

SPECIAL REPORT

19-YEAR EMPLOYMENT PRACTICES CASES FROM 1998 THROUGH 2016

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VOLATILITY

We have concluded our review of the 2016 Employment Practices cases for the past 19 years from 1998 through 2016. The green graph demonstrates the volatility of this litigation class, which relates to claims by employees or applicants against employers for violations of the employees' rights under various employment-related statutes and also contractually. The volatility of these cases needs to be recognized and if we look at the cases in the \$5,000,000+ category, we see the following highest settlements and judgments:

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|---------|--------------|---------|--------------|
| • 1999: | \$45,000,000 | • 2005: | \$10,600,000 |
| • 2000: | \$7,100,000 | • 2010: | \$7,900,000 |
| • 2002: | \$10,600,000 | • 2013: | \$5,500,000 |
| • 2003: | \$6,200,000 | • 2015: | \$16,500,000 |
| • 2004: | \$5,000,000 | | |

This volatility can be as a result of a class-action lawsuit by many employees as in the 1999 case, which is a class-action resulting in \$45,000,000 in settlements or judgments because of alleged wrongful acts for the years 1992-1995.

Volatility can also be the result of a very large company with stock options, resulting in litigation. In 2015, we see a \$16,500,000 judgment in this category.

Volatility can also be in a smaller company with multiple employee claims as in the 2013 \$5,500,000 wrongful discharge case involving four employees.

If we eliminate the \$45,000,000 in 1999 and the \$16,500,000 in 2015, we can say that most cases looking back were in the \$5,000,000 or less category with some potential for cases in the \$10,000,000 area.

DECIDING ON A LIMIT

When deciding on what limit you should choose under your Employment Practices policy, you need to be aware that there is an important distinction between an Employment Practices case and an automobile or slip and fall case from an insurance coverage standpoint. The difference is that the Employment Practices liability policy includes legal defense costs within the limit and these can be substantial, so a \$5,500,000 judgment could have perhaps \$500,000 in legal fees, diminishing the amount that is available to pay a judgment or settlement. This is not true in an automobile or slip and fall case where legal fees are covered outside the limit on an unlimited basis in most cases.

When deciding on a limit under an Employment Practices policy, not only do you need to consider the legal fees, but also other factors that are unique to every business such as:

- Public or private company
- Strong HR department or not
- Number of employees
- Wage level of employees
- Claims history
- Turnover of workforce
- Increases in workforce because of expansion
- Multiple locations or single location
- Nature of employees such as low-wage employees doing assembly work versus high-wage professionals working within an office or, let's say, a medical facility
- Collectability of the employer and its executives

As a general rule, a \$15,000,000 limit including legal defense costs would not be an excessive limit for most companies.

CLAIM REPORTING

The policy that provides coverage for Employment Practices claims is almost always a claims-made policy, meaning that it is triggered when the employee makes the claim and not necessarily when the offense occurred. For example, if an employee is terminated in January 2017 and then the first notice of a claim arrives January 2018, it is the 2018 policy that would provide coverage for that claim. If no policy is in force in 2018, the employer would have no coverage.

A claim is not necessarily a formal lawsuit; it could be a letter from the employee or an attorney and even an EEOC (Equal Employment Opportunity Commission) complaint or an MESC (Michigan Employment Security Commission) complaint that includes allegations of wrongful acts. Failure to report a claim quickly could result in a claim denial under a claims-made policy.

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