



**EPLI SELECTION REQUIRES HR INVOLVEMENT AND CAREFUL NEGOTIATION OF APPROPRIATE OPTIONS**

By: Greg Grobe  
Liebmann, Conway, Olejniczak & Jerry, S.C.  
E-Mail: [grobe@lcojlaw.com](mailto:grobe@lcojlaw.com)

The many new laws being passed by congress and state legislatures represent a significant challenge for Human Resource professionals. These increased risks are magnified by other events occurring simultaneously with the enactment of new employment laws. First, the willingness of workers to file claims against their employers has dramatically increased in the past year. The EEOC reports an average 15 percent increase in claims last year, led by a 29% increase in age claims and 23% increase in disability claims. Second, President Obama has promised a significant increase in funding for enforcement agencies (such as the EEOC, DOL, OFCCP, NLRB, OSHA and others) and has appointed many pro-employee leaders as the new heads of those agencies. Third, court decisions and some of the new laws have significantly eased the burdens of proof for employees to establish discrimination. Finally, the recession has led to multitudes of terminations – which are the most risky personnel decision and the most likely to lead to a claim. This combination of legislative, legal and economic factors is creating a “perfect storm” of unprecedented legal risk to employers.

Many employers may look to add or increase Employment Practices Liability Insurance (“EPLI”) coverage to respond to this elevated risk. If so, this is a decision that HR professionals need to be integrally involved in. There are a wide variety of EPLI coverage terms and the use of EPLI can have a significant, and possibly unexpected or unwelcome, impact on the functioning of an organization’s Human Resource department.

Many organizations purchase their insurance through an outside broker. The purchase may be handled through the company’s accounting department, risk manager (if one exists) or possibly the owner (in smaller businesses). The brokers generally provide what they consider the best all around option, or may present several options at comparative prices. Many times the EPLI coverage becomes a rider to the general liability coverage purchased by the company and thus provided by the same insurer. In some cases, little analysis may be given to the nature of the EPLI policy. There are many reasons for this:

- EPLI coverage is a relatively new insurance and is not as “standardized” as general liability coverage. Some involved in the purchase process may not realize this or their ability to bargain coverage clauses to better fit your business.
- Brokers and others involved in the purchase are not HR professionals and may not be as equipped to evaluate the impact of various coverages, exclusions and other terms, or understand what might be the best options given the HR environment and policies of your workplace.
- Brokers and purchasers may focus primarily on cost and deductibles instead of items which may have a more direct impact on your personnel practices.

The purchase of EPLI coverage and the decisions made by the EPLI insurer may have a significant impact on your business and your personnel practices. For example, some insurers view legal claims

solely as a function of liability risk and monetary cost, and apply the same analysis that is applied to a routine automobile accident case. Employment claims are different – the results of a settlement may become widely known by a large group of potential plaintiffs (co-workers), the case may impact the company’s reputation and ability to attract future employees, the settlement decision may create a precedent not only for the settlement of future claims, but also for handling future employee issues, and employment lawsuits often involve challenges to policies or practices rather than a single incident. EPLI policies often include clauses giving the insurer two significant rights – the right to approve or select counsel and the right to control settlement (also known as the “hammer clause”). Each of these clauses creates potential problems for an employer and efforts should be made to negotiate both clauses out of any EPLI policy.

The “hammer clause” allows the insurer, not the employer, to decide when the case is ready to settle and what amount. If the employer does not agree, the insurer will not be liable for any subsequent judgment or settlement in excess of the amount the insurer decides is reasonable. In some policies, the insurer no longer has to pay defense costs. The employer, on the other hand, may want to defend the case, even if the cost of settling it is less than the cost of defense, due to the precedential nature of the settlement and other factors. The existence of the “hammer clause” can create serious conflicts between the insurer and the insured and come as an unwelcome surprise to an employer who purchases the policy without recognition of this danger.

In conjunction with the hammer clause, some EPLI policies allow the insurer to select counsel. This again may be a severe disadvantage to the employer. For example, when conflicts between the insurer and employer arise over such issues as the appropriate settlement amount, the counsel selected by the insurer (which is often a firm that relies upon the insurer for a significant portion of their revenues) may not be trusted as an advocate for the employer’s position. The employer may have disagreements with counsel selected by the insurer in the scope of the defense and may want to have more effort put in the defense than the insurer is willing to authorize. Once again, there will be a question of whether the employer will have trust in the “assigned” counsel as opposed to the employer’s regular labor counsel.

The defense of a case may be greatly assisted by an overall knowledge of the employer’s business, knowledge of the backgrounds and personalities of the owner, managers and employees, knowledge of past incidents and events that may be relevant in defending the current claim, and knowledge and appreciation of the ripple effect that a settlement or adverse verdict may have on the organization. Insurers, on the other hand, may also be more focused on the costs of the attorney rather than the quality of representation, and may select counsel who may not be specialized in employment laws or in the industry or trade that your business is involved in.

Unfortunately, the selection of counsel is not an issue that can generally be negotiated at the time a claim is filed. It should be negotiated at the time that the insurance is bid. If the issue is not raised until a later date, the insurer may refuse to use counsel other than that which it has selected, or may require that the employer pay some or all of the defense costs in order to retain its present counsel. Thus, selection of counsel should be negotiated as an endorsement to a duty-to-defend policy.

In addition to “hammer clauses” and selection of counsel, care should be taken in reviewing the definition of “insured” in terms of who is protected and will be defended by the insurance. If the organization has subsidiaries or related organizations, those should be specifically named. All of the owners, directors, employees, consultants, agents, independent contractors, part time employees, seasonal employees, temporary employees and others with a connection to the employer should all be part of the group. Likewise, the definition of claimant should be sufficiently broad to include those

parties and any third parties suing under any employment-related theory.

The next key issue is the scope of coverage and exclusions. These differ dramatically between insurance policies, and HR professionals should negotiate coverage that fully protects against the most likely and the most dangerous claims, and also have a very good understanding of what is not covered, so that internal steps can be taken to enhance prevention strategies for those claims or damages and to advise upper management of the uncovered risks. The last thing an employer wishes to discover is that a claim that it thought was covered is not covered. Some coverages and exclusions may be bargained with the insurer. Examples of exclusions include:

- The cost of providing “reasonable accommodations”
- Claims arising from the Fair Labor Standards Act
- Claims arising from the National Labor Relations Act
- Claims arising from the Workers Adjustment and Retraining Act (“WARN”)
- Claims arising under ERISA
- Claims arising under COBRA
- Claims arising under OSHA
- Claims for non-monetary or injunctive relief
- Claims arising from reinstatement orders
- Claims arising out of downsizing, layoffs, workforce reductions, plant closures or strikes,
- Claims involving acts toward non-employees or third parties
- Claims involving intentional actions
- Punitive damage claims
- Claims for front pay, fines or penalties
- Claims for negligent hiring, training or supervision,

Many of these exclusions can be subject to special endorsements negotiated by the purchaser or may be included in policies offered by other insurers, so it is critical that someone skilled in these laws review the proposed policy before the purchase to understand the relevant scope.

The size of the deductible is also a relevant factor in determining what type of EPLI to purchase. Plaintiffs have a right to obtain a copy of any insurance policy maintained by the employer, and the existence of insurance coverage could be a factor, positive or negative, in litigation brought against the employer. Many times the payments made for low-deductible EPLI coverage could be better spent on improving internal practices and policies and providing training to managers. The overall limits of the policy are equally important.

Most EPLI policies are “claims made” policies, which mean that they only cover claims that are filed or asserted during the coverage period. The policies also have language describing when the employer is required to notify the insurer of a claim and the consequences of a late notice. It can be very challenging to determine when a “claim” has actually been asserted by an employee, and care should be given to negotiate long notice of claim windows and avoid language that cancels coverage for late claims.

Finally, steps should be taken to research the insurer’s relationship with other insureds. The insurer

should be willing to provide a list of local employers who have purchased its products and those companies should be interviewed concerning their experience with the insurer. If a list is not provided, contacts can still be made with other businesses to obtain recommendations and also learn of any problems encountered.

In summary, EPLI may be a prudent step to respond to the “perfect storm” of legal risks being faced by today’s employers. But EPLI should not be viewed as the only answer; it is only one of many prevention tools that should be evaluated by HR staff. If EPLI is purchased, then care should be taken to select the proper coverage and appropriate endorsements should be negotiated to ensure that there are no surprises when a claim is filed.

If you have any questions regarding the content of this article or would like to speak to an attorney regarding other employment law matters, please contact one of our employment team attorneys at (920) 437-0476 or via email at the following email addresses:

Greg Grobe (grobe@lcojlaw.com)  
Jodi Arndt (jla@lcojlaw.com)  
Ross Townsend (rwt@lcojlaw.com)  
Dawn Korver (dmk@lcojlaw.com)