

Employment Practices Liability

What Is It
How Can It Hurt You
How To Protect Your Company



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Important Notice

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DISCLAIMER: This report is intended to give an overview of the subject matter and serve as a basis for further discussion. It should not be relied upon for detailed answers to specific questions. Although great effort has been taken to provide accurate numbers and explanations, the information in this report should not be relied upon making Risk Management and Human Resource decisions. The actual application of some of these concepts may be the practice of law or require application of IRS rules and regulations and should be discussed with the appropriate professional advisor (Attorney or CPA).

What Is Employment Practices Liability (EPL)

EPL is one of the fastest growing areas of concern for corporations today. Litigation by employees (present and past) for employment practices type allegations will most likely increase as the economy changes.

Employment Discrimination laws seek to prevent discrimination based on race, sex, religion, national origin, physical disability, and age by employers. There is also a growing body of law preventing or occasionally justifying employment discrimination based on sexual orientation. Discriminatory practices include bias in hiring, promotion, job assignment, termination, compensation, and various types of harassment. The main body of employment discrimination laws is composed of federal and state statutes. The United States Constitution and some state constitutions provide additional protection where the employer is a governmental body or the government has taken significant steps to foster the discriminatory practice of the employer.

Discrimination in the private sector is not directly constrained by the Constitution, but has become subject to a growing body of federal and state statutes. The Equal Pay Act amended the Fair Labor Standards Act in 1963. The Equal Pay Act prohibits paying wages based on sex by employers and unions. It does not prohibit other discriminatory practices bias in hiring. It provides that where workers perform equal work in jobs requiring "equal skill, effort, and responsibility and performed under similar working conditions," they should be provided equal pay. The Fair Labor Standards Act applies to employees engaged in some aspect of interstate commerce or all of an employer's workers if the enterprise is engaged as a whole in a significant amount of interstate commerce.

Title VII of the Civil Rights Act of 1964 prohibits discrimination in many more aspects of the employment relationship. It applies to most employers engaged in interstate commerce with more than fifteen (15) employees, labor organizations, and employment agencies. The Act prohibits discrimination based on race, color, religion, sex or national origin. Sex includes pregnancy, childbirth or related medical conditions. It makes it illegal for employers to discriminate in hiring, discharging, compensation, or terms, conditions, and privileges of employment. Employment agencies may not discriminate when hiring or referring applicants. Labor Organizations are also prohibited from basing membership or union classifications on race, color, religion, sex, or national origin.

The Nineteenth Century Civil Rights Acts, amended in 1993, ensure all persons equal rights under the law and outline the damages available to complainants in actions brought under the Civil Rights Act of 1964, Title VII, the American with Disabilities Act of 1990, and the Rehabilitation Act of 1973.

The Age Discrimination in Employment Act (ADEA) prohibits employers from discriminating on the basis of age. The prohibited practices are nearly identical to those outlined in Title 7. An employee is protected from discrimination based on age if he or she is over 40. The ADEA contains explicit guidelines for benefit, pension and retirement plans.

The American with Disabilities Act (ADA) was enacted to eliminate discrimination against those with handicaps. It prohibits discrimination based on a physical or mental handicap by employers engaged in interstate commerce and state governments. The type of discrimination prohibited is broader than that explicitly outlined by Title VII.

The Equal Opportunity Employment Commission (EEOC) interprets and enforces the Equal Payment Act, Age Discrimination in Employment Act, Tide VII, Americans With Disabilities Act, and sections of the Rehabilitation Act. The Commission was established by Tide VII. Its enforcement provisions are contained in section 2000e-5 of Title 42, and its regulations and guidelines are contained in Tide 29 of the Code of Federal Regulations, part 1614. State statutes also provide extensive protection from employment discrimination. Some laws extend similar protection as provided by the federal acts to employers who are not covered by those statutes. Other statutes provide protection to groups not covered by the federal acts. A number of state statutes provide protection for individuals who are performing civil or family duties outside of their normal employment.

Third Party

Any natural person who is a customer, supplier, vendor, service provider, volunteer, leased worker, temporary worker, or independent contractor, business invitee or other client of the "Insured Organization".

Wage & Hour Laws

Any violation of any of the responsibilities, obligations, or duties imposed by any Federal, State or local statutory or common law, including but not limited to the Fair Labor Standards Act, or amendments to or regulations promulgated under any such law, that governs wage, hour and payroll policies and practices.

Illegal Alien Investigation

A Criminal investigation of the "Insured Organization" by any governmental agency for allegedly hiring or harboring illegal aliens.

How To Protect Your Company

Top Seven (7) Reasons To Have And/Or Review An Employee Handbook

Most businesses need some formal written policies - whether an actual "Employee Handbook" or a collection of pages on key topics. It is a type of preventive medicine, and can also serve as a good business planning tool. There are lots of good reasons to have written policies, but here are the "top" seven (7) (in no particular order):

1. They will help you and your managerial staff save time. Formal policies help cut down on answering the same questions over and over again.
2. It is a way to document expectations and obligations of management and staff.
3. Written policies create uniformity and help prevent disputes.
4. Spending time thinking about the messages you want the employees to have regarding your business, and distributing those messages can improve leadership, and help keep the business on track with its mission.
5. A handbook is a way to think through and communicate the company's disaster readiness plan. In light of the recent natural disasters in this country, not to mention manmade disasters, this can be extremely important in protecting the company and its employees.
6. Written policies, consistently enforced, can help avoid legal disputes later on down the road. A well drafted and enforced Employee Handbook can ward off accusations of favoritism; it provides clear guidance on the company's position(s) against discrimination/retaliation/harassment and provides information on how to report any violations.
7. A handbook or other written policies are also a good way to communicate information the business is legally obligated to provide anyway. For example, companies larger than fifty (50) must provide information regarding the Family Medical Leave Act (FMLA) to their employees.

Employment Practices Checklist

An employment practice is a term referring to the patterns that may be observed in a company's hiring and workplace conditions. Some of these issues, such as sexual harassment, discrimination and unfair wages, can become serious liabilities if they are not treated carefully. Many local, state and federal mandates define acceptable and unacceptable employment practices. The United States Equal Employment Opportunity Commission, or EEOC, regulates businesses in accordance with these laws.

****Please use this checklist to help determine your current Employment Practices Liability (EPL) exposure.****

If you don't have an employee handbook, you should at a minimum make sure the policies noted in our Employment Practices checklist are in place. Have each employee sign & date a copy of the policy and place the signed copy in their personnel record.

1. Does your company have written guidelines, policies or procedures related to the following:
 - a. Employment At-Will? ☐ Yes ☐ No
 - b. Discrimination? ☐ Yes ☐ No
 - c. Sexual and Other Workplace Harassment? ☐ Yes ☐ No
 - d. Equal Employment Opportunity? ☐ Yes ☐ No
 - e. Disabled Employees and Reasonable Accommodations? ☐ Yes ☐ No
 - f. Reporting, Investigating and Resolving Employee Complaints? ☐ Yes ☐ No
 - g. Drug & Alcohol? ☐ Yes ☐ No
2. Are employees required to acknowledge receipt of the above guidelines, policies and procedures? ☐ Yes ☐ No
3. Does your company:
 - a. Utilize employment applications? ☐ Yes ☐ No
 - b. Document employee performance? ☐ Yes ☐ No
 - c. Conduct human resources training for management employees? ☐ Yes ☐ No
4. Does your company have written policies outlining employee conduct when dealing with customers, clients, or any third parties? ☐ Yes ☐ No
5. Does your company have written policies or procedures for dealing with complaints from customers, clients, or any third parties for issues involving harassment or discrimination? ☐ Yes ☐ No

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Employment Practices Liability Insurance

Employment Practices Liability Insurance (EPLI) began to be offered in the 1990's as one result of federal legislation such as The Americans with Disabilities Act, The Civil Rights Act of 1991, the Age Discrimination Act, and the Family Medical Leave Act. Each of these acts established new, legal rights that employees had not held in the past. These new rights sometimes provided the legal basis for an employee, former employee, or potential employee to sue an employer.

What Is It?

EPLI provides protection to an employer, including officers and directors, against claims made by employees, former employees, or potential employees relating to many types of employment-related lawsuits. Examples of some of the types of claims typically covered by an EPLI policy are:

- Sexual harassment
- Hostile work environment
- Discrimination (age, sex, race, religion)
- Wrongful termination as a result of downsizing, mergers, or acquisitions
- Unfair hiring practices
- Retaliation

What's The Risk?

The current economic downturn, characterized by a sharp increase in workforce reduction, has created a potentially hostile environment where the possibility of an employee lawsuit is quite high, even for firms that make every effort to comply with the law.

Statistics kept by the U.S. Equal Employment Opportunity Commission (EEOC)¹ give a rough sense of the magnitude of the risk. For FY 2011, the EEOC logged more than 99,000 new complaints.² While many cases are settled without going to court, in the same time period the EEOC resolved 277 individual and class lawsuits, with a total monetary recovery of over \$90,900,000, an average of over \$328,000 in damages per case.³

Why Does My Business Need This?

Defending an employment practices claim, even if the claim is groundless or fraudulent, can be costly. If the employee's claim is upheld, an un-insured liability for monetary damages could be a significant threat to a company's continued existence. A business cannot rely on its general liability policy to provide protection, as nearly all standard general liability policies contain exclusions for claims resulting from employment-related practices.

¹ The EEOC is the federal agency responsible for enforcing federal workplace discrimination laws.

² Source: EEOC, Charge Statistics FY1997 through FY2011.

³ Source: EEOC, Fiscal Year 2011 Performance and Accountability Report Highlights.

Employment Practices Liability Insurance

Cost vs. Risk

Pricing for EPLI policies can vary widely, but is generally based on the number of employees. Because the premiums are relatively inexpensive however, the benefits of purchasing an EPLI policy typically far outweigh the cost. Small businesses may be especially vulnerable to employment related claims as they often lack formal procedures for hiring, managing, and terminating employees, or fail to implement such procedures.

In addition to the insurance protection, many policies also offer valuable loss prevention services such as online resources, access to HR consulting firms, law firms, toll free hotlines, and other specialized services, all of which can help avoid EPL lawsuits.

Understand the Policy

As with all types of insurance, it is important to understand a policy's key terms and provisions. Some of the more important issues for EPLI policies include:

- **Exclusions:** Common exclusions include intentional violations, strikes, lockouts, invasion of privacy, network security, and claims made after a business files or is placed in bankruptcy receivership, liquidation, or conservation.
- **Who picks the attorney?:** If a lawsuit is filed against the insured, who chooses the attorney to defend the lawsuit? Some insurance companies permit the insured to choose an attorney, while others reserve the right to select the attorney.
- **Third party coverage:** An additional consideration is whether or not coverage is needed for vendors, independent contractors, customers, clients and other third parties. Third party liability coverage is usually available for a relatively small additional cost, but you must be sure to ask for it.

Seek Professional Guidance

Insurance agents and brokers, insurance counselors, and other trained financial consultants can help provide answers to detailed questions about a particular policy. These professionals are also helpful in selecting the right policy and the appropriate amount of coverage.

About Cloud, Minturn & Associates, LLC

Information ~ Service ~ Administration ~ Answers

Objective:

Cloud, Minturn & Associates, LLC (CMA) helps you minimize the time you spend dealing with human resource & risk management issues and maximize the time you spend building your business. CMA pays special attention toward protecting against financial losses lawsuits or fines for non-compliance by providing answers to technical questions and hands-on administration.

Service:

Customer service is something that sometimes seems to have been lost in today's fast paced world. At CMA our unparalleled dedication to service is paramount. Whether serving our clients as administrators or advocates, CMA's integrity, expertise and attention to detail have made us the "best friend" of many businesses. No challenge is too small nor any question unreasonable.

Our Motto:

"An ounce of prevention is worth a pound of cure" An old saying that is very applicable in today's Human Resource & Risk Management environment. What with changing laws and changing compliance obligations as well as the need to properly handle risk the employer needs Cloud, Minturn & Associates, LLC for that ounce of prevention.

Background:

Originally established in 1986 to help employers implement and administrate their employee benefits, we realized that this was a great service to our clients, but there was a need to go beyond just benefits. Our clients came to us with questions about hiring and termination procedures, COBRA compliance, leave of absences, the latest labor laws, workers' compensation issues, employee handbooks, illness and injury prevention programs, commercial business coverage, even business, retirement and estate planning. We felt an obligation to deliver, and an opportunity to fill a need that no one else had met. Cloud, Minturn & Associates, LLC now occupies a unique niche in the business world bringing a complete human resource & risk management back office to the employer.