



EMPLOYMENT PRACTICES LIABILITY

Learn how Employment Practices Liability Insurance intersects with COVID-19 and other 2020 events that increase premiums, affect businesses, and more.

This year has brought many unique challenges to the table, both for employers and employees. From stay at home orders, uncertain reopening plans, health concerns to attempting business as usual, many companies and their employees experience stress, anxiety, and uncertainty as the year goes on. As companies continue to move through 2020, it's important to assess not only the health and safety aspects of a workplace but also the coverage business insurance policies provide.

The COVID-19 pandemic and other modes of activism like the #MeToo movement have brought forward the need for businesses of all sizes to have comprehensive insurance coverage in case of legal action taken by employees. Employment Practices Liability Insurance is one way companies can protect themselves while staying true to their corporate values.

In this white paper, we will discuss the ongoing changes COVID-19 has brought to the world of EPLI, claims that may arise as employees return to work amidst the pandemic, and current market conditions as we enter the latter half of 2020.

EPLI Coverage Overview

Employment Practices Liability Insurance, most commonly abbreviated to EPL or EPLI, is an essential business insurance policy for companies large and small. While someone will more likely hear of a lawsuit against a more substantial corporation in the news, all organizations, regardless of size, are at risk of employment practices litigation and have a need for this type of business liability insurance.

EPLI provides coverage for a business if an employee files a claim against the company alleging violations of their legal rights. EPLI can protect businesses against lawsuits regarding the following situations:

- Sexual harassment
- Negligent evaluation
- Employment contract breaches
- Discrimination
- Wrongful termination
- Mismanagement of employee benefit plans
- Wrongful infliction of emotional distress
- Deprivation of career opportunity
- Wrongful discipline
- Failure to employ or promote

These policies can exclude criminal or civil fines and other claims that might be covered under a different business insurance policy, such as bodily injury or state unemployment insurance claims. Additionally, liabilities covered by workers compensation are usually excluded from EPLI policies, but there may be exceptions regarding COVID-19 that will be discussed later.



Current Claims Trends

According to AmTrust Financial, the top five EPLI claim areas in the years 2018-2020 have been as follows:

1. Retaliatory Claims

Retaliation claims are claims where an employee has faced discrimination based on a protected class, like their race, gender or disability, and as a result of that claim has faced retaliation in the form of an adverse action by the company (like being fired, demoted, or having wages garnished). There has been a connection between retaliatory claims being made in response to workers compensation filings.

2. Sexual Harassment Claims

The #MeToo movement has rocked Hollywood and companies in various industries around the world as well. The Equal Employment Opportunity Commission, or EEOC, reported about 1/3 of its claims involving sexual harassment. LGBT-based discrimination filings have been increasing in the last five years.

3. Wage and Hour Litigation

There has been an increase in litigation involving gig workers and the Fair Labor Standards Act as the gig economy becomes many employees' primary income source. Wages and hour litigation claims could also increase as people transition in and out of remote work during the pandemic.

4. Gender Pay Gap

There is still a wage disparity between men and women in the workforce. There may be an increase in gender-based claims during COVID-19 as women are reported to be disproportionately affected by remote work,

childcare responsibilities, and other demands.

5. The Legalization of Marijuana

As more and more states loosen restrictions regarding marijuana, employers have to revisit their own rules and practices to conform to state and federal restrictions that may still apply.

As 2020 continues, the insurance industry will see if these claims trends hold going forward, or if the pandemic will change what claims are being brought forward as their workplaces deal with massive amounts of uncertainty.

Possible COVID-Related Claims

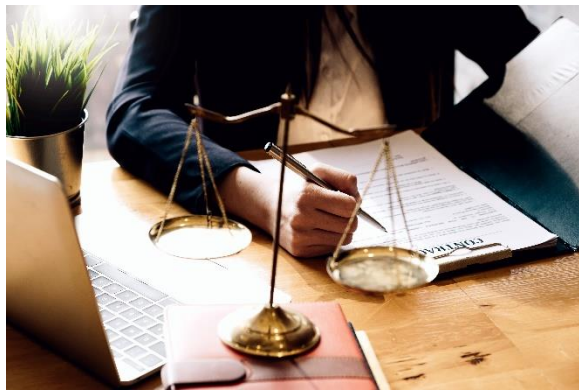
There are a few categories of EPLI claims that could see an increase as COVID-19 continues to affect the global workforce. COVID raises questions about forcing employees to return to work under what might be seen as unsafe conditions, whether or not employees should have to travel to virus hotspots, and whether or not employees who contract COVID will be covered by EPLI or workers compensation. While EPLI coverage can answer some of these questions, others are left to be determined.

Many EPLI policies exclude claims that fall under OSHA violations or FMLA unless those claims are deemed retaliatory by an employee in a lawsuit. Suppose an employee refuses to return to work or wants to work remotely during the pandemic, but is fired by their employer. In that case, an EPLI policy could kick in if the employee files a wrongful termination lawsuit.

If employees are being asked to travel to virus hotspots, aren't being given protective gear, or basic safety protocols aren't being followed in the workplace, there is a chance the number of lawsuits will increase against a company.

States like Washington are working on legislation that would cover employees under workers compensation insurance who contract COVID-19 at work. This is one area where it isn't entirely clear if workers compensation or EPLI would step in to cover an employee who was exposed to and got the coronavirus in their workplace.

Additionally, businesses have to consider the WARN Act, which prevents unexpected layoffs for certain companies without 60 days' advance notice. Businesses with 100 employees or more that plan to lay off at least 50 of them are required to give 60 days' notice under the WARN Act. However, the WARN Act doesn't cover natural disasters or unforeseeable business circumstances; it's unclear as to whether or not the insurance industry is willing to classify the pandemic as one or the other (or both). With this gray area in mind, businesses should give their employees as much notice as possible in advance of mass layoffs because of COVID-related closures.



Handling Return to Work for Employers

Ideally, employers should have a plan for safe operating procedures in place before employees return to work. However, with the constant changes the pandemic has brought, this might not be the case. Employers are obligated to create a set of

comprehensive policies and procedures outlining their COVID-19 plan and make it available for every employee before they return to work. Additionally, protective gear, masks, sanitizer, and regular cleaning of common surfaces should be considered the new normal.

There may be a plan for staggered shifts or remote work as employees gain confidence in returning to their usual workspaces. Employers should aim to follow the most recent CDC guidelines for health and safety and any city or state mandates that may be in effect.

Although it is difficult in practice, all employees should be held to the same standards as they return to work. These standards may not be the same as before the pandemic; business, as usual, is not business as we are used to it. There will likely need to be considerations made for parents who now may not have reliable childcare and those who have other health considerations or disabilities that make working during a pandemic difficult.

What Types of Claims Might Arise Due to COVID?

There are a few categories of lawsuits that may arise as people return to work during COVID. These include return to work claims, possible wage and hour claims, discrimination claims, and ADA claims. The insurance industry is still adjusting to the changes the pandemic has brought and may not have all the answers to coverage questions yet. However, the number of lawsuits concerning EPLI will not be decreasing in the months and years to come.

Return to Work Claims

Employers can do a few things to minimize the chances an employee will file a wrongful return to work claim. Employers can follow

mask mandates and social distancing guidelines and provide cleaning supplies, masks, and hand sanitizer to employees. Employees can be screened for COVID before entering their workplace. Where possible, employers could implement a staggered work schedule to minimize how many people are in the building or allow for a flexible work from home schedule.

There should also be a plan in place for protocols to follow if an employee contracts COVID-19.

Possible Wage and Hour Claims

Wage and Hour claims are covered under specific EPLI policies. Unfortunately, working from home, staggering a work schedule, and other pandemic considerations can throw people's usual plans off track. Avoiding Fair Labor Standard Act violations is essential, especially during a pandemic. Check your EPLI policy to determine if Wage and Hour claims are covered, partially covered, or not covered.

Discrimination Claims

Discrimination claims can still be brought against a business not only by employees, but also by customers, vendors, suppliers, contractors, service providers, and other third parties. Discriminatory claims will likely increase as health and safety mandates continue to be controversial in some locations. As services remain disrupted for many companies, there may be an increase in discrimination claims as the pandemic continues. EPLI does offer coverage in most cases for claims of discrimination.

ADA Claims

As businesses switch to curbside pickups or takeout only, they are still considered places of public accommodation. This means they still have to be ADA compliant. Pending

ADA claims against businesses, which are permanently closing due to the pandemic, will likely be rendered moot, depending on the case. The COVID crisis could lead to an increase in ADA lawsuits.

Current EPLI Market Conditions

Only time will tell how dramatically the pandemic changes the business insurance structure in the United States. Currently, some underwriting changes are going on that could affect specific EPLI policies moving forward. Some insurance companies are underwriting EPLI policies with more in-depth considerations made to how companies are mitigating their COVID risk, which could change eligibility and policy pricing in the long run. However, the vast majority of insurance companies are not doing the same just yet, and there plenty of other EPLI options on the market.

As there are also many legislative changes being made on the city, state, and federal levels, the insurance industry is trying to keep up alongside other businesses. Companies are examining their EPLI policies to see what their coverages are and what changes need to be made if they aren't satisfied with their current coverage levels. There has been an uptick in lawsuits covered by EPLI, and there have been more businesses choosing this kind of insurance policy or upping their coverage limits this year.

As the ramifications of the #MeToo and #timesup movement continue, EPLI insurers see an increase in sexual harassment-related lawsuits with higher settlements and defense costs. EPLI claim frequencies are reportedly increasing, which also drives premium prices up. There is no indication this trend won't continue well into the rest of 2020.

Benefits of WA Group

Many benefits come from working with a 100% ESOP owned insurance company. Not only are we made up of insurance experts in all categories, but our company boasts an executive risk expert who can guide businesses of all kinds through the uncharted territory of EPLI claims during COVID times. WA Group offers professional consultations on all insurance coverage, including Directors & Officers Liability, EPLI, Fiduciary, Crime, Professional Liability, and Cyber Liability. We offer custom insurance solutions and unbeatable customer service to make sure your business is covered for all your liability insurance needs.

It's important to have an insurance expert on your side, especially in 2020. As laws and regulations change with the times, having an expert walk you through your coverage options can make all the difference in the financial health of your company.

To learn more about Employment Practices Liability Insurance and COVID-19, contact the experts at WA Group at (507) 452-3366. Our licensed professionals will be happy to answer any questions you have.

