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Using EPL insurance effectively in mediation

Understand what your policy does and does not cover, and what your relationship is with the insurer

BY DEBORAH GAGE HAUDE, ESQ.

Many companies purchase employment practices liability (EPL) insurance to cover the costs of defending a variety of claims and losses related to employment litigation. These may include negligent hiring, failure to promote, wrongful termination and a host of other claims brought under discrimination, contract or tort theories. There are, however, limitations on what an EPL policy may cover. For example, attorneys' fees may be covered, while losses are not. Potentially expensive claims arising under the Fair Labor Standards Act (FLSA) or state wage and hour law, WARN Act, ERISA or severance pay plans may be excluded. Coverage for defense costs may count towards the policy limits, eating into the amount available for a settlement. Insurers may also be allowed to make decisions as to choice of defense attorneys, whether to mediate, and whether to settle and for how much.

Since a great number of employment disputes today go to mediation and then settlement, it is important to know that the clock could be ticking on what a company can pay out for the process. There are, however, ways to build a smoother process.

It is important to have a clear understanding before mediation of what the EPL policy does and does not cover, who makes decisions, whether possible allocation issues exist and how the insurer values the insured portions of the claim.

A thorough reading of the policy will provide answers to many of the underlying questions about a company's relationship with the insurance carrier. Companies should pay attention to restrictions in the policy and the size of the deductible. If a company's business is large enough and important enough to the insurer, it might actually have more leeway in deciding on issues such as defense counsel, choice of mediator and settlement amounts than the policy language might suggest. If not, company representatives must be prepared to explain or advocate to the insurer what the company needs that may be beyond the literal language of the contract.

The next step involves the logistics of the mediation itself, and who will work with company representatives in terms of the insurer and defense counsel. Will there be an insurance representative at the mediation? If not, how accessible will he or she be? Do company representatives understand the respective roles, including decision-making, among company, the insurer and the defense counsel? How does the insurer value the case? If it is not the same as company's valuation, it is helpful to understand that. Are there special aspects that are important to the company, such as precedent or publicity? Can the company persuade the insurer to see things its way if needed, or to see value in settling on terms that company representatives think are necessary in this particular case? What does the company believe the costs of defense are likely to be? Does the insurer agree?

As company representatives work through an approach to the mediation and the insurer, another consideration is whether the case has multiple counts and, if so, whether the insurance policy covers only some counts. If there are allocation issues and the company will likely end up contributing to a settlement, is it better to sort that out before the mediation, or will it be up to the mediator to help with a mediation-within-a-mediation?

EPL insurance can help a company deal with claims and litigation. Being prepared and understanding the mediation process can ensure that a company gets the most out of what is available under the EPL policy.

Deborah Haude, Esq. is a panelist with JAMS, based in Chicago. Ms. Haude handles a full range of employment, discrimination, wage and hour, and compensation and benefit disputes, as well as commercial disputes and non-profit board matters. She can be reached at dhaude@jamsadr.com.