

# 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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