

# CLIENT ADVISORY

## Navigating the Tricky Waters of EPL Claims Reporting

Employment Practices Liability (EPL) Insurance continues to grow in popularity among commercial insurance buyers. Once considered a luxury by many insureds, more and more companies are realizing that EPL coverage is an essential part of a comprehensive insurance program. Claims arising from employment issues can be quite substantial, especially if they take the form of class actions and, if not managed properly, EPL claims can put a serious dent in almost any insured's bottom line. Even unfounded allegations can lead to expensive defense costs. Chubb Insurance Company's 2010 Private Company Risk Survey notes that the average defense costs over the past five years for an EPL claim was \$51,975.

Underscoring the need for adequate EPL protection is the fact that employment-related claims have been on the rise five out of the last six years. According to the U.S. Equal Employment Opportunity Commission (EEOC), the federal government entity that handles certain employment-related grievances, the number of complaints that it received last year (99,922) represented more than a 7% increase over 2009's figure (93,277).

FISCAL YEAR	TOTAL # OF CHARGES FILED WITH EEOC
2010	99,922
2009	93,277
2008	95,402
2007	82,792
2006	75,768
2005	75,428

*Source: U.S. Equal Employment Opportunity Commission, Fiscal Year 2010 EEOC Performance and Accountability Report, Litigation Section, <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>.*

There are many reasons for an employee to make a claim against his or her employer. Typical allegations include wrongful termination, discrimination, harassment and failure to promote. In a poor economy companies have layoffs and wrongful termination allegations follow. We also know that humans are prone to making comments that can be viewed as inappropriate by a coworker whether intentional or a just a poor choice of words. Occasionally a poorly phrased comment or two can lead to harassment allegations. There are also some employees who strike preemptively and file complaints to avoid being laid off, because firing him or her could be seen as retaliatory. Whatever the reason, EPL claims are on the rise.

Knowing how and when to report an EPL claim or circumstance can spell the difference between having a covered or uncovered claim.

Most of today's EPL policies are written on a "claims made and reported" basis, which means that the claim must be first made against the insured and reported to the carrier within the same policy period, or during some other prescribed time, such as within the first 90 days following the policy's expiration. (For more information, [download our client advisory on claims-made policy terminology](#).)

Each policy is different, however, and is governed by its unique terms and conditions, including reporting requirements.

Most EPL policies today also allow for the reporting of circumstances that could give rise to a claim, such as a verbal threat of a possible claim from an employee, an impending layoff or a strong suspicion that something is about to happen. The policy will spell out the facts required for the notification to be accepted by the insurer. At minimum, the policy will require you to name the potential plaintiff, the potential allegations and potential damages. If an actual claim is later made against the insured arising out of that circumstance, it will be deemed to have arisen at the time that the notice of a potential claim was given to the carrier (and will be covered under the terms of the policy that was in force at that earlier time). There are three important benefits to noticing a circumstance. First, you reduce the potential for a coverage denial based on late reporting of a claim. Second, you reduce the potential for a coverage denial on your next insurance policy based upon having knowledge of a claim prior to the inception of the new policy. And third, the loss will be deducted from a policy limit you are likely no longer using, which preserves your next policy for new claims.

It's important to keep in mind that there is usually no duty to report notice of a potential claim; it's a matter of the insured's preference. The duty to report only arises when an actual claim is made against the insured.

To learn more about how AmWINS can help you place EPL coverage for your clients, reach out to your local AmWINS broker or [marketing@amwins.com](mailto:marketing@amwins.com).

If you do not have a contact at AmWINS to help with your financial services risks, [click here for a list of brokers on our website](#).

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As stated earlier, one of the more challenging aspects of EPL coverage is knowing when to report a matter to the carrier. The answer to this question lies with the specific wording of the particular policy in question. Hopefully, the policy language will clearly lay out what is required with respect to both notice of actual claims and potential claims.

When it's not absolutely clear as to when to report an EPL matter under your particular policy, Luigi Spadafora, a partner with the law firm of Winget, Spadafora & Schwartzberg, says that you should err on the side of caution. *"We advise our insured clients that it's better to be safe than sorry. If you refrain from reporting a questionable matter that's later determined to have been a claim, it could result in a denial of coverage for a loss that would have been otherwise covered had it been properly reported. No insured wants that result."*

There are flexible solutions provided by insurers to help manage reporting requirements so an insured won't feel like it is critical to report every possible circumstance, which will clutter up a loss run and make a renewal difficult.

Steve Carabases, Vice President of ACE USA North American Claims - Professional Risk, advises that insureds should not hesitate to customize their EPL coverage to fit their needs.

*"While most insureds think that defining the term 'claim' under an EPL policy to include EEOC and other administrative proceedings is a benefit, it can sometimes come back to bite you, because you have increased reporting responsibilities. Insureds with sizeable self-insured retentions who have a fair number of EPL administrative proceedings should consider revising their policy's definition of 'claim' to only include actual lawsuits. These suits are usually more serious than administrative proceedings and it should be clear that they need to be reported. If you can resolve EEOC proceedings within your retention, why place the burden on yourself to report it? On the other hand, if they turn into lawsuits, then you can report them without fear of being late."*

Mr. Carabases goes on to advise that insureds who want coverage to begin at the EEOC (or other administrative proceeding) level can ask that their insurer accept notice of such actions on a list that's known in the insurance world as a "bordereau." This list can be sent to the carrier quarterly or semi-annually. The list should provide basic details about administrative matters, such as claimant's name, venue of the proceeding, details of the allegations and the amount sought. Then, if a specific matter catches the carrier's eye as being potentially problematic, the carrier can request additional information.

The bordereau method of reporting is usually most appropriate for insureds who have a fairly high-volume of EPL disputes and who don't want to be burdened with constant reporting of individual matters.

Another possible solution would be to agree with your carrier that the requirement to report an EPL issue of any type is only triggered when a certain amount of money has been spent defending the matter, such as 50% of the retention amount or something along those lines.

In the final analysis, reporting requirements under an EPL policy are a critical component of the coverage and should be reviewed and understood fully before your policy incepts. As always, your AmWINS broker is ready to assist you in analyzing your particular needs in light of the various EPL products available in order to provide you with the best guidance possible.

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*This article was prepared exclusively for AmWINS Group, Inc. by Larry Goanos, CEO of Andros Risk Services, an independent insurance consulting firm.*