



EXECUTIVE RISK

Getting the Most from Your Employment Practices Liability Insurance

6 Pitfalls to Avoid

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NUANCED COVERAGE. *POSSIBLY UNEXPECTED RESULTS.*

Employment practices liability insurance, or EPLI, is coverage designed to address financial losses that businesses become legally obligated to pay stemming from actual or alleged employment-related wrongful acts. Coverage is nuanced and can be very complex.

This e-book looks at pitfalls employers sometimes fall prey to that can impact how coverage performs and result in unmet expectations.

This document is not a substitute for professional guidance and does not offer specific advice. Always consult your trusted legal adviser and/or insurance professional if you have questions or need assistance.

A decorative horizontal line of yellow dots is positioned at the top left. On the right side, there is a large, stylized teal brushstroke graphic that curves downwards and to the left, partially overlapping the dark grey background.

PITFALL 1:

ACCEPTING AN OFF-THE-SHELF POLICY

Policies are written on “coverage forms,” which are documents that contain policy terms, conditions and exclusions. Many types of insurance coverages are fairly boilerplate. EPLI forms, in contrast, are not standardized, and as with most contracts, the devil is in the details.

A lack of attention to policy wording or accepting an off-the-shelf policy can result in unanticipated coverage gaps.

Avoid the pitfall: Engage a broker with expertise in market offerings and coverage negotiation. EPLI is available with a continuum of options ranging from low-limit, bare-bones endorsements attached to general liability policies, up to highly tailored standalone policies. Become educated in the policy nuances and select a carrier whose offering best aligns with your exposures and risk appetite. Insurance carrier quality matters.

PITFALL 2: *FAILING TO RECOGNIZE A CLAIM*

Definitions vary by policy, but **in general, a “claim” is defined much more broadly than just a “lawsuit.”**

Most EPLI policies include several other claim triggers, such as “receipt of an EEOC letter.” Failure to notify the carrier of a claim as defined by the policy and in compliance with specific reporting obligations may result in a “late notice denial” from the carrier when the related lawsuit actually develops.

Avoid the pitfall: Read your policy, including the definitions that are typically in bold type. Your broker should negotiate the broadest flexibility in reporting a claim. The time to ensure you understand your obligations under the policy is before a claim occurs.



PITFALL 3: MISUNDERSTANDING HOW CLAIMS-MADE POLICIES WORK

Most EPLI policies are written on a “claims-made” basis. This means that regardless of when a wrongful act took place, the policy in force **when the claim is made** is the policy that applies to the situation. With a general liability (GL) policy, in contrast, the policy in force **on the date the incident occurred** is the policy that applies to the situation.

Why is this important? A “claim” needs to be identified and reported in the proper policy period. Once the reporting period is closed, there is no ability to file a claim with that carrier or with a new carrier, who would deny coverage, citing it as an event that was already pending prior to their coverage inception.

In addition, while somewhat rare, some carriers may try to impose a retroactive date, also known as a “prior acts exclusion,” on claims-made EPLI coverage. This means that the policy would not respond to wrongful acts occurring prior to this date. *(continued)*

Example: **Claims-Made Vs. Occurrence Policy**

An employer receives a written complaint in 2021 citing sexual harassment that is alleged to have occurred in 2019. The EPLI policy that responds is the 2021 policy (i.e., claims-made policy).

A customer slips in a lobby in 2019 but files a lawsuit in 2021. The general liability policy that responds is the company’s 2019 policy (i.e., occurrence policy).



PITFALL 3:

MISUNDERSTANDING HOW CLAIMS-MADE POLICIES WORK

This is broader than the “pending and prior” exclusion mentioned above because it applies even if you have no knowledge. So, in the example, if the EPLI policy had a retroactive date of January 1, 2020, there would be no coverage for the 2019 claim.

Avoid the pitfall: Ensure that your organization has a procedure to track issues and alert individuals charged with the responsibility for reporting to the carrier. It is particularly important to ensure all claims and notices of known circumstances that could reasonably result in a claim have been reported to and accepted by the current insurer before moving coverage. Insist on full prior acts coverage unless there are very specific circumstances, such as a change in ownership.

Example:

Claims-Made Vs. Occurrence Policy

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PITFALL 4: *BLINDLY ACCEPTING EXCLUSION WORDING*

All policies contain exclusions, but some are more problematic than others. EPLI policies should not contain intentional conduct exclusions, since that behavior would be alleged in almost any claim. Certain types of violations of employment law are always excluded because it would be in violation of public policy to insure them. However, there should be wording indicating that this exclusion does not apply to claims alleging retaliation for the exercise of the employee's rights under any such laws.

Avoid the pitfall: Review policy terms prior to binding coverage to ensure that best-in-class policy wording will apply. Select a broker who is cognizant of these nuances and can negotiate amendments on your behalf.



PITFALL 5:

TRYING TO HANDLE A CLAIM YOURSELF

EPLI policies include specific defense provisions. Depending on the structure, the duty to defend could belong to the carrier or the insured. The carrier will typically have a voice in the selection of defense counsel with either option, but it has more control with the former.

Selection from a panel of pre-approved defense attorneys is often required. Carriers have vetted their expertise and negotiated discounted rates with these firms. If an exception to the panel is desired, the time to address this is when the policy is being placed, not after a claim occurs. **Any costs incurred prior to the carrier's consent to engage a firm may not be covered or even be credited to your retention.**

Avoid the pitfall: Report claims promptly to your carrier and have your broker advocate for a timely response. Do not begin to defend, negotiate or settle a claim without input from the carrier.





PITFALL 6: *MISUNDERSTANDING YOUR POLICY LIMIT*

In contrast to most GL policies, defense costs erode the limit of EPLI policies.

For example, if a policy has a \$1MM aggregate limit and a claim is filed that requires \$200K to defend prior to a settlement being reached, only \$800K will remain for settlement and any additional claims that come in.

Avoid the Pitfall: There is no crystal ball to help you predict and purchase the right liability limit. However, you can consult with your broker and review benchmarking data with the knowledge that defense costs are included in the aggregate and, as discussed, you can do everything right and still have to defend a meritless claim.



LEARN MORE

Have questions? [**Click here**](#) to connect with a Hylant risk management expert.

We also invite you to read our most current commercial insurance [**Market Update Report**](#), which you can [**download here**](#). Learn about the specific issues and conditions driving insurance rates and availability today (including EPLI) and what we might see in the future.

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