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## Navigating the Employment Practices Liability Insurance (EPLI) Maze

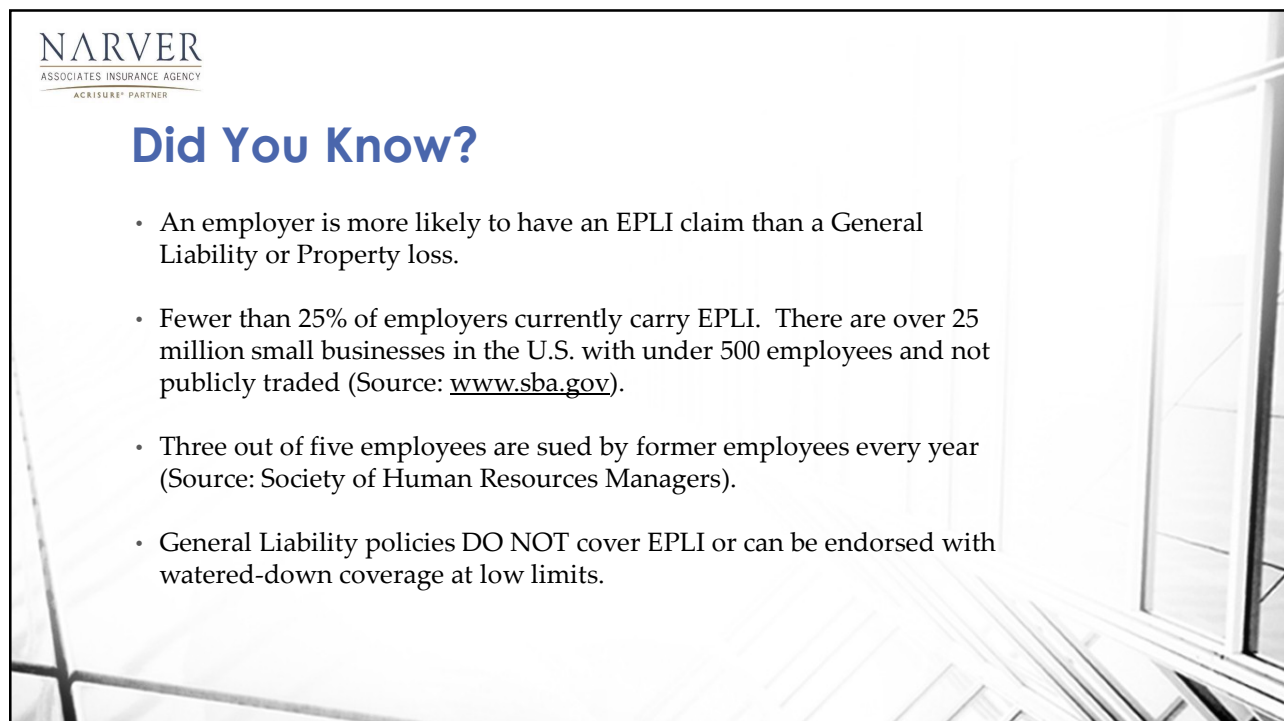
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## Did You Know?

- An employer is more likely to have an EPLI claim than a General Liability or Property loss.
- Fewer than 25% of employers currently carry EPLI. There are over 25 million small businesses in the U.S. with under 500 employees and not publicly traded (Source: [www.sba.gov](http://www.sba.gov)).
- Three out of five employees are sued by former employees every year (Source: Society of Human Resources Managers).
- General Liability policies DO NOT cover EPLI or can be endorsed with watered-down coverage at low limits.

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## Myths of EPLI

- EPLI was created by insurance companies to create new premium sources.
- The exposure is no higher today than it was in the past.
- Employees are already protected under other insurance policies.
- EPLI premiums are too high, and the underwriting process is cumbersome and time-consuming.

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## EEOC Investigations: What You Should Know

- The average time it takes to process an Equal Employment Opportunity Commission (EEOC) investigation is **10 MONTHS**.
- Longer if there is a delay in responding to information requesting to get a determination.
- **Think of the defense costs as well as the cost of the time of the people involved!**

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## EPLI Claim Trends

- Over 40% of EPLI claims are brought against private employers with under 100 employees (Source: Society of Human Resources Managers).
- Most litigious states: CA, NJ, IL, TX, FL, and NY (Source: Insurance Journal).
- EPLI claims represent 30% of all civil litigation in the U.S. today (Source: Bickmore Risk Services).
- Over 500 EPLI lawsuits are filed every day (Source: Insurance Journal).
- The average cost to defend an EPLI claim is \$150,000 (Source: Insurance Journal).

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## Exposures – Federal Laws

- Fair Labor Standards Act of 1938 (FLSA)
- Equal Pay Act of 1963 (EPA)
- Title VII to the Civil Rights Act of 1964
- Executive Order 11246 of 1965
- Age Discrimination in Employment Act of 1967 (ADEA)
- Americans with Disabilities Act Amendments Act of 2008 (ADAAA)
- Family and Medical Leave Act of 1993
- Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)
- Employment Non-Discrimination Act (proposed) – 2007 (ENDA)
- Genetic Information Non-Discrimination Act of 2008 (GINA)

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## Exposures – Federal Laws

- Civil Rights Act of 1991
  - Amended Title VII
  - Allows for
    - Jury Trial
    - Punitive Damages
    - Damages for Mental Anguish and Emotional Distress
- In 1992, the first stand-alone EPLI policies hit the marketplace.

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## Background to EPLI

- EPLI was designed to cover employers and their directors, officers, and employees for claims brought by past, present, or prospective employees alleging employment-related wrongful acts.
- The policy largely evolved to fill the gaps in standard general liability, professional liability, and directors and officers liability policies.

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## Importance of EPLI in Current Workplace Settings

- All businesses with employees have an exposure.
- It only takes **ONE** employee to bring a claim but countless situations that could lead to grievance.
- Hire/fire – Every time an employer hires or fires an employee, the employer runs the risk that one of those new hires or recently fired employees may sue down the road.
- Vicarious liability – Employers can be held vicariously liable for acts committed by their employees in the workplace.
- Media – More than ever, employees are aware of their legal rights as a result of a regular stream of well-published cases in this area and a greater level of general awareness of laws that protect them in the workplace. Increasingly, the media has been used to exert pressure on employers. The key “trial by media” cases are now well known.

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## Importance of EPLI in Current Workplace Settings

- Social Media – The prevalence of social media and other online networking sites is also creating significant concern and potential liability for employers. Although the most common claim arising from employees’ or employers’ access of social media and networking sites appears to be invasion of privacy, the practice could also lead to claims of discrimination if an employer or supervisor only “friends” certain employees and not others, or defamation if certain disparaging comments are made about employees. The potential exposure is compounded by the fact that many employers now use social networking sites as part of their background checks on potential job applicants.

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## Persons Covered Under EPLI Policies

- The employer (company/organization/entity and all subsidiaries that are more than 50% owned, under management control, or the control of an appointed board).
- Directors, officers, and employees (past/present/future).
- Employee may include full-time, part-time, seasonal, temporary, and leased employees. Volunteers and independent contractors also may be included in the definition.
- Most EPLI policies also provide coverage extension to spouses and domestic partners, heirs, estates, and legal representatives for claims against the estate or spouse of an individual insured as a result of the insured's wrongful act (although wrongful acts of the spouse or domestic partner are not covered).

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## Common Root Causes for EPLI Claims

- No orientation for new employees.
- No supervisory or management training.
- Unclear performance expectations.
- Short probation periods.
- Asking people to perform beyond their abilities or authority.
- Providing no incentives to perform well.
- Lack of succession planning.

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## Common Root Causes for EPLI Claims

- A workplace dominated by fear, silence, and isolation.
- Lack of diversity training.
- Inconsistent execution of policies and procedures.
- Perception of unfair treatment.
- Not addressing problems, harassments, and marginal performers.

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## EPLI Coverage Features – Covered Perils

- Discrimination
- Retaliation
- Wrongful Termination
- Sexual Harassment
- Workplace Harassment
- Breach of Contract

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## EPLI Coverage Features – Covered Perils

- Discrimination
  - Discriminating against employees in the workplace is a criminal offense.
  - EEOC has passed seven different federal laws against discrimination.
  - An EEOC report shows that over 67,000 charges of workplace discrimination were placed in 2020.
  - The high number of discrimination cases shows the importance of EPLI for businesses since EPLI will pay for in-court and out-of-court settlements.
  - The coverage includes discrimination based on:
    - Race
    - Sex
    - National origin
    - Religion
    - Color
    - Age
    - Disability

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## EPLI Coverage Features – Covered Perils

- Retaliation
  - If an employee alleges discrimination or harassment and in revenge, their employer could take harmful action against them.
  - For example, if you fire, demote, or harass an employee for filing a discrimination claim, it is retaliation.
  - Such cases can result in employers paying out for compensatory and punitive damages, not to mention the costs of legal representation.

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## EPLI Coverage Features – Covered Perils

- Wrongful Termination
  - Wrongful termination is when an employee is terminated unlawfully.
  - Suppose an employee injures their shoulders at work and cannot work for a month. If the organization immediately fires the employee, then it is considered wrongful termination.
  - Although it is difficult for employees to win wrongful termination claims, it still takes time and money for employers to defend themselves.

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## EPLI Coverage Features – Covered Perils

- Sexual Harassment
  - Sexual harassment is a national issue, and its awareness is on the rise.
  - EPLI protects against any lawsuits that arise from sexual harassment in the workplace.

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## EPLI Coverage Features – Covered Perils

- Workplace Harassment
  - Department of Labor (DOL) states that workplace harassment is punishable under federal law.
  - No employee can harass another employee based on race, color, religion, sex, national origin, age, disability, genetic information, sexual orientation, or parental status.

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## EPLI Coverage Features – Covered Perils

- Breach of Contract
  - Violation of the terms of the employment contract is also a legal offense.
  - All employers and employees must sign an employment contract while starting a job.
  - Breach of contract is when any one of the parties fails to abide by the terms of the contract.
  - EPLI covers you for lawsuits arising from breach of contract.

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## EPLI Defense Coverage

- EPLI policies include defense coverage.
- This coverage is of two types:
  - Duty to defend – The insurer has to choose your lawyer, fight your case, and pay your fines.
  - Non-duty to defend – You choose your lawyer and fight your case. The insurer only pays for the defense costs. You can select the type of defense coverage as per your needs.
- Some other events that EPLI covers are:
  - Defamation cases.
  - Negligent HR decisions.
  - Negligent supervision of appraisal processes.

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## EPLI Defense Coverage

- EPLI is usually written on a claims-made basis, which means that the policy only covers claims made while the policy is in effect and if the event in question occurred while the policy was in effect.
- If an incident happened in the coverage period, but the claim was made after the coverage period had ended, the policy will not cover the losses.
- That is where a tail policy can be helpful. A tail policy covers losses after the coverage period and essentially extends the reporting period. If an incident happens during regular coverage and then is reported while a tail policy is in effect, the losses will be covered.

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## EPLI Defense Coverage

- EPLI coverage usually comes with “consent-to-settle” and “hammer” clauses.
- When there is a consent-to-settle clause, the carrier needs your consent to settle claims.
- The hammer clause comes in effect if you do not want to settle a claim, but your insurer does. When this happens, your carrier will give you a fixed amount of money to cover your losses.

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## EPLI Definition of “Claim”

- Written demand – an oral threat leads to a “notice of circumstance.”
- Demand for monetary damages of non-monetary relief.
- Civil proceedings.
- Arbitration proceedings but not any labor or grievance arbitration under a collective bargaining agreement.
- Administrative or regulatory proceedings with the EEOC or similar federal, state, or local agency.
- Office of Federal Contract Compliance Programs (OFCCP) – Audit, Notice of Violation, Order to Show Cause.

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## EPLI Common Exclusions

- Bodily injury – EPLI does not cover bodily injury. It covers only cases related to bullying and mental distress due to a hostile work environment.
- Property damage – EPLI does not cover property damage.
- Penalties and fines – EPLI will not cover monetary penalties as well as criminal penalties.
- Criminal activities – If an employer is involved in illegal activities, then EPLI will not provide coverage.
- Contractual liability – EPLI does not cover any loss arising from a commitment to an employee, as mentioned in their contract.
- Strikes or lockouts – EPLI does not cover costs due to strikes or lockouts by employees.
- Violation of laws – EPLI does not cover the breach of laws.

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## Violations Not Covered Under EPLI

- National Labor Relations Act – Protects laborers' rights to form a union and collectively bargain with their employers.
- Worker Adjustment and Retraining Notification Act – States that an employer must provide 60-day advance notice if they lay off more than 50 employees at a time.
- Occupational Safety and Health Act (OSHA) – Protects employees' right to safety and healthcare services while on duty.
- Employee Retirement Income Security Act (ERISA) – Gives out guidelines for retirement, health, and pension plans.
- Workers' Compensation laws – Gives guidelines to pay employees' expenses if they are harmed while performing job-related duties.
- Consolidated Omnibus Budget Reconciliation Act (COBRA) – Allows employees to get health insurance coverage for some time after leaving the organization.

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## Standard Endorsement to EPLI

- Third-Party Coverage – It gives coverage for discrimination lawsuits filed by third parties, such as customers or suppliers. If your employees need to work with third parties often, then we recommend that you get third-party coverage as an addition to your EPLI.

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## Factors Affecting Cost of EPLI

- Number of employees – There are limits to the number of employees covered under one policy. Having more employees significantly increases your risks and defense costs. Hence, the premium is bound to be higher.
- History of lawsuits or employment issues of the employer – Insurance carriers look at an employers' history to calculate their risks before planning policies. The price would be higher if claims, including employment cases, had occurred frequently in the past.
- Employee turnover rate – The employee turnover rate indicates a certain level of risk. The higher number of new employees in an organization indicates a greater amount of risk. A higher employee turnover rate is also an indicator of dissatisfaction among employees. Therefore, the premium rate will be higher if employees are leaving often.

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## Common Lawsuits Relevant to EPLI

- Medical marijuana use – Employers would not be able to force job applicants to test for the use of marijuana. EPLI will cover losses from cases related to the use of medical marijuana.
- Sexual harassment lawsuits – The rise of the “Me-Too” movement has encouraged women and men to come forward about their experiences of sexual harassment.
- Whistleblower claims – Whistleblower claims filed by employees in the U.S. has resulted in more than \$2 billion losses to employers embroiled in wrongdoing since the Securities and Exchange Commission’s inception (Source: 2019 Securities and Exchange Commission Annual Report).
- Website accessibility lawsuits – If websites are not accessible to differently-abled people, then it violates the law. These lawsuits are also on the rise. Third-party coverage includes these types of claims.

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## EPLI Claims Scenarios

- Wrongful Termination – An executive of a manufacturing company filed a suit against the company for wrongful termination and intentional infliction of emotional distress. The plaintiff, a former Chief Operating Officer, made statements that the company failed to pay an employee overtime and terminated the employee for filing a complaint. The plaintiff alleged that although the company advised him that his termination was due to performance problems, he was actually terminated in retaliation for the honest statements he made in connection with a fellow employee’s termination. Total defense costs and settlement exceeded \$500,000.

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## EPLI Claims Scenarios

- Retaliation – The plaintiff alleged she had her employment terminated because she testified on behalf of another co-worker who brought a separate action against the company. Plaintiff alleged that this was a violation of her employment contract, which provided that she could only be terminated for good cause. Plaintiff asserted cause of action for wrongful termination, breach of contract, and retaliation. Total defense and settlement exceeded \$120,000.

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## EPLI Claims Scenarios

- Sexual Harassment – The plaintiff alleged she had her employment terminated because she testified on behalf of another co-worker who brought a separate action against the company. Plaintiff alleged that this was a violation of her employment contract, which provided that she could only be terminated for good cause. Plaintiff asserted cause of action for wrongful termination, breach of contract, and retaliation. Total defense and settlement exceeded \$120,000.

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## Best Defenses for Employers

- Create effective hiring and promoting programs to avoid discrimination.
- Post corporate policies throughout the workplace and in the employee handbook (review them annually for updates).
- Provide employees with clear, written steps to follow in reporting acts of sexual harassment or discrimination.
- Provide annual training to managers/supervisors on how to handle discrimination claims from employees.
- Document, Document, Document! Be sure all actions related to harassment and/or discrimination situations are documented.
- Identify workplace issues that create employment-related lawsuits.
- Purchase EPLI coverage.

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