have an “Intentional Acts” Exclusion
 - Bodily Injury exclusion may include emotional distress or other personal injury elements common to EPL allegations

Risk Management/Loss Prevention

Step 5 - Consider Purchasing a “Standalone” EPL Policy

- Full “prior acts” including acquisition
- Coverage for “downsizing”
- Include “punitive” damages
- Vicarious liability for intentional harm (sexual harassment)
- Loss includes defense costs, taxable legal costs, settlements, judgements
- Termination awards beyond normal statutory termination and severance pay
- Access to loss prevention service

Risk Management/Loss Prevention

Step 6 - Common Pitfalls to Avoid

- Failure to comply with minimum employment standards
- Ignoring employee reinstatement obligations
- Conducting background/reference checks post hiring
- Recognizing unique jurisdictional employment principles
- Failure to obtain sound legal counsel



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