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PERSPECTIVE

Do you know if insurance covers employment claims?

By Hon. Rex Heeseman (Ret.)

Insurance issues may be key in resolving employment claims. Assuming the presence of some insurance, from the claim's inception counsel should be cognizant of the existence of a "potential for coverage" and therefore a duty to defend; if extant, such coverage will pay for most (if not all) of the attorney fees and costs for the employer defendant as well as, perhaps, certain other defendants (e.g., a sued supervisor). Similarly, counsel later needs to evaluate the presence of "actual coverage," that is, the insurer's indemnity duty, if present, to pay for any settlement or judgment. In this sense, "counsel" can be either plaintiff's or defendant's, as each should frequently benefit from this knowledge.

Because of a limitation upon or a complete lack of employment coverage in many policies, some insurers offer liability insurance specifically designed for employment-related claims, aka an employment practices liability (EPL) policy. Depending upon the circumstances giving rise to the claim, and the identity of those sued, an employer may be entitled to defense expenditures or indemnification under an EPL policy.

On the other hand, another policy (alone or with an EPL) may provide coverage for employment-related claims. Such insurance may be found in policies such as employment benefits liability (aka EBL, focusing on ERISA risks), commercial general liability (CGL), workers' compensation, employers' liability (EL) ("Part II" of a typical workers' compensation policy), or directors and officers (D&O). Sometimes, such coverages (especially EBL) may be found in another policy or

added to by means of an endorsement.

The typical EPL policy may provide coverage for the "named insured":

- If an individual, also his or her spouse
- If a partnership or joint venture, also its partners or members
- If a limited liability company, also its members and managers
- If another entity, also its "officers" and "directors"
- Employees "unless otherwise excluded"
- Former employees "unless otherwise excluded" but only with respect to a "wrongful act" committed "while in the named insured's employment."

A policy's "wrongful act" may embrace one or more of the following employment-related claims: breach of employment contract; wrongful termination; negligent hiring or supervision; harassment; libel, slander, invasion of privacy, defamation or humiliation; or "other work-related verbal, physical, mental or emotional abuse arising from 'discrimination.'"

Other policies extend to "wrongful employment practices" — for instance, "wrongful failure to promote" or "wrongful demotion, evaluation, reassignment or discipline." Still other policies are more general — "any error, misstatement, neglect or breach of duty ... [related to an] unlawful treatment of an employee."

A cautionary note, many employment policies are claims-made, that is, "on the risk" is not when the damage took place (invariably for "occurrence" insurance) but when the "claim" was first made (i.e., a "claims made" policy). In that regard, the "claim" must first be made during the policy period. Other policies, includ-

ing the standard EPL policy, are written on a "claims made and reported basis" — i.e., the claim must be first to the insured which must report it to the insurer within the policy period (or any "tail" or other extended reporting period).

Because of a limitation upon or a complete lack of employment coverage in many policies, some insurers offer liability insurance specifically designed for employment-related claims.

Other factors may be critical. For instance, a policy may limit the risk to losses or damages first suffered after the "retroactive date" stated in the declarations page. For example, there would be no coverage for a claim relating to sexual harassment which started before the retroactive date even though the alleged misconduct continued long thereafter.

Moreover, exclusions may be significant. A typical exclusion is no insurance for a claim related to workers or unemployment compensation, or for a violation of specified laws (e.g., Americans with Disabilities Act, Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964).

Definitions may be noteworthy. For example, the standard EPL policy states: "We will have the right and duty to defend therein the insured against any 'suit' pursuing damages" as defined therein. "Suit" typically means a civil lawsuit but also may embrace an arbitration or an administrative proceeding (e.g., an EEOC hearing).

Under the standard EPL policy, the insured is responsible for all

monetary exposure up to the deductible. For instance, the insurer's obligation arises only "when the amount of damages and 'defense expense' exceeds the Deductible shown" in the declarations page. On the other hand, some policies refer to the insured's obligation to pay a self-insured retention (SIR); an SIR generally does not reduce coverage limits, while a deductible generally does.

Beyond the preceding features found in many policies, counsel needs to be aware that available insurance for employment disputes may be "unique" in some ways (e.g., coverage for attorney fees if the plaintiff successfully recovers such fees as provided by certain laws (e.g., Fair Employment and Housing Act)).

In urban counties in California, employment disputes often constitute up to one-third of the civil litigation or ADR matters pending in that jurisdiction. One more reason to be cognizant of this insurance which may affect the resolution (by mandatory settlement conference, mediation, trial or arbitration) of such disputes.

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