

EMPLOYMENT PRACTICES LIABILITY ISSUES

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I. INTRODUCTION

The rights of employees have been expanded significantly within the last thirty years. Federal statutory relief lies within Title VII of the Civil Rights Act of 1964 (“Title VII”),¹ the Age Discrimination in Employment Act of 1967 (“ADEA”),² the Americans with Disabilities Act of 1990,³ The Civil Rights Act of 1991,⁴ and the Family and Medical Leave Act of 1993 (“FMLA”),⁵ all providing remedies designed to address inequities in the workplace. As a result of continuing viability of statutory and common law remedies, many corporations face substantial liabilities and defense costs for employment practices claims. This article will review available coverages and exclusions for alleged acts of employment discrimination, wrongful termination, sexual harassment, and similar employment-related actionable conduct, focusing on four types of liability policies: (1) the commercial general liability policy (“CGL”), (2) the workers’ compensation/employers’ liability policy, (3) the errors and omissions policy, and (4) the employment practices liability policy.

II. CONSIDERATIONS UNDER THE COMMERCIAL GENERAL LIABILITY POLICY

A. Coverage Provisions

The basic insuring agreement of the standard CGL form provides, in part:

¹ 42 U.S.C. § 2000e. Title VII created a federal cause of action for employment discrimination on the basis of race, color, religion, sex, or national origin, and includes claims for disparate impact.

² 29 U.S.C. § 626. The ADEA created a federal cause of action for employment discrimination on the basis of age.

³ 42 U.S.C. § 12101. The ADA prohibits discrimination against disabled persons in the terms, conditions, and privileges of employment.

⁴ 42 U.S.C. § 1981. The Civil Rights Act of 1991 makes it easier for employees to bring suit and recover compensatory and exemplary damages for employment-related claims involving race, disability, and sex in hiring, firing and promotion decisions, and for workplace conduct.

⁵ 29 U.S.C. § 2601. The FMLA permits employees to take leave from work for births, adoptions, and certain medical situations without loss of job or employment benefits.

We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend any “suit” seeking those damages. We may at our discretion investigate any “occurrence” and settle any claim or “suit that may result.

The bodily injury or property damage must have been caused by an “occurrence,” typically defined as, “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” Insureds will, in most cases, seek liability or defense coverage for employment-related claims under either the CGL policy’s “bodily injury” or “personal injury” coverages.⁶

1. Bodily Injury Coverage

Under the standard CGL forms, “bodily injury” is defined as “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.” The most common issue arising in employment-related claims is whether emotional or mental distress is within the scope of “bodily injury” when there are no accompanying symptoms. Indeed, if there is a potential for coverage under this definition, the broad duty to defend the insured will arise.⁷ The question of whether emotional injury is a bodily injury is inherently a fact question, requiring medical or psychological expert testimony. Considerations when evaluating a claim include:

- Are the claims alleging purely emotional distress?
- Is there a well-developed factual record as to the nature and extent of the claimant’s alleged bodily injury?
- Are the alleged injuries sufficiently akin to physical injury to render the term “bodily injury” ambiguous?

⁶ See ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE, § 11B.02[1] (2006).

⁷ See *id.* § 11B.02[1][a].

2. Personal Injury Coverage

The personal injury coverage provides another basis for coverage for employment-related claims. “Personal injury” is generally defined as:

Injury, other than “bodily injury,” arising out of one or more of the following offenses:

False arrest, detention, or imprisonment;

Malicious prosecution;

Oral or written publications of material that slanders or libels a person or organization, or

Oral or written publication of material that violates a person’s right to privacy.

Umbrella policies may expand on the “bodily injury” definition, such that “personal injury” may include “bodily injury, mental injury, mental anguish, shock, sickness, disease, discrimination, humiliation, slander, libel, or defamation of character or invasion of rights of privacy.”

Because these policies unambiguously provide coverage for “mental injury” and “mental anguish,” discrimination and many other types of injuries common in employment-related claims, coverage for defense costs or liability may arise under this coverage provision.

3. Exclusions

Usually, questions arise whether the intentional acts exclusion, the willfulness exclusion, and the employment exclusion will bar coverage for employment-related claims. A recent civil rights exclusion may also be applicable. Public policy considerations may also arise concerning whether coverage for certain acts or damages may violate the underlying policy reasons for insuring risk.

a. **Intentional Acts Exclusion**

The standard CGL excludes coverage for bodily injury or property damage “expected or intended from the standpoint of the insured.” The exclusion does not apply to personal injury coverage. Many claims

allege intentional conduct caused the claimant’s injuries, the operation of this exclusion may be critical in determining coverage under the CGL. Coverage may exist for liability or defense costs for acts of discrimination, harassment, defamation, infliction of emotional distress, and other employment-related claims if the claimant’s injuries are alleged or proven to be an unintended consequence of the policyholder’s intentional acts. Nonetheless, a number of courts have concluded that intentional acts such as terminating a person’s employment or sexual harassment are so inherently likely to cause injuries that the intent to cause these injuries must be inferred or presumed as a matter of law from the intent to do the act.⁸

Considerations:

- Is there a separation of insureds clause, providing that the policy applies separately to each insured against whom a claim or suit is brought?
- Whose intentions and expectations are relevant in determining application of the exclusion?
- Does the policy include an assault & battery/negligent hiring exclusion?
- Does the claimant allege the insured intended both the act and the result?
- Does the claimant allege the insured desired to cause the consequences or acted knowing that such consequences were substantially certain to result?
- Does the claimant allege recklessness, gross negligence, or wrongful, unlawful, or unfair conduct?

b. **Willfulness Exclusion**

This exclusion is applied in considering personal injury coverage, barring the coverage for injury “arising out of the willful violation of a penal statute or ordinance committed by or with the [knowledge or] consent of the insured.” The exclusion involves consideration of whether the claim involves the insured’s intent or knowledge that its conduct violates a penal obligation. It appears the exclusion would apply to violation by the insured’s agents with its knowledge or consent. Considerations:

- Does the claim allege the insured acted intentionally or with a high degree of

⁸ See *id.* § 11B.02[2].

knowledge? What about reckless or gross negligence?

c. Employment Exclusion

The CGL generally also excludes coverage for bodily injury to:

An employee of the insured arising out of and in the course of employment by the insured . . .

The exclusion applies “whether the insured may be liable as an employer or in any other capacity.” Commentators explain that the intent of the exclusion is to avoid duplication of coverage provided under workers’ compensation and employers liability policies.⁹ Issues generally arising through this exclusion include the meaning of the phrases “arising out of” and “in the course of employment by the insured.” Many courts have interpreted this exclusion to bar coverage for employment-related claims.¹⁰ Considerations:

- Is the employment of the claimant by the policyholder the “efficient” or “direct” or “proximate cause” of the bodily injury?
- Does the claimant complain of activities occurring during the time of employment by the policyholder?
- Is the claimant limiting the complaint to acts occurring while he/she is actually doing work for the policyholder?
- Is the conduct of the kind the servant is employed to perform and actuated by a purpose to serve the master?
- Is the conduct an intentional tort?

d. Civil Rights Exclusion

A fairly recent exclusion barring coverage for bodily injury applies to “any person arising out of any federal, state, or government civil rights violations or alleged violations.” Courts have excluded coverage under the CGL for claims brought under Title VII, for alleged conduct including (1) subjecting women to a hostile work environment due to sexual and gender-based harassment; (2) failing to take immediate and appropriate action to correct the hostile environment;

⁹ See *id.* § 11B.02[2].

¹⁰ See *id.* § 11B.02[2] and cases cited therein.

(3) unlawful retaliation against charging parties and a class of women complainants; and (4) the employer’s unlawful employment practices.¹¹

III. COVERAGE CONSIDERATIONS UNDER EMPLOYERS LIABILITY POLICIES

Employers liability (“EL”) policies protect the insured against common-law liability imposed for injuries resulting to employees not covered by workers’ compensation insurance. The policy is a gap-filler policy to provide coverage for claims involving the employee’s bodily injury falling outside coverage through workers’ compensation and excluded under a CGL policy’ employment exclusion.¹² There is no standard EL policy form, but policies are similar to CGL policies, but provide:

The insurer will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury by accident or disease sustained by any employee of the insured arising out of and in the course of his employment.

The EL policy may include similar exclusions as contained within the CGL and may also exclude “damages arising out of discrimination against any employee in violation of law,” or “bodily injury intentionally caused or aggravated by the employer.” Many of the same coverage issues and considerations applicable to CGL policies also arise under the EL policy.¹³

IV. COVERAGE CONSIDERATIONS UNDER ERRORS AND OMISSIONS POLICIES

There is also no standard form for errors and omissions (“E&O”) policies, which generally provide complementary coverage for any losses that an insured organization incurs in indemnifying its officers or directors. The coverage agreement generally provides language similar to:

The Company shall pay on behalf of the Insured Person all loss for which the

¹¹ See *id.* § 11B.02[2][e] and cases cited therein.

¹² See *id.* § 11B.03 and cases cited therein.

¹³ See *id.*

Insured Person is not indemnified by the Insured Organization and which the Insured Person becomes legally obligated to pay on account of any claim made against him, individually or otherwise . . . for a Wrongful Act committed, attempted, or allegedly committed or attempted, by the Insured Person.

OR

This policy shall reimburse the Company for Loss arising from any claim or claims which are first made against the Directors or Officers. . . for any alleged Wrongful Act in their respective capacities as Directors or Officers of the Company, but only when and to the extent that the Company has indemnified the Directors or Offices for such Loss.¹⁴

“Wrongful Act” has been defined within the E&O policy as:

Any actual or alleged error, misstatement, misleading statement, act or omission, or neglect or breach of duty by the Directors or Officers in the discharge of their duties solely by reason of their being Directors or Officers of the Company.¹⁵

These policies provide coverage for liability arising out of claims for wrongful acts made against the “insured person” or the “officer or director,” such that a claim against an organization only may not be covered. Coverage and consideration issues arising under the E&O policy include (1) who is the insured under the policy; (2) what amounts to a claim made against the insured; (3) whether the insured’s liabilities are “damages” under the policy; (4) whether an E&O policy covers intentional discrimination against the insured; and (5) whether the “contract exclusion” bars coverage for back pay awards (one of the general damages claimed in employment-related claims). Considerations:

- Does an administrative action fall within the definition of “claim” or “suit?”
- Are the damages limited to back pay, an equitable form of relief?
- Does the claimant allege disparate treatment?
- Does the claimant allege an intentional act?

V. COVERAGE CONSIDERATIONS UNDER THE EMPLOYMENT PRACTICES LIABILITY POLICY

The Employment Practices Liability (“EPL”) policy is relatively recent development appearing in response to the increase in employment-related claims over the last three decades. There are fewer judicial decisions interpreting the EPL policy. Policies are written on an occurrence or claims-made basis.

EPL policies may cover CGL exclusions, such as false imprisonment, defamation, deceit, fraud, and wrongful interference with contractual relationship.¹⁶ Policies may require deductibles or be subject to a coinsurance obligation. Certain types of statutory claims may require additional deductibles or coinsurance. Punitive damages may be expressly covered or excluded, as may be civil fines and penalties, costs, severance pay, employee benefits unless awarded as damages, future compensation of any kind, any amounts payable to a spouse under derivative claims. And, the insuring agreement may contemplate and require the concurrent and continued existence of approved human resource risk management services during the term of the policy, including, for example, an audit of the insured’s human resource practices and pertinent management practices.¹⁷

A. Coverage Provisions

Coverage may be expressly provided for violations (and alleged violations) of various Federal Civil rights laws, such as ADA, FMLA, the Fair Labor Standards Act of 1938, the Uniform Employment and Reemployment Rights Act of 1994, and similar state statutes. Coverage provisions may generally promise to pay on behalf of the insured, sums due from claims made during the policy period

¹⁴ See *id.* § 11B.04 and cases cited therein.

¹⁵ See *id.*

¹⁶ See FC&S BULLETINS, SPECIALTY LINES SXA, SXE, SXF, SXN, SXT (May 2000, July 2001).

¹⁷ See *id.* at SXF-5.

or during the extended reporting period, or damages the insured incurs as a result of a “wrongful employment practice.” Defense costs are also provided, even if the allegations are false, and may be erode policy limits and are paid prior to indemnity or damages.¹⁸ In addition, the EPL policy may include supplementary payments for pre- and post-judgment interest, premiums for bonds required in a suit the insurer defends, all reasonable costs incurred by the insured.¹⁹ Damages may be expressly defined to include monetary compensation for economic and noneconomic loss suffered by the claimant, but may not include medical expenses or property damage.

A “wrongful employment practice” may include:

- Discrimination
- Harassment
- Wrongful discharge
- Retaliation
- Workplace tort
- Wrongful employment practice
- Any other act where the employer treats one employee differently from another

Accordingly, coverage may exist for lawsuits arising from allegations of these types of conduct, as well as claims based on:

- Protected Status Harassment
- Wrongful Failure to Employ
- Wrongful Failure to Promote
- Wrongful Denial of Training
- Employment Related Infliction of Emotional Distress
- Employment Related Defamation or Misrepresentation

¹⁸ See *id.*

¹⁹ See *id.* at SXF-3.

Employment Related Invasion of Privacy

Breach of Employment Agreement

Wrongful Discipline

Wrongful Deprivation of Career Opportunity

Wrongful Denial or Deprivation of Seniority

Wrongful Failure to Grant Tenure

Wrongful Evaluation

Downsizing

B. Exclusions

EPL policies often contain exclusions barring coverage for certain types of contractual obligations, for liabilities resulting from harm intentionally caused by the insured, for fines, penalties, punitive or exemplary damages assessed against the insured.²⁰ Additionally, claims arising under certain theories of liability may be expressly excluded, such as:

- Admiralty law;
- National Labor Relations Act;
- Labor Management Relations Act²¹;
- Benefits payable under ERISA²²;
- Liability under ERISA, COBRA, and WARN Act, as well as similar local and state statutes²³;
- Compliance with ADA requirements;
- Strikes and lockouts;
- Claims against subsidiaries²⁴;

²⁰ See LONG, § 11B.05.

²¹ See FC&S BULLETINS, SPECIAL LINES AT SXE-2.

²² See *id.*

²³ See *id.* at SXF-3.

Pre-existing wrongful practice²⁵

Available endorsements may amend definitions, such as that of “claimant” to include leased employees and independent contractors, and of “employee” to include a volunteer. An endorsement may also provide coverage for a subsidiary, and claims by third parties alleging sexual harassment.²⁶

VI. CONCLUSION

When determining the coverage necessary, evaluating renewal of coverage, or when a claim is actually noticed, the company should review available insurance to determine the needs for additional or different coverages. Just as the viable bases for liability and damages have evolved, issues arising under the CGL, EL, and E&O policies have begun to be addressed within the relatively recently-developed EPL policy. In sum, the organization should examine the anticipated risk in light of current insurance coverage under the CGL, EL, and E&O policies. The organization must evaluate past employment practices and claims history, projected hiring needs and policies, and if human resource policies must be addressed, do so. Conduct human resources risk management. Coverage is available for conduct constituting a wrongful employment practice or alleged wrongful employment practice.

²⁴ *See id.*

²⁵ *See id.* at SXT-5.

²⁶ *See id.* at SXT-5.