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SPECIAL REPORT

EMPLOYMENT PRACTICES LIABILITY INSURANCE
What It Is and Why You Need It

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In securing insurance coverage for your business, you may ask: What is Employment Practices Liability Insurance, and does my business really need it? The short answer is, "Yes, if you have employees, Employment Practices Liability Insurance is essential to your business."

Employment Practices Liability Insurance and What it Covers

Employment Practices Liability Insurance provides employer coverage for **settlements, judgments, and legal defense costs** in employment-related suits brought by current employees, former employees, or even potential employees that you may have only interviewed. In general, Employment Practices insurance covers employers for claims arising out of employment matters such as sexual harassment, retaliation, discrimination (e.g. race, sex, age, disability, religion), wrongful termination of employment, and other employment-related allegations. Employment Practices Liability Insurance generally covers your business or firm, including its Directors and Officers (though, Directors and Officers Liability Insurance should also be considered as a necessary and separate coverage for claims brought specifically against Directors and Officers).

Significantly, legal defense costs are within the coverage limit, not in addition to your limit. That means the attorneys' fees and costs associated with defending the claim will reduce your limit. For example, if you only have $500,000 total coverage and your attorneys' fees are $250,000, then you only have $250,000 left for a settlement or judgment. This may not be enough as plaintiff's demands are often into the millions for these types of

claims. The astounding verdicts in these types of claims are addressed in more detail below.

Companies often think that if they have committed no wrongdoing, they will not be sued. But this simply is not true. Even if the claim against your company is meritless or fraudulent, the cost of proving that the claim against you should be dismissed is a significant drain of your resources.

The Litigation Process

As an attorney who practiced at a defense firm for several years, I can attest to the significant cost of litigation. This is true even where the case is dismissed prior to trial. The following is a simplified summary of the process of defending a claim and evidences why the immense legal fees can come as an unwelcomed surprise to many companies.

Once a claim is filed against your business, you secure an attorney and answer the complaint. Next, pre-trial discovery commences in which a team of attorneys conducts "discovery" (e.g. depositions, interrogatories, investigations, discovery motions, etc.). Discovery is a process that can take anywhere from weeks to months to complete.

Once discovery is conducted, your team of attorneys then undertakes legal research and will likely prepare a dispositive motion supported by a lengthy legal brief in an attempt to get your claim dismissed. Since attorneys often bill at a rate of several hundred dollars an hour, the cost of defense can quickly become staggering. And this is all before trial has even begun.

In the event that your claim is not dismissed, you then continue on with the litigation process and move to trial. Once a case goes to trial, a tremendous number of hours are spent litigating your case, from pre-trial motions and briefs to the trial itself, resulting in large legal fees. A remarkable amount of time goes into trial preparation in addition to the days or even weeks of actually attending trial, depending on the complexity of your case. It is not unusual to spend several hundred thousand dollars in legal fees for a case that goes to trial, which can be devastating to many companies.

Additionally, following a verdict or dismissal, there is likely to be an appeal in the case which can take upwards of an additional hundred hours between submitting briefs, prepping and attending oral arguments. Thus,

you could be facing an additional hundred thousand dollars tacked on to your legal bill for either pursuing an appeal or defending an appeal. In fact, I have worked on cases where more than one appeal took place in a single case. Claims that proceed to trial and appeal often take years of your time, which equals years of mounting legal defense fees.

Whether the case is resolved prior to trial or after litigation and appeal, the end result is often an enormous legal bill for several hundred thousand dollars. Therefore, it is crucial that your company secure adequate Employment Practices Liability Insurance limits to cover not only your settlement or judgment, but also the significant cost of defending your claim.

Moreover, employers are often surprised to discover that their Commercial General Liability policies lack coverage for employment-related lawsuits and claims. In fact, most Commercial General Liability policies contain specific wording excluding coverage for these types of claims.

Similarly, most Professional Liability policies also exclude coverage since it is not a claim by a client, but instead an insured (an employee) suing another insured (the employer). Most often there is also an express employment practices exclusion within a Professional Liability policy. For this reason, Employment Practices Liability Insurance is essential to fill that gap in a company's insurance package.

Employment-Related Claims and Verdicts on the Rise

Finally, employment-related lawsuits and legal costs are dramatically on the rise, making coverage more important than ever. The influx on employment litigation can be attributed to several factors.

Over the past couple decades, there have been several federal statutes and state counterpart statutes which have created a favorable climate for plaintiff employees to bring lawsuits against their employers. Notably, these laws include and are enforced by the Equal Employment Opportunity Commission (EEOC):

- Title VII of the Civil Rights Acts of 1964 (discrimination based upon race, color, sex, national origin and religion),

- Civil Rights Act of 1991 (providing for jury trials in federal courts and punitive damages),
- Age Discrimination in Employment Act of 1967 and 1985,
- Americans with Disability Act of 1992, and
- Family and Medical Leave Act of 1993 (including maternity and family leave).

Where the federal statutes leave off, state statutes provide remedies for plaintiffs such as Michigan's Elliot Larsen Act. Federal and state legislation create complex laws that can be difficult for companies to keep in compliance. There are intricacies to these laws that businesses are sometimes unaware of, whether it is not realizing what factors cannot legally be considered in making an adverse employment action, or even knowing the accommodations that must be made for certain employees from disabilities to nursing mothers.

Moreover, in many cases statutes provide that aggrieved persons are entitled to attorneys' fees if they prevail with even nominal damages. Thus, even in cases where there are no substantive damages, there can be a substantive cost to the business.

In addition to recent legislation providing remedies to employees, the economy and media create an environment making employment-related suits more prevalent in our society. With so many recent cases involving harassment charges against high profile individuals, officials, and politicians, employees have become more aware than ever that the court system is available to them.

Similarly, labor demographics are shifting the balance in employment. As a sector of the working population becomes older and more employees come from diverse nationalities, religions, and cultures, the makeup of the workforce changes and creates an environment making employment practices claims more prevalent.

Along with employees realizing that the court system may provide a remedy, plaintiff employees are requesting higher demands than ever. It is not uncommon for a plaintiff employee to demand millions of dollars in a settlement or jury verdict for an employment claim.

In Grand Rapids, Michigan, a jury awarded **$7.9 Million** to a female employee who worked for Consumers Energy for claims of sexual harassment, hostile work environment.

In 2011, a jury awarded **$95 million** to a former employee in a sexual harassment suit. The defendant chain of more than 1,800 stores made a profit of $118 million the previous year, and a jury stated that it owes the vast majority to a former employee of one of its branch stores in a sexual harassment case against her boss. The employee, whose life struggles became part of the case, was awarded $95 Million in compensation. It is expected that a cap on damages in federal sexual harassment cases will reduce that to about $41.6 Million.

In 2011, a former UBS sales assistant was awarded a **$10.6 Million** jury verdict in a sexual harassment and retaliation suit. In 2007, a former team executive of the New York Knicks received an **$11.6 Million** jury verdict in a harassment and retaliation suit.

In 2012, an employee was awarded a **$168 Million** jury verdict in a California sexual harassment and retaliation suit. A federal court jury awarded the 45-year-old former cardiac surgery physician assistant $125 Million in punitive damages, $39 Million for mental anguish and $3.5 Million for lost wages and benefits. The district court applied a statutory cap on some of the damages, reducing the verdict to $82,330,484.80.

On May 1, 2013, a jury awarded more than **$20 Million** in a sexual harassment and retaliation suit brought by the Equal Employment Opportunity Commission (EEOC) on behalf of employees of a Florida travel agency. A federal jury returned a unanimous verdict awarding a total of $20,251,963 to eight former employees of Four Amigos Travel, and Top Dog Travel, a former Florida vacation agency, who suffered sexual harassment and retaliation.

Just recently, the EEOC announced a jury award of over **$1.5 Million** in a sexual harassment and retaliation suit against New Breed Logistics. This jury verdict represents the second $1.5 Million verdict in a sexual harassment case that EEOC office has obtained since March 2011.

As further example of the staggering verdicts in employment practices claims, the EEOC reported "four noteworthy resolutions" of cases in 2008:

- $27.5 Million settlement in age discrimination claims against law firm Sidley & Austin
- $4.3 Million settlement on behalf of a class of Hispanic warehouse workers at B&H Foto & Electronics
- $2.2 Million settlement following harassment and retaliation claims against New York's Tavern on the Green
- $1.6 Million settlement following race discrimination claims with Visteon Corp. and Ford Motor Co. on behalf of black workers allegedly denied entry to apprenticeship programs

Similarly, the EEOC recently announced a $600,000 settlement with egg giant National Food Corporation to settle a sexual harassment lawsuit. Likewise, BMO Harris Bank will pay $400,000 to a group of 14 former employees to resolve a disability discrimination case brought by the EEOC.

These are merely examples of a few individual cases, with hundreds of millions being awarded in employment claims since. In fact, the EEOC reported $359.4 Million in monetary benefits awarded between 2008-2011, in EEOC charges alone:

- 2008 – $101.2 Million
- 2009 – $ 82.1 Million
- 2010 – $ 85.1 Million
- 2011 – $ 91.0 Million

In 2012, the EEOC reported 99,507 charges in the United States. Michigan alone had 2,587 federal charges in that year alone.

The 2012 EEOC Claims Statistics are detailed below. The Michigan charges from 2012 are broken down into categories of claims. In a three-year span (2010, 2011, 2012), Michigan had 8,049 EEOC charges filed. That means thousands of businesses were affected by federal claims brought by employees.

Significantly, these numbers represent only the EEOC's monetary awards in enforcing federal laws prohibiting employment discrimination. The $359,400,000 awarded in employment-related claims between 2008-2011 does not even contemplate the myriad of claims brought under various state statutes.

No employer is immune from employment lawsuits. Every company that has employees has an Employee Practices Liability risk exposure and should be proactively covering its assets to mitigate the potentially catastrophic impact of judgments, settlements, and defense costs associated with employment-related litigation. Moreover, third parties such as customers and clients are also frequently seeking legal remedy for alleged discrimination or harassment, posing an additional exposure.

You may think they are doing everything by the book, but do you really know what your managers and employees are doing every second of the day? Whether it is a joke told in the break room, an inappropriate email, an employee that has been fired, or even a person you interviewed and decided not to hire, every employer faces the risk of being pulled into a legal action by a past, present, or prospective employee.

2012 EEOC Claims Statistics

2012 Claims by State (includes United States and U.S. Territories)

Total 2012 Charges – United States and U.S. Territories . . . . 99,507 *
Michigan 2012 Total Charges . . . . . 2,587 *
Michigan Total Charges 3-year span only . . . . . 8,049 *
(2010=2,737; 2011=2,725; 2012=2,587)

Michigan 2012 EEOC Claims by Category **

- Race – 860
- Sex – 686
- National Origin – 129
- Religion – 74

- Color – 19
- Retaliation – 781 (Title VII Retaliation claims account for 628)
- Age – 545
- Disability – 814
- Equal Pay Act – 17
- GINA *** – 4

Monetary Benefits Awarded in EEOC Litigation ($ in Millions)

- 2008 - $101.2 Million
- 2009 – $ 82.1 Million
- 2010 - $ 85.1 Million
- 2011 - $ 91.0 Million

* The number of total charges reflects the number of individual charge filings. Because individuals often file charges claiming multiple types of discrimination, the number of total charges for any given fiscal year will be less than the total of the ten categories of discrimination listed.

** These numbers are based on Michigan EEOC claims and do not even include state law statutory claims such as Elliot Larsen.

*** GINA is Title II of the Genetic Information Nondiscrimination Act. The Act, which prohibits genetic information discrimination in employment, took effect November 21, 2011.