

Steps to Take Before Your Company is Hit with an Employee Lawsuit



by Jessica M. Farrelly
Employment Law Group
941.366-8100
jfarrelly@icardmerrill.com

Six out of 10 employers have faced employee lawsuits within the last five years. During fiscal year 2017 alone, more than 84,000 workplace discrimination charges were filed with the Equal Employment Opportunity Commission (EEOC). 6,858 of those charges were filed against Florida employers. In Florida, retaliation was the most frequently filed charge (50.8%), followed by disability discrimination (32.4%), and race discrimination (31.4%). The EEOC also received 6,696 sexual harassment charges and obtained \$46.3 million in monetary benefits for victims of sexual harassment. Those numbers are only expected to climb as a result of the #MeToo and #TimesUp movements.

It's not just large corporations that are being hit. Roughly 41.5% of employee lawsuits are brought against private companies with between 15-100 employees. The financial damage can be dramatic; the cost of settling out of court averages \$40,000, and the average jury award hits \$217,000 if you go to court and lose.

For all of these reasons, it is beneficial for any executive or human resources manager to investigate their company's Employment Practices Liability Insurance ("EPLI") coverage, if any. EPLI can save employers money. At its basic level, EPLI helps protect employers from financial risks associated with various types of employee-related legal claims, including discrimination, retaliation, harassment, and a multitude of other types of claims. Attorneys' fees and costs are generally included in the coverage, subject to a deductible.

However, when you have a trusted relationship with counsel who is familiar with your business, do not wait until your company has been served with a threatened litigation letter, a charge of discrimination, or a lawsuit to inform the insurance carrier about your preferred counsel. **Be proactive.** To ensure your company has the right to choose counsel and that your trusted employment lawyer will be able to defend your company's interests, take the following steps at the time you obtain EPLI coverage, or upon renewal:

- ▶ **Read the Policy:** What does the policy's provision on selection of counsel say?
- ▶ **Team Up with Your Insurance Broker:** Make sure you align with the insurance broker who has been, or will be placing, the EPLI policy for your company. The broker should be knowledgeable about the terms of coverage and be able to tell you exactly what the coverage allows in terms of the ability to select counsel. Additionally, find out whether your insurance broker has internal contacts at the insurance

company that underwrites the policy. The broker may be able to speak with his/her contacts about: (a) changing or amending the terms of the policy to allow the company to select its own counsel in the event of a claim; and/or (b) adding your preferred employment lawyer and law firm to the list of approved firms used by the insurance company.

- ▶ **Negotiate:** Be mindful of the leverage you may have at the time of obtaining and/or renewing your EPLI coverage. The insurance company wants your business, particularly if you have a large policy with a significant premium. In attempting to persuade the insurance carrier, you can inform them that your lawyer and/or law firm already knows your business, your policies and procedures, the players involved, the jurisdiction, locale, and judges most likely to be involved in your case. All of these factors equal a cost savings to the insurance carrier, as compared with new lawyers who would have to spend time (*i.e.*, billable time) getting acquainted with your business and the backdrop in which the claim arose. Those are great selling points.
- ▶ **Confirm the Endorsement:** If you are successful in negotiating a separate agreement or specific endorsement to the policy which gives you the right to select counsel, or to add your preferred law firm to the list of firms used by the insurance company, be sure to carefully review the endorsement and confirm it grants you the specific right you've negotiated.

Litigation is inevitably stressful, but one way you can diminish that stress is by having your trusted lawyer by your side. I have been approved as panel counsel defending employers in both Florida and Massachusetts for numerous EPLI insurance carriers over the course of my 20-year career. Often times, when insurance carriers are informed of a lawyer's familiarity with the insured's business, and also with the protocols and guidelines of the insurance carrier, approval is more readily obtained.

In today's litigious climate where disgruntled employees are quick to commence legal action, don't wait for the proverbial shoe to drop. Be proactive. Investigate the insurance coverage your company currently has, and leverage your business by confirming the right to choose your desired lawyer should a claim arise under your EPLI policy.

Please contact me if you would like guidance regarding compliance with anti-discrimination laws or assistance with securing approval for Icard Merrill to act as defense counsel for your company under a particular policy.