

Accountability

Issue XXI

Why isn't Employment Practices Liability covered by a professional liability policy?

Since our last bulletin on the subject of Employment Practices Liability Insurance, we received enquiries from clients about whether or not a professional liability policy provides coverage for this exposure.

Unless specifically endorsed onto the policy, the short answer is "NO".

As you may recall from the previous bulletin, employment practices liability insurance combines coverage for three types of claims: (1) discrimination, (2) wrongful termination, and (3) sexual harassment. These policies usually explicitly cover the primary three categories of employment suits: breach of contract, statutory torts and common law torts. Usually, the employee (or former employees) brings a lawsuit against the insured.

On the other hand, a professional liability policy is intended to protect an insured against legal liability claims made in connection with professional services rendered. The insured's clients or the insured's client's investors/creditors usually initiate a lawsuit.

A sample professional liability insurance policy contains the following wording:

Covered Services

*In consideration of payment of the required premium and subject to the Declarations, limitations, conditions, provisions and other terms of this policy, **we** will pay on **your** behalf all sums that **you** become legally obligated to pay as **Damages** and associated **Defense Expenses** because of an act, error or omission or **Personal Injury** arising out of **your** performance of **Professional Services***

This is pretty clear. However, the policy continues:

Definitions:

***"Professional Services"** means services performed or advice given by **you** provided that the fee for such services or advice, or a portion thereof, inures to **your** benefit (unless, with **your** consent and knowledge, such services or advice are provided Pro Bono).*

There is also a specific exclusion:

*This policy does not apply to any **Claim** or **Defense Expenses** based upon or arising out of:*

*claims made by any of **your** directors, officers, partners, members or employees alleging discrimination by **you** on the basis of age, color, race, sex, sexual orientation, creed, national origin, or marital status;*

It is apparent that it is not the intent of the insurer to cover employment practices claims made by employees/partners against an insured.

Even where a policy is silent about discrimination or harassment, coverage may exclude employment practices claims via another area of the policy. For example, the contract provided by another insurance company states:

This insurance does not apply to Claims or Potential Claims:

I. Made by an Insured against another Insured, unless such Claims arises solely out of the Professional Services performed in an accountant-client capacity:

Notwithstanding any extension of the definition of professional services (e.g. an extension to include the operation or management of premises), this exclusion is clear. An insured (which includes past and present employees and partners) cannot sue another insured and obtain coverage, unless it arises from services that that person received as a client of the firm.

A professional liability policy does not cover automobile liability, property damage or workers compensation, as these are unique perils and the

subject of separate coverage. Employment practices liability should be treated in the same manner.

True employment practices liability coverage has been reducing in cost and available from a variety of leading insurers. Consequently, although certain insurers can offer this coverage as an extension to a professional liability policy (at the time of publication there are two insurers offering this) we usually recommend to our clients to make alternative arrangements.

Employment practices liability risk exposure is unique and significantly different from professional liability risk and should be treated accordingly. There are a variety of disadvantages in blending these two exposures together:

- A coverage extension shares limits with the main policy. Consequently, a claim made for employment practices erodes the coverage available for professional liability.
- Adverse loss experience for employment practices liability may negatively impact (increase) the cost of professional liability insurance in the future.
- The coverage afforded via the extension for employment practices is usually limited; either the limit is substantially less than the main policy or applies to defense costs only.
- The coverage via the extension may be limited in scope (where compared with true, independent employment practices liability insurance) and consequently give a false sense of security about what may be covered.
- The underwriting process for employment practices liability gives invaluable risk management advice as an additional benefit. The underwriter may recommend certain procedures that may mitigate the possibility of a claim arising, and in certain cases, insurers provide risk management manuals, pre-claims assistance or free access to legal advice. To the best of our knowledge, this is never provided via a coverage extension.

As stated in the previous bulletin, employment practices liability insurance is becoming more important in the increasingly litigious business environment. Our recommendation to clients is to talk to your CPA *Gold*TM agent and evaluate the cost and appropriateness of the coverage for their practice.