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Employment Practices Liability Insurance: Occurrence Forms Versus Claims-Made Forms

Prior to the introduction of specialized EPL insurance policies, many employers sought coverage under one or more of their standard liability insurance policies. Because some early EPL claims were paid under these general policies, it is fair to say that the very first EPL policies were those providing coverage on an occurrence basis. Underwriters of EPL insurance, squeamish about how losses might pan out, first issued EPL insurance on a claims-made basis. Recently there have been instances of EPL coverage being issued on an occurrence basis, such as endorsed to or added onto a general liability, umbrella liability or other liability policy. Although many people think that claims-made coverage is inferior to occurrence coverage, there are arguments why this may not be so for EPL coverage.

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EPL insurance coverage has changed greatly in recent years. Just a few years ago, EPL coverage was often severely limited by the use of retroactive dates or other exclusions eliminating or restricting coverage for prior acts. Additionally, coverage was not widely available for many common-law torts¹ frequently alleged in EPL claims. Today, however, nearly every major EPL insurer has done away with retroactive dates and offers claims-made coverage for prior acts. Most major EPL insurers also have expanded their coverage to include some common-law torts.

Because the EPL insurance market is undergoing rapid development, most insurance companies are modifying, and in many instances improving, their EPL policy forms at least annually. This is good news for buyers of EPL insurance, as each recent year has brought expanded coverage choices and often lower premiums.

A recent development has been the limited availability of EPL insurance coverage on an occurrence basis. But before switching to occurrence-based EPL insurance, you should consider the following issues.

The Prior-Acts Issue

Prior-acts coverage is a particularly important feature for insureds because many employment claims allege a pattern of wrongdoing spanning more than one year. It is not uncommon for sexual harassment suits and race-and-gender discrimination suits to allege wrongful conduct occurring over 10 years or more for both class-action claims and individual claims. If EPL coverage is written on a claims-made basis, now that prior-acts coverage is widely available, the policyholder can capture the benefits of the most recent policy enhancements.

If coverage is written on an occurrence basis, the coverage may not be enhanced from year to year, and even if coverage is enhanced, such coverage enhancement will only be available for that policy period with the enhanced coverage. There would be no enhanced coverage for claims based on acts taking place in prior years. Under an occurrence EPL policy, a claim involving alleged wrongful conduct over the period of many years would likely make for complex coverage issues because the acts giving rise to an EPL claim might be covered under one year's policy and not covered in an earlier year's policy. The result is likely to be coverage gaps and expensive litigation regarding the allocation of claims between covered and non-covered policy periods. The nature of EPL claims and the current state of the EPL insurance market may actually make a claims-made coverage format more suitable than an occurrence-based coverage.

The Intentional-Acts Issue

Another important advantage that claims-made EPL forms may have over some occurrence-based liability policies endorsed to provide EPL coverage is how claims involving intentional conduct are treated. Intentional acts is an important issue because most employment claims allege some form of intentional wrongdoing. Having an EPL insurance policy that excludes intentional acts is highly undesirable, as such exclusions can eviscerate coverage. Most claims-made EPL policies today are clear in their intent to cover intentional conduct. Many occurrence forms providing EPL coverage reviewed for this article contained outright exclusions regarding intentional acts. In addition to excluding intentional acts, some EPL occurrence endorsements also excluded willful failure to comply with the law, malicious acts and other wrongful acts that are in violation of the law.

But many claims-made EPL policies routinely grant coverage for intentional acts, including but not limited to:

1. Termination—actual or constructive—of an employment relationship that is against the law
2. Allegations of wrongful demotion, retaliation, misrepresentation, promissory estoppel and intentional interference with contract
3. Defamation, infliction of emotional distress or mental anguish, humiliation, false imprisonment, invasion of privacy and other personal injury allegations
4. Allegations of breach of an implied employment contract, breach of the covenant of good faith and fair dealing in the employment contract
5. Employment terminations, disciplinary actions, demotions or other employment decisions that violate public policy
6. Violations of the Uniformed Services Employment and Reemployment Rights Act
7. Allegations of breach of an employee's federal, state or local civil rights, including but not limited to any violation of the Civil Rights Act of 1886 or 42 U.S.C. section 1983
8. Allegations of retaliation against any insured for filing under the Federal False Claims Act, in connection with whistle blowing, for union activities or in connection with strikes and lockouts

9. Allegations of wrongful deprivation of career opportunity or failure to grant tenure

Breadth Of Coverage

Many claims-made EPL policies also cover economic damages such as front and back pay and insurance benefits that are usually excluded under occurrence liability policies endorsed to provide EPL coverage.

EPL insurance coverage attached to a general liability or other occurrence-based liability policy is not generally intended to provide extensive EPL coverage. Coverage under standard liability policies is often limited to liability for “bodily injury,” “property damage” and certain “personal injury” offenses. Unless such a policy is properly endorsed, many of the allegations brought in an EPL suit would not be covered.

Conclusions

The notion that EPL insurance may be written on an occurrence basis seems to be a good idea. Indeed, occurrence-based coverage does have its advantages. For example, under claims-made policies the limit of liability may be more prone to exhaustion. Because a claims-made policy may cover prior acts, the limit of liability may be spread over many years. It may be necessary to increase the limit over what might be considered sufficient under an occurrence policy. Another drawback of claims-made coverage is that as soon as the policy is cancelled or expires, coverage ceases. This may require the purchase of tail coverage, and there may be no guarantee that such coverage will be available.²

Today, however, stand-alone EPL insurance written on a claims-made basis generally offers the broadest coverage available, pricing remains highly competitive, and high limits of liability are available for most insureds. The widespread availability of prior-acts coverage and the affirmative grant of coverage for intentional acts under most claims-made EPL policies represent important features that may be missing under occurrence-based EPL insurance.³

Before you choose any EPL policy form, always read the policy and understand how the policy stacks up regarding the features most important to your particular risk situation.



EDITOR'S NOTE

If any readers think occurrence-based EPL insurance coverage is better than claims-made coverage, we would like to hear from you. Please write to us at The Risk Management Letter, 1420 Bristol Street North, Suite 220, Newport Beach, CA 92660. You may also e-mail us at griffcom@ix.netcom.com.

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NOTES

- 1 Employees may make claims for, among other things, assault, battery, false imprisonment, slander, libel, fraud, negligent misrepresentation, conversion, etc. in conjunction with complaints alleging discrimination, sexual harassment or wrongful discharge.
- 2 Tail coverage is usually restricted to covered acts occurring during the policy period or retroactive period. There usually is no coverage for claims based on covered acts taking place after the policy expiration.
- 3 These features may also be absent or ambiguous under some claims-made policy forms.

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