Avoid Wrongful Employment Practices

Learn how to put a "zero-tolerance" policy to work for you.

Mounting a powerful defense against the rise of employee lawsuits is critical in these litigious times. This means identifying and eliminating any wrongful policies you may unknowingly be using. It also calls for protecting your business with Employment Practices Liability Insurance (EPLI).

Employment Practices Liability Insurance

Employment Practices Liability Insurance is designed to provide coverage for claims made against an employer that arise from wrongful employment practices, such as discrimination or sexual harassment.

EPLI is written on a "claims-made" basis. This means that the wrongful practice must *occur* after the retroactive date but before the expiration date of the coverage *and* the claim must be *made* during the policy period or any extended reporting period. Legal defense costs usually are considered to be within limits. This means that policy limits are reduced by the amounts of any legal costs. However, some policies will provide for defense costs outside of limits.

EPLI coverage forms usually list the following:

- Wrongful refusal to employ or promote a qualified applicant or employee.
- Wrongful demotion, evaluation, reassignment, or discipline of an employee, including constructive discharge.
- Harassment, coercion, or unfair discrimination as a consequence of such things as race, color, creed, gender, etc.
- Defamation of character.
- Slander or libel of an employee or violation or invasion of an employee's right of privacy.

This article outlines two of the more common liabilities — discrimination and sexual harassment — and offers suggestions on how to control these exposures.

Discrimination Claims

Discrimination can take many forms. Primarily, claims of discrimination are based on Title VII of the Civil Rights Act and fall under the scrutiny of the Equal Employment Opportunity Commission (EEOC). Title VII covers discrimination complaints based on race, color, national origin, religion, gender, age and other factors. The intent of Title VII is to ensure that employment decisions are made on the basis of an individual's qualifications for a particular job, rather than on personal biases.

The first step in limiting exposure to discrimination claims is to create a fair and unbiased employment application, followed by specific job descriptions for each position within your organization.

Employment applications can reduce the possibility of discrimination claims. Inappropriate questions, such as asking the applicant's race or national origin, should be eliminated.

An application should be accepted for a specific position. If applications are accepted for "any position" or "whatever is open," the employer may be required to consider all the applicants when any position becomes available. Applications should be retained for a specified period; e.g., 60 or 90 days. Finally, there should be a sign-off where the candidate acknowledges that the information provided is true and correct and that the candidate has read and understood the application.

Another major control is the job description. It should indicate the job criteria i.e., the physical, educational and experience requirements. Where possible, the criteria should be quantifiable, for example, the ability to lift thirty pounds every five minutes for four hours. An application that merely states "some lifting required" opens the employer to liability.

Sexual Harassment Claims

Another type of employee lawsuit that has become more prevalent in recent years involves charges of sexual harassment. Acceptable workplace conduct has become more defined, and a failure to maintain a sexual harassment policy can lead to litigation. Sexual harassment can be described as unwelcome sexual advances, requests for sexual favors, and may also include verbal, visual, and physical conduct of a sexual nature. There are two categories of sexual harassment:

- *Quid pro quo* (meaning "this for that"). This category identifies harassment in which sexual contact is made a condition of employment (for which there is strict liability). An example is a supervisor who tells his/her subordinate she/he will get a promotion only if she/he consents to a sexual relationship.
- *Hostile environment.* This category identifies harassment in which unwelcome conduct creates an intimidating, hostile, or offensive working environment. An example is an employee who continuously ogles or touches another employee.

Mitigate this exposure with a formal, written program to deal with sexual harassment. The program should clearly state that sexual harassment is unacceptable and outline possible consequences for such conduct. The program should also include:

- ☐ *An on-going training program* for all employees which defines sexual harassment and the company's policy. Employees should date and sign an acknowledgment stating that they understand the policy.
- ☐ *Education for managers and supervisors* to ensure they understand what constitutes sexual harassment and their responsibilities. Managers and supervisors must listen to employees' concerns, take complaints seriously, and investigate them promptly. The investigation should be made thoroughly and confidentially. Where harassment is found, swift and appropriate action must be taken. A three- to four-month follow-up time is also recommended to assure that the harassment has ceased.
- ☐ *Appropriate documentation,* including sign-offs that the parties have understood the issues and that the solutions are mandatory. Any disciplinary action must be documented and placed in the employee's personnel file. Documentation of training programs attendance sheets and employee sign-offs is also appropriate.

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