

Employment Practices Liability (“EPL”) Insurance ... the advantages of an EPL policy.

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This article does not purport to analyze employer liability or EPL policies in depth. Its purpose is merely to give the reader a better understanding of the coverage afforded by this type of product.

1- Employer liability:

An employer may incur its liability in various situations. The first example that comes to mind is an action based on the violation of a statutory obligation, that is, a duty imposed by law. Cases often arise where the employer fails to comply with the standards enacted by the various labour or health and safety laws. An employer may also be required to indemnify an employee for a breach of the express or tacit provisions of an employment contract. Finally, an employer may be sued by a third party for an extra-contractual fault. Remember that the employer may be accountable for not only its own negligence but also that of its employees. For example, it is not unusual for an employer to be found liable for the consequences of the psychological harassment of one employee by another.

Although the circumstances that may incur the employer’s liability are many and varied, the most common grounds fit into the following categories:

- discrimination or misrepresentation at the time of hire,
- discrimination in the workplace on every basis: age, sex, race, religion, disability, etc.,
- wrongful dismissal,
- communication of private information to a third party looking for a reference on a former employee,
- defamation,
- psychological harassment,
- sexual harassment,
- violence or an attack in the workplace, either against an employee or a third party,

- intimidation,
- management of the employee pension fund.

2- Potential claims:

Employer liability suits may be instituted before various tribunals: civil, administrative or criminal.

In some cases, the victim may seek reparation in kind by applying for reinstatement in his former job. However, more often than not, the victim will seek financial compensation and claim an indemnity for loss of salary, physical injury or alleged psychological injury, damage to reputation and costs. Depending on the jurisdiction, punitive damages may also be awarded.

3- Features of EPL policies:

The type of coverage offered by an EPL policy varies tremendously from one Insurer to another. It is up to the Insured to carefully scrutinize the wording of the policy to determine whether it really suits the company's structure and operations.

We will limit ourselves to drawing the reader's attention to the main features of EPL policies:

a- Claims made:

Most EPL policies are written on a "claims-made" basis rather than on a "per-occurrence" basis. The claim must therefore be reported to the Insurer within the time frame stipulated in the policy.

EPL policies may also have a limited geographical scope. It is therefore essential to ensure that the policy covers the regions where the company has its operations.

b- definition of Insured:

The definition of the Insured in an EPL policy may cover both the company and certain individuals, such as the company's directors or officers. In some instances, the definition will be extended and cover future employees.

c- loss:

The definition of "loss" may also vary from one policy to another. In general, a loss will be described as being a claim made against the Insured which puts the employer's practices in issue. Such a claim may be brought before various civil courts or administrative tribunals.

EPL policies cover a broad spectrum of situations, from claims for wrongful dismissal to job discrimination, harassment, unreasonable disciplinary practices, misrepresentation of employment conditions, depriving a person of advancement opportunities, inadequate

performance evaluation of an employee, all the way to defamation and humiliation. The type of coverage available ensures that to some degree even intentional acts, such as reprisals taken against an employee, may be covered.

If the coverage is broad, the policy will usually contain a number of exclusions. The main exclusions relate to the Insured's statutory obligations concerning workplace safety, employment insurance, pension plans, corporate obligations under the collective agreement, costs of accommodating a disabled employee, etc.

d- costs of defence:

Under an EPL policy, the Insurer agrees to take charge of the Insured's defence. The defence obligation exists not only before the civil courts but also before the various administrative bodies before which an employee may file an application.

In most Canadian provinces, costs of defence are included in the coverage limits of the policy. However, in Quebec the Insurer is not only obligated to defend the Insured but it must also bear the costs of defence over and above the coverage limits stipulated in the contract.

e- damages covered:

Another special feature of the EPL policy is that coverage extends to not only compensatory damages but also exemplary damages. By definition, the claims covered by the policy are indeed of a nature that would entail this type of damages, especially where there has been a violation of a right guaranteed by the Charter of Rights and Freedoms.

4- Comparison of EPL policies with other coverage available on the market:

The coverage offered by EPL policies is different from the other products on the market, both in terms of the losses covered and the definition of the Insured.

Traditional D&O policies are designed to cover the directors and officers for negligence in the administration of the company or breach of their fiduciary duty. Such policies generally do not cover the company. Wilful negligence is clearly excluded, rendering the policy useless in the case of an action based on reprisals. Nor do D&O policies cover claims for bodily injury, which may raise certain issues if the victim complains of psychological damage due to the employer's conduct. Finally, such policies generally exclude "sexual misconduct", although that constitutes one of the most onerous risks an employer may have to assume.

General liability insurance policies are also not well suited to claims founded on the Insured's employment practices. In essence, such policies are based on the concept of an accident or event which, by definition, is sudden and unforeseeable by the Insured. It

is hard to imagine how a dismissal or the adoption of a discriminatory policy could fit this definition.

Moreover, liability policies generally exclude employee damages or claims. In principle, such claims must be for bodily injury or property damage, although they can extend to personal injury. Wilful damage is clearly not covered and a number of policies contain a specific exclusion for damages in the context of employment. Finally, unlike EPL policies, only compensatory damages are covered.

Conclusion:

EPL policies therefore meet a specific market need and enable an employer to shield itself from potential actions based on its employment practices. Every employer should take a critical look at its practices to assess whether such a product would be advisable. The involvement of a third party, the Insurer, in employment relations could also create problems.

The market for EPL policies is still evolving. It is important for the employer to ascertain that the policy it takes out is consistent with its reality. Absent a standard formula, the Insured must pay close attention to the available coverage, and especially the policy exclusions. It should also be aware that because this product is new, the courts will be called upon to rule on a number of aspects of the coverage and the legality of certain clauses.