

The basics of Employment Practices Liability (EPL) insurance



EPL insurance is intended to protect businesses (including subsidiaries), directors, officers, and all employees against claims alleging employment practices wrongful acts brought by or on behalf of any past, present, or prospective employees and by the Equal Opportunity Employment Commission (EEOC) or similar state or local governmental authorities. Broadly, EPL policies cover claims alleging violations of federal laws such as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), the Equal Pay Act, and similar state or local laws, as well as employment-related torts or common law violations. Most EPL policies also provide coverage for discrimination or sexual harassment brought by individual third parties, including customers, clients, and vendors.

At every decision point in the employment life cycle, a claim can emerge, so it is important to understand how EPL insurance can be an effective risk transfer mechanism.

What's covered?

EPL insurance policies are typically written on a “named perils” basis, which means that a claimant’s allegations must fall within one of the policy’s specifically enumerated employment practices wrongful acts in order to trigger coverage. Although the definition of employment practices wrongful acts, which will vary depending on the insurer and policy form, operates as a menu, it has evolved to become comprehensive and can include allegations of:

1. Breach of any oral, written, or implied employment contract or quasi-employment contract.
2. Discrimination or harassment in employment, whether based upon race, national origin, color, religion, sex, sexual preference, sexual orientation, marital status, age, disability, genetic disposition, military status, or any other protected status under any law, statute, regulation, ordinance, common law, or public policy.
3. Employment-related torts, including:
 - Misrepresentation, including misrepresentation regarding advancement opportunity or employment benefits.
 - Any actual, alleged, or constructive wrongful dismissal, discharge, or termination of employment.
 - Wrongful failure to employ or promote.
 - Wrongful discipline.
 - Wrongful deprivation of a career opportunity.
 - Wrongful demotion or adverse change in the terms, conditions, or status of employment.
 - Failure to grant tenure.
 - Failure to adopt adequate workplace or employment policies and procedures.
 - Retaliatory treatment.
 - Negligent hiring, retention, training, or supervision.
 - Negligent evaluation.
 - Defamation, libel, or slander.
 - Wrongful reference.





- False imprisonment or detention.
- Malicious prosecution or wrongful infliction of emotional distress.
- Workplace harassment relating to workplace bullying and abusive, offensive, or hostile work environments of a non-physical or non-sexual nature.
- Employment-related promissory estoppel.
- Employment-related fraudulent inducement.

4. Invasion of privacy, including disclosure of medical information in violation of the Health Insurance Portability and Accountability Act of 1996, disclosure of credit information in violation of the Fair Credit Reporting Act, and unauthorized disclosure or use of background, criminal records, or other employment related screening methodology.

When is coverage triggered?

EPL policies are often written as claims-made and reported policies, meaning that in order to trigger coverage, a claim must be both made during the policy period and reported in a timely manner in accordance with policy provisions. However, the alleged wrongful act usually does not have to also be committed during the policy period.

In order to avoid late notice issues that can result in claim denial, it is critical to understand what constitutes a “claim,” as the definition is usually much broader than a standard lawsuit. EPL claims typically also include:

- Written demands for monetary damages or non-monetary relief.
- Requests to toll, waive, or extend statutes of limitations.
- Administrative or regulatory proceedings, including EEOC charges.
- Receipts of demands for arbitration or other alternative dispute resolution proceedings.
- Governmental civil actions, including those brought directly by the EEOC and the Department of Labor.

How do retentions apply to EPL policies?

Retention levels are usually driven by employee count and/or industry. Oftentimes, EPL policies will have a split retention, meaning there will be one level for a single-plaintiff matter and a higher level for multi-plaintiff matters (typically five or more individuals). Some policies may also require higher retentions for high-wage earners or claims brought in California due to the especially pro-employee legal climate and resulting high frequency and severity of EPL claims in the state.

What key policy terms should be considered?

- Notice of claim: This is one of the most critical provisions, and is oftentimes misunderstood. It is imperative that insureds understand their notice obligations, especially if their policies include provisions that allow annual or bi-annual reporting via a collective list frequently referred to as a bordereau.
- Defense: Policyholders must understand who has the duty to defend — the insurer or the insured. Are there rate caps specified in the policy? Are insureds required to use panel counsel, or can they choose counsel subject to insurer consent?
- Settlement: Policyholders must understand when an insurer’s consent is required and whether there is a “hammer clause” in the policy that can allow the insurer to encourage the insured to settle a claim.
- Punitive damages: A US policy will typically include punitive damages where insurable, with most favorable venue wording. Recoverability of punitive damages can be enhanced by considering an offshore punitive damages wrap-around policy available from Bermuda-based insurers.
- Loss control services: As part of their insurance product offerings, many insurers will include certain services designed to help employers prevent or mitigate losses, such as training, audits, and sample forms.

Common exclusions in EPL policies include:

- Wage and hour (W&H) type claims — those alleging violation(s) of the Federal Labor Standards Act (FLSA) and state wage and hour laws (including failure to pay overtime, failure to provide meal breaks and rest periods, and misclassification), except retaliation for W&H risks first became available in the Bermuda marketplace on a standalone basis in 2013, it is becoming more common for companies to purchase W&H insurance on a blended basis with an EPL insurance program.
- Worker Adjustment and Retraining Notification Act (WARN) claims, except retaliation. Some insurers will provide defense costs coverage for such claims.
- Occupational Safety and Health Act claims, except retaliation.
- National Labor Relations Act (NLRA) claims, except retaliation.
- Pollution claims, except retaliation.
- Benefits under workers' compensation insurance, unemployment insurance, disability policies, and laws regulating the provision of employee benefits, except retaliation.
- Assumption of contractual liability of another entity.
- Bodily injury, except for emotional distress, humiliation, and mental anguish.
- Amounts payable under written employment contracts; however, defense coverage is typically provided.

- Pending and prior litigation (all types, including prior EEOC charges) or investigations as of the date of policy inception.
- Prior notice under any other policy.

The definition of loss under EPL policies typically excludes:

- Costs of providing any injunctive or non-pecuniary relief. Note: Some insurers provide an exception for the costs of providing minority, sensitivity, and diversity training if agreed to in a settlement, judgment, or award, oftentimes with coinsurance and costs for up to two years only.
- Costs incurred to acquire, alter, modify, or construct any building or property as required by the ADA.
- Benefits due.
- Fines, penalties, and taxes.
- Stock options.

Additional resources

[Marsh EPL/Wage & Hour Home Page](#) — which includes a variety of interviews, Risk in Context blog posts, and podcasts, as well as EPL updates and articles.

Five reasons why your organization should consider purchasing EPL insurance:

- 1 Increased focus on sexual harassment claims, including the use of mandatory arbitration agreements, as a result of the #MeToo movement.
- 2 Heightened focus on pay equity laws at the state level.
- 3 Increased claims alleging sexual orientation and transgender discrimination.
- 4 Expanding scope of the ADA, including alleged lack of accessibility of company websites.
- 5 Replace Increased traction of medical marijuana discrimination claims with General societal environment regarding workplace culture, public awareness and development of formidable plaintiffs' bar.

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