

Accountability

Issue I

What is Employment Practices Liability Insurance?

Over the past few months we have received an increasing number of discrete inquiries from clients about insurance coverage for discrimination, harassment or similar employer-employee disputes. Most clients are unfamiliar with a relatively new type of insurance coverage available for such situations.

Employment practices liability insurance first came into existence in the early 1990's, probably inspired as a result of the Anita Hill-Clarence Thomas hearings and the consequent increased public awareness of appropriate conduct in the workplace. As of the date of this newsletter, there are more than 30 insurers offering this coverage, some as a stand-alone policy, others as an extension to another coverage, e.g., Directors' and Officers' liability insurance. The number of employment practice liability claims is increasing, possibly because of several new employment-related laws. The 1991 Civil Rights Act broadened the conditions under which employees can sue employers for discrimination, wrongful discharge or sexual harassment. In addition, the 1992 American with Disabilities Act (ADA) and the 1993 Family and Medical Leave Act created additional responsibilities for employers.

Employment practices liability insurance combines coverage for three types of claims: (1) discrimination, (2) wrongful termination, and (3) sexual harassment. Policies are generally written in one of two forms: a named perils form – policies that

provide coverage only for exposures arising from events or legislation specifically named in the policy; or, an “all-risks” form – the policy explicitly covers the three categories of employment suits: breach of contract, statutory torts and common law torts. Obviously, “all-risks” coverage offers the best option as it automatically provides for newly-arising perils or changes in the law.

Coverage is usually written on a “Claims Made” basis and is subject to conditions, limitations and exclusions. The exclusions generally relate to willful, reckless or wanton acts (whilst providing coverage for vicarious liability), workers compensation matters, labor management or relations issues (strikes, etc.), criminal proceedings, punitive damages (some insurers provide this coverage) or settlements due for services rendered. Defense costs are often included in the limit of coverage (there are some exceptions). Coverage is subject to an each claim deductible and sometimes a nominal co-insurance percentage (that is, the insured bears a fixed percentage of the costs of any claim, e.g., 5 or 10%). A specimen policy may be obtained from the author, which provides full details of the terms and conditions of coverage.

In the past 12 months, certain professional liability insurers have offered *Defense Costs Only* employment practices liability insurance as a coverage extension. At first sight this appears a good idea and we applaud the initiative of the insurers that have made this available. However, often the coverage is added with an inner policy limit. That is, the coverage is provided for a nominal amount (e.g. \$100,000 each loss

and in the aggregate) and if utilized, can erode the limit of liability available for any professional liability claims. Additionally, the quality of coverage is arguably inferior from that available from other insurers offering the insurer as a separate policy. Usually the coverage is offered on a named perils basis (see above) and is an *indemnity*, rather than *pay on behalf of* policy (that is, the insured must pay defense costs and then seek reimbursement from the insurer as opposed to the insurer paying the defense costs directly). In addition, the cost of the coverage extension may not be significantly less than that of a separate policy.

Employment practices liability insurance is becoming more important in the increasingly litigious business environment. Our recommendation to clients is to seek assistance from an experienced insurance agent and evaluate the cost and appropriateness of the coverage for their practice. Not only is the insurance itself invaluable, but many insurers provide useful risk management advice, newsletters, publications and loss control recommendations that might help to avoid a claim. Often coverage is provided in conjunction with a toll-free hotline to provide free legal advice.

Some of the largest and more publicized decisions and settlements include the following:

- *A Texas jury awarded \$124 million in a wrongful discharge verdict against a large energy corporation. A former executive accused the company of terminating him because he refused to file a false report.*
- *An international telecommunications company settled a pregnancy discrimination case for \$66 million.*
- *A major insurance company settled a \$157 million class action suit filed by women who alleged they were denied promotions.*

- *A \$15.6 million verdict was rendered against Proctor & Gamble for firing a 41-year old veteran of the company and then accused him of stealing a \$35 company telephone.*

These are obviously the extreme end of the spectrum of claims made in the past few years, but the number of claims made against employers is increasing and is not an exclusive problem of the largest public companies.

A final word may be in respect to our clients' clients. Although not generally part of the audit process (where the existence of property and general liability insurance is verified), it may be prudent to highlight to your clients the financial exposure to a business from discrimination, harassment and employment-related claims, and the existence of appropriate insurance coverage. From a firm risk management viewpoint, this action may avoid a future allegation of professional negligence and a possible professional liability claim for an accounting firm.