

# **INSURANCE COVERAGE FOR EMPLOYMENT CLAIMS: AN OVERVIEW**

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## **I. INTRODUCTION**

Employment Practices Liability Insurance (“EPLI”) came into vogue around 1995 and has gathered steam since then. EPLI policies were a product of the boom in employment litigation in the early 1990s as well as the enactment of employee protection laws, such as the Americans With Disabilities Act and Family Medical Leave Act, as well as court opinions providing employees remedial and protective measures.

EPLI coverage arose as a response to the new reality. The majority of the work force now belongs to some protected class: ethnic minority, female, persons over 40, physically handicapped, or a similar category. At-will employment rules have been eroded in many jurisdictions. Courts have proved more willing to hold employers accountable for sexual misconduct by supervisory staff and on occasion other employees.

Like Errors & Omissions (E&O) and Directors & Officers (D&O) policies, EPLI policies are “claims made” and address concerns fundamental to the operation of most companies’ day-to-day business. Also like D&O policies, it took some time following its introduction for EPLI to become a generally accepted part of the standard insurance portfolio of contemporary corporations. The majority of midsize and smaller corporations have not acquired EPLI policies.

Despite its growing popularity, EPLI insurance is not the sole vehicle for recovery of attorney fees in employment disputes. Other policies typically possessed by companies include commercial general liability, employee benefits and on occasion a fiduciary liability policy. Employment counsel need not be left without resources to direct their clients to a panoply of insurance coverages beyond those typically accessed.

## **II. STATE OF THE MARKET**

### **A. Rates and Retention**

Premium rates were either flat or decreasing for 2007/2008.

### **B. Volume**

2007 volume was flat from 2006, with \$1.66 billion in premiums written that year. Limited growth for new insureds continues, especially in the less-than-50-employees segment. Even the 50-to-100-employee company is typically not buying EPLI. With premium rates down, the increase in the number of policyholders in the smallest employer market segment held overall premium volume level steady.

### **C. Claims**

Insurers had more covered claims than expected, combined with increasing defense costs. They reacted with mandatory higher deductibles. Both mass tort claims and wage and hour claims are problematic. Major corporations with brand names have had challenges buying EPLI coverage at costs they believe are affordable because carriers have been forced to pay significant settlements for claims employers preferred to fight. Many companies fear the reputational costs of litigation will exceed costs to settle. Thus, mandatory deductibles for major corporations often exceed \$1 million, with co-insurance of 10% to 25%.

Carriers for smaller to mid-size employers have not seen mass tort claims as a problem (since most of their insureds are not as vulnerable to the pressure of such claims) and generally have not applied any special restrictions. These employers are encountering a higher-than-expected wage and hour claim volume.

#### **D. New Coverages**

Traditionally EPLI carriers have been reluctant to provide any coverage for wage and hour claims. Products reaching the market in 2007/2008, offering defense-only coverage include:

Beasley  
Great American  
Houston Casualty  
Monitor (AVRO or Carolina Casualty)  
NAS, Navigators (up to \$100,000 sublimit)  
PLIS, Professional Underwriters Agency (Lloyd's market \$150,000 sublimit)  
Travelers Bond (private and nonprofit)  
U.S. Risk Underwriters<sup>1</sup>

#### **E. EPLI Target Markets**

EPLI carriers find both law firms and entertainment industries undesirable. Specialty markets must be accessed by employee leasing, temporary staffing, educational, religious and public entities.

Another group of undesirables has less access to specialty markets and includes extended care (nursing home) facilities, real estate/property management companies, auto dealers and technology companies.

### **III. EMPLOYMENT PRACTICES LIABILITY INSURANCE**

#### **A. Distinguishing EPLI Coverage from Employers Liability and Employee Benefits Coverage**

Carriers describe EPLI coverage as specially written to insure employers against liability claims of discrimination, sexual harassment and wrongful termination by their employees. Employment Practices Liability Insurance is on occasion confused with other coverages with similar descriptors. EPLI policies should not be confused with Employer's Liability Insurance for personal injury claims (i.e., bodily injury, property damage) or claims outside of workers' compensation coverage. Also distinct is Employee Benefits Liability insurance, issued to cover errors and omissions on a claims-made basis. This policy addresses negligent administration of employee benefit plans.

#### **B. No Standardized EPLI Policy**

Critically, there is no standard form EPLI policy from the Insurance Services Office ("ISO") even though one was initially proposed in 1998. The genesis of the proposed EPLI, as well as the variously issued EPLI policy language, was the errors and omissions coverage written for lawyers. The underwriters for EPLI coverage tend to be drawn from that lawyer malpractice group.

These policies are written on a "claims made" basis; defense costs are within limits. A lawsuit, administrative proceeding, discrimination, sexual harassment or wrongful termination

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<sup>1</sup>Each of the above carriers has an unknown sublimit. Only two carriers offer defense and settlement coverage: Ademco and Evanston.

claim is the trigger of coverage. Excluded are punitive damages, company downsizing, plant closures, contract claims and intentional acts.

## **C. Common Policy Provisions**

### **1. Claims Made vs. Claims Made and Reported Coverage**

“Claim” Definitions Requiring Early Notice or Loss of Coverage.

1. Any written notice received by an “Insured” that any person or entity intends to hold Insured responsible for a Wrongful Employment Act.
2. Any judicial or administrative proceeding initiated against any Insured seeking to hold an Insured responsible for a Wrongful Employment Act, including any proceeding conducted by the equal employment opportunity commission or similar federal, state or local agency and any appeal therefrom.

### **2. Pure Claims-Made Coverage Preference**

One preferable form of “claims made” coverage includes policy language that merely requires a claim within the policy period and the reporting “as soon as practicable” as opposed to “within the applicable policy period.” EPLI policies typically permit purchase of an extended reporting period, or continuing the period within which the insured may properly submit a claim after expiration of the policy, typically for 12- or 24-month periods. EPLI policies may include “full prior acts coverage.” This provides coverage for acts occurring before the policy became effective as long as a claim is first made during the policy period or the policy’s “extended reporting” period.

### **3. Claims Reporting and Extended Reporting Period**

A number of insurers have shortened the length of “extended reporting” periods (ERP protection) available; their length and costs differ among carriers. Negotiation of an ERP should be conducted before a carrier may lose interest in your EPLI business since a long ERP is valuable should the EPLI carrier decide it does not want to continue providing coverage.

### **4. Selection of Counsel**

While most carriers continue to control selection of counsel, almost all are very flexible in allowing the insured to select or approve counsel before a claim is asserted. If requests are made for approval at the right time (during proposal negotiations), the carrier is likely to approve the policyholder’s choice.

### **5. Consent to Settle**

The “hammer” clause in most policies allows the carrier to limit its payment to no more than the amount it could have settled for plus defense costs. This protects the carrier against a “litigate at any cost” insured while protecting the employer against a “who cares about the precedent” carrier.

### **6. Co-Insurance Participation**

Softer hammer clauses exist which share the cost of the claim between the carrier and the insured. Seventy percent is offered by Hartford Premier Choice, Liberty, Travelers (private companies), with 75% available from Monitor and Excel and 70% also available from Beasley,

Bisys and Chubb, where carriers offer 50%, such as AIG Executive Liability (larger employers), Ademco, Great American, Naspua and Houston. Axis and CNA have an unspecified percent, as does RLI. Where the insured has good reason to continue its defense, the carriers will typically not enforce their hammer clause.

## **7. Worldwide Coverage**

This is typical for suits brought in the U.S. or Canada or in territories.

## **8. Risk Management Services**

A number of law firms and other vendors are competing for business in the risk avoidance sector.

## **9. Wage and Hour Coverage**

Due to the origin of the EPLI policy form from an errors and omissions policy form, some common features apply that permit generalized discussion of policy forms.

There is a surprising lack of coverage law analyzing EPLI policies. This stems in part from the fact that where timely notice is provided of a claim that falls within the policy period for conduct after the retroactive date, the coverages are typically broad enough to cover many torts encountered in employment disputes.

Nevertheless, case law analyzing errors and omissions policies, which address some of the same issues encountered in claims-made coverage, can be relied upon to predict likely results for EPLI policy analysis.

## **10. Prior Act of Coverage**

Carriers now address prior acts with the option of limiting the exposure via retroactive dates. A recent Ninth Circuit opinion in *James River*<sup>2</sup> evidences that the subjective standard in an errors and omissions policy issued to a lawyer should apply such that the lawyer should reasonably have anticipated a claim based on the facts known to him. The facts there are illustrative of the limitations of this doctrine. This rule, however, may not apply outside of California as the law on this topic varies.

It is therefore critical to consider the application for the EPLI insurance policy to evaluate whether the answers given were accurate at the time so as to gauge whether that policy may be void.

An insurance policy with an application which fails to disclose awareness of the circumstances that could reasonably be expected to result in a future claim may be subject to

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<sup>2</sup>*James River Ins. Co. v. Hebert Schenk P.C.*, 523 F.3d 915, 922 (9th Cir. (Ariz.) 2008) (“Reasonable persons could . . . find that the omission of the Nolan communications from Supplement 6 reflected Hebert Schenk’s opinion that the Nolans’ dissatisfaction would not result in a claim. . . . Question 10(c) is ambiguous about whether the basis for the probability determination should be the applicant’s subjective assessment or an objective, reasonable-person standard. Because Arizona tends to construe ambiguity in insurance applications in favor of the insured, *Employers Mut. Cas. Co. v. DGG & Car, Inc.*, 2008 WL 382934, at \*2, 183 P.3d 513, 515-16 (Ariz. Feb. 14, 2008), Question 10(c) is more appropriately viewed as eliciting a subjective determination. Second, even assuming that the Question clearly references an objective standard, answering the Question still required Hebert Schenk to exercise judgment in applying that standard to the facts concerning particular clients.”).

cancellation for misstatements in the application. Strong documentary evidence about what the prospective insured knew could counter any difficulty in assessing what might otherwise be deemed a subjective state of mind. Moreover, the policyholder's state of mind is unlikely to be subject to resolution on summary judgment.

Awareness may go beyond the scope of an actual policy application. In forums like California, however, where the questions and the application are deemed material, the materiality of the non-asked question, based on a general standard of awareness, places the heavier burden on the insurer.<sup>3</sup>

A policyholder is best served by providing prompt notice of its awareness of these circumstances. While this is a challenge for lawyers under professional liability policies, employers who must consider a vast array of communications of a nebulous character from an employee are placed under a heavy burden to evaluate which ones would require a "notice of circumstance."

An overly pessimistic approach could lead to over-inclusion of claims that constitute a "notice of circumstance" (i.e., a laundry list) that could negatively impact future insurance coverage costs. Specific questions as to whether a "notice of circumstance" is appropriate should be reported to coverage counsel.

#### **D. Pertinent Policy Provisions**

##### **1. Common Policy Definitions**

Coverage is typically described by reference to "employment practices." There are substantial differences in policy wording. Nuances in language can make a difference as to whether coverage can arise under individual policies. Most policies now contain all-inclusive wording that limits the need to enumerate perils. Other carriers, in response to all-inclusive wording, have frequently broadened their coverage by adding "and other protected classes" policy language.

Specific lists of "employment practices" include "discrimination, harassment, retaliation, wrongful termination, wrongful discipline, defamation, invasion of privacy, intentional infliction of emotional distress and others."

Common definitions of such terms include:

- **"Discrimination":** (1) The termination of an employment relationship; (2) a demonstration of or failure to hire or promote any individual; or (3) any other limitation or classification of an employee or applicant for employment that would deprive any individual of employment opportunities or adversely affect any individual's status as an employee because of race, color, religion, sex, disability, pregnancy,

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<sup>3</sup>*TIG Ins. Co. v. Blacker*, 54 Mass. App. Ct. 1683 (2002) (An attorney's contention that he had understood correspondence from an insured to refer to a securities law claim, but not one for malpractice, was deemed unreasonable, permitting summary judgment for the insurer to avoid coverage. Other cases suggest varying results: *Chicago Ins. Co. v. Lappin*, 58 Mass. App. Ct. 769, 792 N.E.2d 1018 (2003) (Lawyer won because he was not aware of any likely claim.); *Pantropic Power Products, Inc. v. Fireman's Fund Ins. Co.*, 141 F. Supp. 2d 1366 (S.D. Fla. 2001) (Insurer prevailed because it did not receive timely notice of claim.); *St. Paul ReIns. Co., Ltd. v. Commercial Fin. Corp.*, 144 F. Supp. 2d 1057 (N.D. Iowa 2001) (Insurer's claim of nondisclosure and application failed since facts were known to its agent.).

national origin, marital status, sexual orientation or other protected class or characteristic established under applicable federal, state or local statute, ordinance, regulation or order.

- **“Harassment”**: (1) Sexual harassment including unwelcome sexual advances, requests for sexual favors, other verbal or physical conduct of a sexual nature that may be condition of employment, or are used as a basis for employment decisions or create a work environment that is hostile, intimidating or offensive or that otherwise interferes with performance; or (2) other workplace harassment that creates a work environment that is hostile, intimidating or offensive or that otherwise interferes with performance.
- **“Retaliation”**: Any actual or alleged retaliatory treatment against an employee because of: (1) the exercise of or attempt to exercise an employee’s rights under the law; (2) an employee’s disclosure of or threat to disclose to a governmental agency or superior acts of actual or alleged wrongdoing against the insured; (3) the filing of any claim under any federal, state or local “whistleblower” law including the federal False Claims Act; or (4) employee strikes or slowdowns.
- **“Wrongful Termination”**: The actual or constructive termination of the employment relationship or the demotion of or failure to promote any employee in a manner that is illegal or wrongful or in breach of an implied agreement to continue employment. Wrongful termination shall not include a termination that is or is alleged to be in breach or violation of an express contract of employment or an express obligation to make payments in the event of the termination of employment.

## 2. Exclusions

### a. Employment-Related Misrepresentation

- **Employment-related misrepresentation**; negligent evaluation, training or supervision of employee; failure to enforce adequate policies and procedures relating to any wrongful employment act; wrongful discipline; retaliation or wrongful deprivation of career opportunity.

### b. Intentional Acts

One of the key exclusions is the “intentional acts” exclusion, which bars coverage for conduct “expected or intended from the point of view of the insured.” These provisions must also be understood in light of applicable state statutes prohibiting the insurance of willful conduct. Thus, in California, Insurance Code § 533 prohibits indemnification of willful acts typically defined to include an act that is undertaken with an intent to harm. Intent to harm can be an inherent aspect of the tort charged, such as that for malicious prosecution or child molestation.

Other case law in California suggests that where the insured “knew or should have known” that his conduct would be harmful, that will suffice. Other states have more specific prohibitions on what “intentional acts” means. Massachusetts provides that “no company may insure any person against legal liability for causing injury, other than bodily injury, by a deliberate or intentional crime or wrongdoing, nor insure his employer or principal if such acts are committed under the direction of his employer or principal . . . .”<sup>4</sup> If a named insured is held

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<sup>4</sup>MASS. GEN. LAWS ANN. ch. 175, § 47 (West 2003).

vicariously liable for an employee's wrongful acts, coverage may exist for the named insured, but not for the wrongdoing employee.<sup>5</sup> Strict liability for discrimination and/or negligent failure to prevent harassment will thus fall within an EPLI policy.

A more problematic issue is whether a claim may be "deemed made" where there are circumstances leading the insurer to be aware of a possible future claim. Is that claim chargeable to the insured as if a claim, i.e., lawsuit seeking damages or threat of lawsuit seeking damages were made during the policy period? This problem can arise even though the eventual claim follows after the "claims made" policy has expired. Principles that underlie this construction of the term "claim" in a claims-made policy that might bar coverage flow from the concept that when the insured has evidence of the probable loss when it purchases the policy, the loss may be uninsurable thereunder.<sup>6</sup>

#### **E. Preferred EPL Policy Provisions**

The insuring clause should cover claims typically asserted in employment disputes.

- Administrative proceedings as well as civil actions should be covered.
- Arbitrations as well as civil actions should be covered.
- The "insured" definition should include former as well as current officers, supervisors, managers, directors, and full/part-time employees.
- The policy language should trigger coverage for circumstances that might reasonably be expected to result in a claim by reporting them to the insurer whose policy is in effect when the insured becomes aware of the circumstances.
- Prior acts coverage should be fully available, with no retroactive date. (This is particularly important as a retroactive date that is the same as the policy's can create illusory coverage.)
- Counsel selection should be either referenced in approved panel counsel, selected with the insured's input, or subject to the insured's selection.
- Punitive damage claims should not be excluded where coverage for same is permitted by law.
- Retaliation claims should not be subject to any exclusion.
- Coverage is preferable in a standalone policy so that the exhaustion of the limits of other coverage for an errors & omissions/directors & officers policy would not automatically eviscerate EPL limits.
- Wage and hour coverage should be provided either as part of the policy or through endorsement.

### **IV. EMPLOYMENT BENEFITS LIABILITY INSURANCE**

#### **A. Scope of Coverage**

Employment Benefits Liability Insurance ("EBLI") covers claims arising out of certain errors and omissions in the administration of a broad array of employee benefit programs. EBLI coverage may be found in various types of policies within an insurance program. Commonly, however, it appears as a lengthy endorsement providing claims-made coverage to general liability policies. EBLI policy forms typically exclude ERISA-Imposed Fiduciary Liability.

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<sup>5</sup>R.E. KEETON & A.I. WIDISS, INSURANCE LAW 528 n.12 (1988).

<sup>6</sup>COUCH ON INSURANCE 1.5, 2.7 (2d ed. 1984); R.E. KEETON & A.I. WIDISS, INSURANCE LAW § 4 (1988).

The genesis of this coverage was a misstatement by the employer as to the scope of the employee benefits available. Representations regarding the scope of coverage, including hypothetical fact situations, may contradict an insurer's later coverage denial. Therefore, policyholders should retain all promotional materials provided by the EBLI carrier and its agent or broker.

Typical situations referenced by hypotheticals are:

- miscalculating pension benefits
- forgetting to enroll in an employee health plan
- erroneously calculating the amount of pension program when an employee elects early retirement only to find out that the amount is considerably less than expected

Consequences of the policies' "claims made" over deductible policy structure are:

- error or omission claims which require more detailed recording and reporting provisions
- "retroactive date" provisions, where liability from errors and omissions taking place prior to a stated retroactive date may be barred from coverage; and
- limit (and deductible or "self insured retention") provisions which may not provide reasonably expected coverage for a series of claims, such as class actions claims (with low individual damage awards), or for claims with high defense costs

Per the insuring agreement, the carrier promises to pay indemnity to each "insured" for damages because of "negligently committed" acts, errors, or omissions committed in the "administration" of "employee benefit programs."

It also agrees to defend the "insured" against "suits" seeking such damages. Insureds typically include employees who administer the employee benefit programs. The 2004 ISO EBLI form extends coverage to each of the named insured's employees and former employees "who is or was authorized to administer the named insured's employee benefit program."

The enumerated programs in the 2004 ISO form include group insurance plans, flexible spending accounts, profit sharing plans, unemployment insurance, social security benefits, and tuition assistance plans. If not enumerated in an endorsement or schedule, the plan may not fall within the employment benefit program's coverage. The 2004 ISO form defines administration as "[p]roviding information . . . with the respect to eligibility for or scope of "employee benefit programs," "[h]andling records in connection with the 'employee benefit program'" and "[e]ffecting, continuing or terminating" participation and benefits. The courts have liberally construed the term "administration."<sup>7</sup>

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<sup>7</sup>*Cust-O-Fab Service Co., LLC v. Admiral Ins. Co.*, 158 Fed. Appx. 123, 128 (10th Cir. (Okla.) 2005) (Rejecting argument that "administration" restricted coverage to "relatively routine, ministerial acts" and excluded decision making and monitoring.); *Wyman-Gordon Co. v. Liberty Mut. Fire In. Co.*, No. 96-2208, 2000 Mass. Super. LEXIS 286, at \*10-13 (Worcester Super. Ct. July 14, 2000) (The courts have also rejected causation arguments by carriers seeking to restrict coverage on the ground that liability was primarily caused by acts which did not fall within the policy coverage.).

There is no requirement in the 2004 ISO form that an “insured” or any employee of the policyholder be the person who committed any negligent act, error, or omission in the administration of employee benefits, which is at issue. The policyholder may be liable under the 2004 ISO form for alleged negligent supervision of the activities of any employee or third party administrator engaged in the oversight of employee benefits.<sup>8</sup> The requirement that the act be negligently committed is not a problem in most cases because claims typically include allegations of negligent supervision.<sup>9</sup>

Individual claims may require close analysis. Differing lead-in language for the various exclusions suggests the policy’s coverage differs with respect to the defense duty for various types of claims. Other EBLI coverage forms may contain duty of defense provisions which clearly extend to certain claims not encompassed by the policy’s duty to indemnify exclusions. Denying an indemnity obligation or reserving its rights, may trigger a policyholder’s rights to independent counsel<sup>10</sup> notwithstanding clear policy language providing the carrier with the right to defense counsel.<sup>11</sup>

## **B. Pertinent Exclusions**

### **1. Dishonest, Fraudulent, Criminal or Malicious Act<sup>12</sup>**

Negligent acts, errors or omissions are frequently characterized in pleadings as intentional or dishonest. They should not vitiate a defense, especially where the alleged wrongful actor is a third party administrators of benefits.

### **2. Bodily Injury, Property Damage or Personal and Advertising Injury**

This exclusion should only avoid duplicative coverage for injury or damage unambiguously provided elsewhere in the CGL policy form to which the endorsement is attached.<sup>13</sup>

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<sup>8</sup>*CPT Corp. v. St. Paul Fire & Marine Ins. Co.*, 515 N.W.2d 747, 750 (Minn. Ct. App. 1994) (“Administration” and “ordinary usage” includes “oversight of any office.”).

<sup>9</sup>The 2004 ISO EPLI form states that the “insurance applies to damages only if . . . [t]he act, error or omission, is negligently committed in the “administration” of the named insured’s benefit program. (Form CG04350305 (2004) Coverage I); *Maryland Cas. Co. v. Economy Bookbinding Corp.*, 621 F. Supp. 410, 414 (D.N.J. 1985) (Allegation “failure to examine the trust checking account and checkbook” was “clearly a charge of negligence.”); *Wyman-Gordon*, 2000 Mass. Super. LEXIS 286, at \*11-12 (“[H]ad Liberty wished to exclude the type of risk . . . it could have drafted a policy to do so.”). Employees include lease workers but may exclude temporary workers, or short term workers. (Form CG04350304 (2004 Coverage 6.). The defense provisions in many EBLI forms, including the 2004 ISO form, provide defense coverage largely tied to the policy’s duty to indemnify. (Form CG04350305 (2004 Coverage 1.)

<sup>10</sup>*Union Ins. Co. v. Knife Co.*, 902 F. Supp. 877, 881 (W.D. Ark. 1995) (In light of conflict of interest posed by policy exclusion, policyholder entitled to choose independent counsel hired at carrier’s expense.).

<sup>11</sup>Section 3 (Form FL6300 (01-05) forms exclusion “(k) removes concrete items from indemnity obligation, but does not affect duty to pay defense costs or other indemnity items.”).

<sup>12</sup>Form CG04350305 (2004 Coverage 2).

### **3. Inadequacy of Performance of Investment/Advice Given with Respect to Participation**

Claims may allege remotely caused damages measured vaguely by the extent of the claimant's investment from the claimant's perspective to "perform." The loss, however, may actually have originated in that having nothing to do with any securities, investment performance on the market.<sup>14</sup> Given the particular language in this exclusion it would appear limited to circumstances where the insured was actively compiling and reporting investment performance – not merely passing along information procured by others.<sup>15</sup>

### **4. Workers' Compensation and Similar Laws**

Claims arising out of errors by third party administrators and outside professionals should not be excluded even where they might have resulted in failures of the named insured to comply with one or more of the obligations listed in the exclusion.<sup>16</sup>

### **5. ERISA**

The exclusion appears limited to circumstances where the insured is actually held to be liable under ERISA. This, in contrast to circumstances where the insured was the recipient of groundless ERISA allegations combined with others triggering potential coverage. In such circumstances, there would be at most a concurrent cause or merely evidence policyholder liability.<sup>17</sup>

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<sup>13</sup>*Search EDP, Inc. v. American Home Ins. Co.*, 267 N.J. Super. 537, 541-46 (App. Div. 1993) (Utilizing "proximate cause" ruled to resolve ambiguity and application of exclusion.); *Great Am. Ins. Co. v. Cohen & Huntington PC*, 2000 U.S. Dist. LEXIS 2075, at \*3-4 (E.D. Pa. 2000) (Allegations of malicious conduct did not deprive policyholder of coverage, as negligence was alleged in the alternative.); *Michael Carbone, Inc. v. General Acc. Ins. Co.*, 937 F. Supp. 413, 417 (E.D. Pa. 1996) ("[C]ourts have applied the 'doctrine of severability,' which holds that each exclusion must be applied to each insured separately . . .").

<sup>14</sup>*CPT Corp.*, 515 N.W.2d at 715.

<sup>15</sup>Exclusion E further excludes "any claim based upon . . . errors in providing information on past performance of investment vehicles . . ."

<sup>16</sup>Exclusion after the 2004 ISO EBLI form excludes "any claim arising out of [the named insured's] failure to comply with the mandatory provisions of any workers' compensation, unemployment compensation insurance, social security or disability benefits or any similar law"; *Benilde-St. Margaret's High School v. St. Paul Mercury Ins. Co.*, 575 N.W.2d 127, 131 (Minn. Ct. App. 1998) (actions of third party administrator covered).

<sup>17</sup>Form CG04350305 (2004 Coverage 2); *Sokolowski v. Aetna Life & Cas. Co.*, 670 F. Supp. 1199, 1206-07 (S.D.N.Y. 1987) (Fiduciary carrier obligated to defend claims under policy providing coverage for personal fiduciary liability under ERISA, or allegations of underlying claims were ambiguous as to source of liability); *Search EDP*, 267 N.J. Super. 541-46 (Utilizing "proximate cause" rule to resolve ambiguity and application exclusion); *Watkins Glenn*, 732 N.Y.S.2d 74, 75 (Sexual assault liability "predicated upon . . . conceptually independent negligent supervision.").

## 6. Available Benefits

The 2004 ISO EBLI form contains an exclusion for “any” claim for benefits to the extent that such benefits are available, with reasonable effort and cooperation of the insured, from the applicable funds created or other collectible insurance.<sup>18</sup>

## 7. Taxes, Fines or Penalties

What are damages and what are taxes, fines and penalties require close distinctions. This exclusion may reasonably be interpreted to apply only to fines imposed directly upon the named insured such as where a settlement of the claim by the beneficiary for life insurance benefits owing to the policyholder’s failure to complete an insurance form may be taxable to the beneficiary.<sup>19</sup>

## 8. Employment-Related Practices

Negligence in administration of benefits that may have contributed to the loss would trigger a defense even though they are asserted in connection with a wrongful termination discrimination or other employment related practice claim.<sup>20</sup>

### C. EBLI Coverage Is More Available to Respond to Employment Claims Than Is Appreciated

Companies often neglect to access EBLI coverage because they don’t realize it exists and that such claims may be implicated in connection with typical employment-related practices litigation. As the nature of the exclusion for same is limited, as noted above, and defense benefits often flow in EBLI policies, further scrutiny of possible covered claims should be undertaken.

It is the rare employee facing termination who does not also wonder about the scope of benefits due him or her upon termination, including those available under an employee benefits plan. Given the likely disagreement between the employee and employer in this context

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<sup>18</sup>Coverage Form CGL4350305 (2004 Coverage 2).

<sup>19</sup>*Board of Trustees*, 1997 U.S. App. LEXIS, at \*8 (“[E]ven though the . . . recovery in the [underlying] suit was based entirely upon the amount of the Fund paid the IRS in settlement and the Fund’s tax liability, the award . . . is unquestionably a tort law compensatory damage award” and was not excluded from coverage.); *Benilde-St. Margaret’s*, 575 N.W.2d 131 (withheld social security monies were not “taxes” of the policyholder.).

<sup>20</sup>*Admiral Ins. Co. v. Rio Grande Heart Specialist of S. Texas, Inc.*, 64 S.W.3d 497, 503 (Tex.App. 2001) (“None of the specific actions listed in this exclusion are raised . . . in the underlying suit.”); *Search EDP*, 267 N.J. Super. 541-46 (Utilizing “proximate cause” rule to resolve ambiguity and application of exclusion.); *Watkins Glenn*, 732 N.Y.S.2d 74, 75 (Sexual assault liability “predicated upon . . . conceptually independent negligent supervision.”); *CPT Corp. v. St. Paul Fire & Marine Ins. Co.*, 515 N.W.2d 747 (Minn. Ct. App. 1994) (Negligent administration of employee benefits related to misconduct by the trustee of the employee stock option plan (ESOP) and acquiescence by the employer was within the scope of the meaning of administration, which included direction or oversight of any officer’s employment.).

regarding the appropriate amount paid, it's not unlikely that upon further review many such suits will involve assertion of employee benefits claims.<sup>21</sup>

The latter scenario may include 401K profit sharing plans, change in employee status from a union plan to management, fails to consider as compensation bonuses, overtime and commission. It also includes formulas that look to the last five years' work instead of the five highest earning years and calculation of pension consideration of part-time work and the calculation of pensions.

## V. COVERAGE FOR EMPLOYMENT DISPUTES UNDER COMMERCIAL GENERAL LIABILITY POLICIES

### A. Bodily Injury

"Bodily Injury" is typically defined as "sickness or disease" sustained by a person, including death resulting from any of these at any time. A majority of reported cases require a physical manifestation of "bodily injury" to establish "bodily injury" coverage.<sup>22</sup> An allegation of emotional distress or mental anguish without an accompanying physical manifestation is insufficient to constitute "bodily injury" under the CGL policy.<sup>23</sup> Such claims must also be caused by an "occurrence." An "occurrence" is usually defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Some employment-related claims include only intentional acts.<sup>24</sup>

Coverage may lie under the "bodily injury" provisions of a standard commercial general liability policy for plaintiffs in discrimination lawsuits. This may include disparate treatment (intentional) or disparate impact (non-intentional) discrimination so long as physical

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<sup>21</sup>Loss of Employee Retirement Benefits can occur where: (1) a retirement plan payout is inexplicably less than colleagues received; (2) the money received is less than what would appear appropriate given the number of years worked; and (3) there has been a merger by the company or a new pension plan administrator has been retained.

<sup>22</sup>*Allstate Ins. Co. v. Diamant*, 518 N.E.2d 1154 (Mass. 1988) (Bodily injury did not encompass damages for emotional distress, mental pain and anguish, or injury to reputation); *University of Illinois v. Continental Cas. Co.*, 599 N.E.2d 1338, 1353 (Ill. App. Ct. 1992) (Bodily injury" means "actual physical injury."). A different result will attend where "bodily injury" is expressly defined to include "emotional distress." *Lavanant v. General Acc. Ins. Co. of Am.*, 595 N.E.2d 819 (N.Y. 1992) (Bodily injury as defined in the general accident CGL includes coverage for purely emotional distress); *Williamson v. Historic Hurtsville Ass'n*, 556 So. 2d 103 (La. Ct. App. 1990).

<sup>23</sup>*Presidential Hotel v. Canal Ins. Co.*, 373 S.E.2d 671 (Ga. Ct. App. 1988) ("Hotel insurance policy . . . did not cover claims brought by hotel's former employees, who sought monetary and mental anguish damages for sexual harassment."); *State Farm Fire & Cas. Co. v. Basham*, 520 N.W.2d 713 (Mich. Ct. App. 1994); *Garvis v. Employers Mutual Cas. Co.*, 497 N.W.2d 254 (Minn. 1993); *Voorhees v. Preferred Mut. Ins. Co.*, 607 A.2d 1255 (N.J. 1992) (Where physical contact occurred, emotional and psychological injuries arising out of the alleged contact, especially where sexual abuse is alleged, are "bodily injury." *Allstate Ins. Co. v. McCrannie*, 716 F. Supp. 1440 (S.D. Fla. 1989).

<sup>24</sup>*State Farm Fire & Cas. Co. v. Compupay, Inc.*, 654 So. 2d 944 (Fla. Dist. Ct. App. 1995) (holding that allegations of sexual harassment and discrimination were not "accidents" and thus not an "occurrence."); *Smith Way Motor Xpress, Inc. v. Liberty Mutual Co.*, 484 N.W.2d 192 (Iowa 1992); *Jackson County Hospital v. Alabama Hospital Ass'n Trust*, 652 So. 2d 233 (Ala. 1994).

manifestations of the alleged emotional distress exists.<sup>25</sup> Potential liability may arise not only under primary general liability policies, but also under umbrella liability policies. Umbrella policies frequently provide broader coverage than primary policies. If these policies include policy language compelling the insurer to "drop down" and serve as primary coverage, or they may afford a defense for such claims even though the primary policy does not.<sup>26</sup>

Both commercial general liability and umbrella policies qualify coverage for "bodily injury" claims by requiring that such claims arise out of an "occurrence" which is defined to include only accidental events. Claims for disparate impact, which can be asserted based on negligence, readily meet this requirement. Thus, claims under the F.E.H.A., a California state anti-discrimination statute, require only proof of negligence. Similarly, the responsible parties may not be officers of the corporation but lower-level managers. The conduct charged may not be the result of corporate policy so that the conduct claimed may constitute an "occurrence" falling within the "bodily injury" coverage.

The majority of courts have found that disparate treatment/wrongful termination claims cannot be an occurrence, because liability requires proof of an intent to discharge employees in a particular manner. Nevertheless, some jurisdictions have found that an intentional act resulting in an unintended injury may constitute an "occurrence" under a CGL policy.<sup>27</sup> By contrast, courts have generally held that the "disparate impact" "discrimination" claims do not allege an accident within the meaning of a CGL policy.<sup>28</sup>

Courts have also found that intentional conduct by lower level employees may preclude coverage for that individual under the "bodily injury" coverage, yet not preclude coverage for an employer vicariously liable for its employee's actions. Corporations are often charged with vicarious liability for non-intentional conduct (i.e., either on the basis of strict liability or negligent supervision). Plaintiffs may argue, however, that corporations fail to adopt express policies to prevent an adverse impact against a lower level managerial employee.<sup>29</sup>

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<sup>25</sup>*Mutual Serv. Cas. Ins. Co. v. Co-op Supply, Inc.*, 699 F. Supp. 1438, 1440 (D. Mont. 1988) ("[T]he mere allegation that plaintiff has suffered 'bodily injury' as a result of the wrongful discharge or discrimination is sufficient to trigger the duty to defend."); *EEOC v. Southern Publishing Co.*, 894 F.2d 785, 789 (5th Cir. 1990) (Plaintiff's allegations of physical pain, as well as embarrassment, humiliation, and emotional distress were sufficient to allege "bodily injury" under the policy.).

<sup>26</sup>Umbrella policies may define "bodily injury" or "personal injury" to include mental or emotional distress.

<sup>27</sup>*Compare, Lipson v. Jordache Enterprises, Inc.*, 9 Cal. App. 4th 151, 159, 11 Cal. Rptr. 2d 271, 276 (1992); *Dyer v. Northbrook Prop. & Cas. Ins. Co.*, 210 Cal. App. 3d 1540, 1547, 259 Cal. Rptr. 298, 303 (1989); *Jefferson-Pilot Fire & Cas. Co. v. Sun Belt Beer Distributors, Inc.*, 839 F. Supp. 376, 379 (D.S.C. 1993); *West American Ins. Co. v. Bank of Isle of Wight*, 673 F. Supp. 760, 765 (E.D. Va. 1987); *Smithway Motor Express, Inc. v. Liberty Mutual Ins. Co.*, 484 N.W.2d 192, 194-95 (Iowa 1992) with *LA Peka Inc. v. Security National Ins. Co. Inc.*, 814 F. Supp. 1540 (D. Kan. 1993); *Maine Bonding & Cas. Co. v. Douglas Dynamics Inc.*, 594 F.2d 1079, 1081-82 (Me. 1991); *Mutual Service Cas. Ins. Co. v. Co-Op Supply Inc.*, 699 F. Supp. 1438, 1440 (D. Mont. 1988).

<sup>28</sup>*International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36, 97 S. Ct. 1843, 1854 (1977); *Castle & Cook, Inc. v. Great Am. Ins. Co.*, 711 P.2d 1108, 1111 (Wash. Ct. App. 1986); *Solo Cup Co. v. Federal Ins. Co.*, 619 F.2d 1178, 1187 (7th Cir. 1980).

<sup>29</sup>See *McLeod v. Tecorp Int'l Ltd.*, 844 P.2d 925, 927 (Or. Ct. App. 1992).

## B. Bodily Injury Exclusions

- Employer's liability

This provision excludes coverage for "bodily injury" to an employee of the insured arising out of and in the course of employment by the insured or performing duties related to the conduct of the insured's business.<sup>30</sup> Thus, in a number of cases, harassment, discrimination, defamation, libel or slander performed by one employee against another were not subject to an express exclusion and in contravention of the policy held are corporation's explicit policies and outside the context of the injured employee's actual work, would not be an injury suffered arising out of and in the course of the employment at the insured.<sup>31</sup>

- Expected or intended injury

The employee must intend the resulting injury, not merely the intentional act.

- Workers' Compensation or Similar Laws

Where workers' compensation risks are at issue, they are to be handled by the workers' compensation insurance policy.

- Employment-related practices exclusion<sup>32</sup>

The most common employment-related practices exclusion bars coverage for "bodily injury to a person arising out of any refusal to employ that person; termination of that person's employment; employment related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination directed at that person." As some employment actions are not specifically delineated, this exclusion may not operate to bar all employment-related claims.<sup>33</sup>

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<sup>30</sup>*Truck Ins. Exch. v. Gagnon*, 33 P.3d 901 (N.M. Ct. App. 2001) (Employer's liability exclusion precluded coverage for a sexual harassment claim brought by the insured's employees. "The overwhelming weight of authority is that employee exclusion clauses in general comprehensive liability policies like the one in this case exclude coverage for sexual harassment of employees."); *Miller v. McClure*, 742 A.2d 564 (N.J. Super. App. Div. 1998) (Coverage for supervisor's alleged liability for sexual harassment of employee was barred by employment-related practice exclusion of a CGL policy); *West Am. Ins. Co. v. Bank of Isle of Wight*, 673 F. Supp. 760, 766, (E.D. Va. 1997) (Withholding an employee's claim for wrongful termination was excluded by employee exclusion.); *Omark Industries, Inc. v. Safeco Ins. Co. of Am.*, 590 F. Supp. 114 (D. Ore. 1984) (Claim for discrimination is barred by employee exclusion.).

<sup>31</sup>*Save Mart Supermarkets v. Underwriters at Lloyd's of London*, 843 F. Supp. 597 (N.D. Cal. 1994) (Exclusion applies only to claims otherwise covered by workers' compensation/employer's liability policy and does not exclude coverage in class action sex discrimination actions.).

<sup>32</sup>(CG 2147)

<sup>33</sup>*Zurich Ins. Co. v. Smart & Final, Inc.*, 996 F. Supp. 979 (C.D. Cal. 1998) (Holding an employment-related practice exclusion did not bar claim for false arrest and imprisonment because they were not clearly listed in the exclusion. Absent an express endorsement to this early exclusion that "whether the injury causing event . . . occurs before employment, during employment or after employment" with that person, former employee claims would not be barred by the exclusion.).

### C. Personal Injury

The greatest opportunity for coverage of employment disputes would include distinct coverage for “personal injury” offenses under standard Commercial General Liability insurance policy provisions. Coverage for discrimination claims may be found under the “personal injury” coverage provisions. Indeed, older versions of CGL policies and many umbrella policies specifically define “personal injury” to cover discrimination claims.<sup>34</sup>

Some courts have denied coverage under the “personal injury” provisions, however, where instead of express coverage for discrimination claims the coverage relates only to a series of affiliated offenses including, “mental anguish, humiliation, false arrest, defamation, or invasion of privacy.”<sup>35</sup> Jurisdictions that permit, as does California, the court to look beyond the face of the pleadings to evaluate the scope of claims asserted may find potential coverage within the policies “personal injury” coverage for a range of conduct falling expressly within these affiliated offenses.<sup>36</sup>

The 2001 ISO CGL form’s “personal and advertising injury” coverage typically includes the following offenses:

- False arrest, detention or imprisonment;
- Malicious prosecution;

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<sup>34</sup>*American Guar. & Liab. Ins. Co. v. Vista Medical Supply*, 699 F. Supp. 787, 793-94 (N.D. Cal. 1988); *Old Republic Ins. Co. v. Comprehensive Health Care Assoc., Inc.* 2 F.3d 105, 109 (5th Cir. (Tex.) 1993) (personal injury defined to include “a bodily injury” defined to include “bodily injury” and “mental injury” could potentially provide coverage for sexual harassment claims) (duty to defend sex discrimination and wrongful termination suit based on allegations amounting to a claim for defamation).

<sup>35</sup>*American Motors Ins. Co. v. Allied Sysco Food Services, Inc.*, 19 Cal. App. 4th 1342, 1352 (1993) (no coverage for sex discrimination claims under listed offense of “humiliation”); *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.*, 14 Cal. App. 4th 1595, 1604 (1993) (no coverage under “personal injury” provisions where no allegations amounting to defamation); *Ottumwa Housing Auth. v. State Farm Fire & Cas. Co.*, 495 N.W.2d 723 (Iowa 1993) (no duty to defend under “personal injury” coverage part because sexually harassing comments do not amount to “disparagement”); *Jefferson-Pilot Fire & Cas. Co. v. Sunbelt Beer Distributors*, 839 F. Supp. 376, 381 (D.S.C. 1993) (no coverage under personal injury provisions where no cause of action for violation of right of privacy and no allegations amounting to such a claim); *Lindsey v. Admiral Ins. Co.*, 804 F. Supp. 4752 (N.D. Cal. 1992) (no coverage for sexual harassment claims under defamation coverage because allegations do not amount to claim of defamation); *Commercial Union Ins. Co. v. Sky Inc.*, 810 F. Supp. 248, 25 (W.D. Ark. 1992) (allegations that employee was “imprisoned” and “defamed” in course of sexual harassment do not trigger personal injury coverage because inseparable from sexual harassment claim); *Nichols v. American Employers Ins. Co.*, 140 Wis. 2d 743, 746, 412 N.W.2d 547, 549 (Ct. App. 1987) (no coverage for administrative claim of sexual harassment despite allegations of facts amounting to defamation because no damages awardable by administrative tribunal for defamation).

<sup>36</sup>*American Guar & Liab. Ins. Co.*, 699 F. Supp. at 793-94.

- The wrongful eviction from, wrongful entry into or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or
- Oral or written publication of material that violates a person's right of privacy.

Coverage B does not contain an employee-employer claim exclusion. Nor does it contain a requirement that the injury for which recovery is sought be caused by an "occurrence." Many of the referenced "personal and advertising injury" offenses encompass intentional torts. There are several elements that must be met, however, including.

(1) A specifically enumerated offense in the policy must be factually asserted.<sup>37</sup>

(2) Whether or not the elements of a tort of false imprisonment, arrest or detention or invasion of privacy must be asserted so as to trigger these coverages is an ongoing debate between insureds and insurers.<sup>38</sup>

Sexual harassment, not including physical detention where the alleged conduct did not trigger potential coverage for false arrest, detention, false imprisonment, libel or slander. Again the issue is whether all of the elements of the libel claim must be asserted to trigger a defense. If so, the claimant must assert a false statement to a third party concerning the plaintiff's reputation that causes actual damage to the plaintiff even where it is cocooned within a claim for sexual harassment or sexual discrimination.<sup>39</sup>

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<sup>37</sup>*See, e.g., Zurich Ins. Co. v. Smart & Final, Inc.*, 996 F. Supp. 979 (C.D. Cal. 1998) (Coverage found for employee's false arrest and imprisonment claims, or coverage under CGL policies specifically provided coverage for "false arrest, detention or imprisonment."); *Melugin v. Zurich Canada*, 57 Cal. Rptr. 2d 781 (Ct. App. 1996) (Holding that insurer had a duty to defend allegations for sex discrimination where a policy specifically provided coverage for sexual discrimination.)

<sup>38</sup>*Cornhill Ins. PLC v. Valsamis, Inc.*, 106 F.3d 80 (5th Cir. 1997) (Allegations that plaintiff's employer attempted to force himself on employee in unlocked supply room where there was no threat of physical force to keep claimant in the closet, did not trigger a defense as it did not constitute privacy invasion or false imprisonment under Texas law. *Id.* at 585.); *Collins Building Services, Inc. v. United Capitol Ins. Co.*, 1999 WL 259519 (S.D.N.Y. 1999).

<sup>39</sup>*Duff Supply Co. v. Crum & Forster Ins. Co.*, No. CIV. A. 96-8481, 1997 WL 255483 (E.D. Pa. May 8, 1997) (Women referenced regularly as sluts and whores were defamatory statements made in a general work environment, thereby constituting publication.); *Community TV Corp. v. Twin City Fire Ins. Co.*, 202 Mass. Super. LEXIS 452 (applying New Hampshire law) (Religious and gender discrimination alleged, coupled with extrinsic evidence of potential defamation claim.); *Town of Montville v. Fidelity & Guarantee Ins. Underwriters*, No. CV 9501088 27S, 1997 WL 614581 (Conn. Super. Ct. Sept. 25, 1997) (Employee's allegations she had been attacked and humiliated by her supervisor sufficed even though complaint failed to allege specific publication.); *Bradley Corp. v. Zurich Ins. Co.*, 984 F. Supp. 1193 (E.D. Wis. 1997) (Subjection to hostile work environment which included "sexual remarks, sexually intimidating language, improper sexual gestures and improper physical and sexual conduct" triggers libel and slander offense coverage.); *Ottumwa Housing Authority v. State Farm Fire & Cas. Co.*, 495 N.W.2d 723 (Iowa 1993) (Disparagement did not encompass sexual harassment since damages for injury to reputation was not asserted)

Claims for invasion of privacy have not always triggered a defense, and are often narrowly construed.<sup>40</sup> CGL policies containing a definition of discrimination as a “personal and advertising injury” offense may implicate employment discrimination coverage.<sup>41</sup>

- Coverage B exclusions – Knowing violation of rights of another

This provision excludes coverage for “personal and advertising injury” caused by, or at the direction of, the insured with knowledge that the act would violate the rights of another and would inflict a “personal and advertising injury.” Few cases have applied this exclusion in any context, much less to an employment scenario. It has typically not barred a defense absent a complete adjudication of an issue against an insured.

- Published with knowledge of falsity

Only where the insured publishes a statement with knowledge of falsity will it preclude coverage. This exclusion does not impact statements that the insured “should have known” were false.

- Material published prior to policy period

This exclusion is dependent on timing. The exclusion must arise out of the injurious oral or written publication that was made before the beginning of the policy period. Where applicable, an earlier policy may provide coverage.

- Criminal acts

An actual criminal act must be asserted.

- Breach of contract

Pure breach of contract employment claims may be barred.

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basis of claim.) *American & Foreign Ins. Co. v. Church Schools in Diocese of Virginia*, 645 F. Supp. 628 (E.D. Va. 1986) (Assault, battery and intentional infliction of emotional distress and improper sexual conduct arising out of teacher’s alleged touching of a student in a sexual manner contained no allegations but false statement, thus no personal injury coverage.).

<sup>40</sup>*Fieldcrest Cannon, Inc. v. Fireman’s Fund Ins. Co.*, 477 S.E.2d 59 (N.C. Ct. App. 1996) (Intimidation, harassment did not constitute a “violation of an individual’s right of privacy” so as to implicate coverage.); *C & A Int’l Reins. Co. v. CPB Enterprises, Inc.*, 2007 WL 718775 (S.D. Ala. Nov. 6, 1997) (Claims that insured’s employee was assaulted by unlawful touching does not implicate the offense of oral or written publication of material that violates a person’s right of privacy as there is no publication of material at issue. *But see Community TV Corp. v. Twin City Fire Ins. Co.*, 2002 Mass.Super. LEXIS 452 (applying New Hampshire law)).

<sup>41</sup>*Glen Lincoln, Inc. v. Zurich Ins. Co.*, 1999 WL 58587 (E.D. Pa. 1999) (Insurer provided defense to insured who was sued by former employee alleging that he was fired because he was HIV positive as “discrimination” was among the covered personal injury offenses.).

- Fellow employee exclusion

This exclusion can be added by endorsement. It excludes coverage for an employee's "personal injury" that was caused by another employee within the course and scope of employment. The key question is whether the alleged wrongful conduct occurred within the course and scope of the co-employee's employment with the insured.<sup>42</sup>

- Employment-related practice exclusion

A key consideration is whether the alleged wrongful act occurred before or after termination<sup>43</sup> and whether it was committed in the course of plaintiff's employment with the insured.<sup>44</sup>

- Suit requirement

Some employment-related claims or enforcement actions are asserted in proceedings that did not seek money damages or may not qualify as a "suit." Examples include: proceedings before an administrative body such as the EEOC which cannot impose monetary damages or adjudicate liability and thus would not meet the definition of a "suit" seeking damages under the policy.<sup>45</sup>

#### **D. Continuing Discrimination Claims Under Title VII**

The majority of courts have found that where the discrimination emanates from one policy or practice then this is the first "occurrence."<sup>46</sup> Discrimination claims, however, typically allege a pattern or practice that has existed for many years. Such claims may be continuous torts

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<sup>42</sup>*Newyear v. Church Ins. Co.*, 155 F.3d 1041 (8th Cir. (Mo.) 1998) (applying Missouri state law to determine plain meaning of course and scope of employment.); *Farmers Ins. Group v. County of Santa Clara*, 906 P.2d 440 (Cal. 1995); *Lisa M. v. Henry Mayo Newhall Memorial Hospital*, 907 P.2d 358 (Cal. 1995).

<sup>43</sup>(CG 2147)

<sup>44</sup>*Frank & Freedus v. Allstate Ins. Co.*, 52 Cal. Rptr. 2d 678 (Ct. App. 1996); *511 Bourbon Street Corp. v. First Financial Ins. Co.*, 701 So. 2d 1088 (La. Ct. App. 1997) (holding that statements made during workers' compensation proceedings of a former employee fall within course of employment); *HS Services, Inc. v. Nationwide Mutual Ins. Co.*, 109 F.3d 642 (9th Cir. 1997); *American Alliance Ins. Co. v. 1212 Restaurant Group, LLC*, 342 Ill. App. 3d 500 (2003) ("[P]ost-termination acts of defamation or other employment-related practices can reasonably arise directly and proximately from the termination."); *Peterborough Oil Co., Inc. v. Great American Ins. Co.*, 397 F. Supp. 2d 230 (D. Mass. 2005); *Alexandra House, Inc. v. St. Paul Fire & Marine Ins. Co.*, 419 N.W.2d 506 (Minn. Ct. App. 1998).

<sup>45</sup>*Campbell Soup Co. v. Liberty Mutual Ins. Co.*, 571 A.2d 1013 (N.J. Super. Ch. Div. 1988); *but see Solo Cup v. Federal Ins. Co.*, 619 F.2d 1178, 1188 (Ill. App. Ct. 1980) ("[W]e think that the duty to defend 'suits' might in some circumstances be triggered by adjudicatory proceedings before an administrative body.").

<sup>46</sup>*Mead Reins. v. Granite State Ins. Co.*, 873 F.2d 1185, 1187 (9th Cir. 1988); *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 61-62 (3d Cir. 1982); *Transport Ins. Co. v. Lee Way Motor Freight, Inc.*, 487 F. Supp. 1324, 1329-30 (N.D. Tex. 1980).

triggering a series of occurrences in each and every CGL policy from the date of the first alleged “wrongful act.”<sup>47</sup>

An employee can introduce evidence of prior discriminatory acts as far back as the passage of Title VII in 1965 as evidence that the corporation engaged in a continuing policy or practice of discrimination. Title VII limits damages for such continuing violations to those occurring within a two-year period prior to the employee’s filing of an administrative complaint. The amount of this award, however, may take into account the continuing and cumulative effect of prior discriminatory acts.<sup>48</sup> Thus, coverage may exist for damage claims for discriminatory acts under CGL policies in place from and after the first date that the alleged discriminatory conduct occurred.<sup>49</sup>

## **VI. COVERAGE FOR EMPLOYMENT DISPUTES UNDER FIDUCIARY LIABILITY POLICIES**

A number of fiduciary liability policies may address certain employee issues. Thus, a Labor Management Trust Fiduciary Policy describes certain fiduciary policies in the pension arena.<sup>50</sup> In one recent case, the issue was whether a fiduciary liability policy as written was limited to fiduciary duties arising out of ERISA and other pension-related laws or whether, contrary to Federal’s position, it also encompassed common law fiduciary duties associated with the insured PTF’s commercial transactions. The court determined the latter was the case and thus problematic investments created sufficient liability to trigger defense duties. The court reached this interpretation by broadly construing the language “any claims first made against the Insured during the Policy Period as a result of any actual or alleged breach of fiduciary duty.”

In light of other applicable California case law, the phrase “as a result of” should not be read more narrowly than “arising out of” to destroy the insured’s reasonable expectation of coverage. It was possible that the insured could be found liable as a lender for breaching fiduciary duties and that because the mere possibility of coverage was enough to trigger a defense duty, Federal was required to defend.

The particular fiduciary liability policy was a claims-made policy with no reporting requirement, requiring notice of claims “as soon as practicable.” There was no requirement that claims be reported within the policy period or even within a specific number of days thereafter. Thus, the court found that Federal’s policy could not be treated as if it was a claims-made-and-reported policy.<sup>51</sup> A notice prejudice rule may be applied to a claims-made policy with no reporting requirements.<sup>52</sup>

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<sup>47</sup>*Castle & Cooke Inc. v. Great Am. Ins. Co.*, 711 P.2d 1108, 1113 (Wash. Ct. App. 1986); *Appalachian Ins. Co.*, *supra*; *Transport Ins. Co.*, *supra*.

<sup>48</sup>*Verzosa v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 589 F.2d 971, 976 (9th Cir. 1978); *Thompson v. Sawyer*, 678 F.2d 257, 290 (D.S.C. 1982).

<sup>49</sup>*American Cyanamid Co. v. American Home Assur. Co.*, 30 Cal. App. 4th 969, 978-79 (1994) (timing of occurrence is based not on general rules but on interpretation of particular policy language).

<sup>50</sup>*Pension Trust Fund for Operating Engineers v. Federal Ins. Co.*, 307 F.3d 944, 950 n.2 (9th Cir. (Cal.) 2002).

<sup>51</sup>*Pension Trust Fund*, 307 F.3d at 956 n.6:

In a number of contexts, the fiduciary breach may apply to the manner in which employee benefit programs are invested which create loss for employees and allegedly chargeable liability flowing therefrom.

## **VII. ERRORS AND OMISSIONS POLICIES AND EMPLOYMENT DISPUTES**

Although an employer's Errors & Omissions coverage (i.e., malpractice policy) may not be a potential source of coverage in a typical employment liability context, it should be examined. Especially where the employee is functioning as a professional, wrongful acts of that employee could trigger E&O coverage. Such coverage is typically claims-made-and-reported, so prompt notice of even a circumstance that could create liability is key to securing the benefits of this coverage. To date more case law has arisen under the Directors & Officers policies and is a better resource to evaluate in determining whether a "wrongful acts" policy trigger may be implicated.

## **VIII. DIRECTORS & OFFICERS INSURANCE POLICIES AND EMPLOYMENT DISPUTES**

A Directors & Officers policy may be considered a form of Errors & Omissions coverage protecting individuals who serve on the boards of corporations or are corporate officers. It covers corporate obligations for indemnity of directors and officers where claims are made against them under certain statutes and corporate bylaws. Typically there is no corporation coverage (i.e., for the entity itself), but rather for the corporate officers, and not other employees. Some recent Directors & Officers policies include express exclusions for employment-related claims (i.e., wrongful termination, discrimination, sexual harassment) added to a commercial general liability policy. Absent these exclusions, there are often restrictive conditions and other exclusions that could impact employment-related coverage.

The insured corporation is not a covered entity and there is no coverage for employees other than officers except for some specialized D&O policies issued to nonprofit entities and hospitals. In addition, the following exclusion apply:

1. The insured v. insured exclusion. This will eliminate coverage for suits where discrimination, harassment, or termination resulted in a suit by an officer against another director or officer.

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The pertinent policy language specifically provides as follows:

This is a claims-made policy. Except to the extent as may otherwise be provided herein, this policy covers claims first brought against the Insured during the Claim Period. [Introductory language].

[T]he Company shall pay on behalf of the Insured ... on the account of any claims first made against the Insured during the Policy Period [Insuring Clause 1].

The Insured shall, as a condition precedent to its right to be indemnified under this policy, give the Company notice as soon as practicable in writing of any claim made against it. [Notice of Claim provision].

<sup>52</sup>*Xebec Development Partners, Ltd. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 12 Cal. App. 4th 501, 532-33, 15 Cal. Rptr. 2d 726, 741 (1993) (The court and the parties presumed that the insured's failure to give sufficient notice was not *ipso facto* a valid reason to refuse to defend. *Id.* at 532.).

2. Exclusions for libel, slander and emotional distress where the covered damages are the form of recovery sought.

A number of D&O policies are starting to offer, as part of a package program, Employment Practices Liability Insurance. As such, the policy is simply part of a broader errors and omissions policy. Therein, the named insured provision is broadened to include all employees in addition to directors and officers, as well as extending coverage to the corporate entity without expansion of the policy limits.

Few reported cases have arisen under this policy provision. One exception, *Olympic Club v. Those Interested Underwriters at Lloyd's London*, 991 F.2d 497 (9th Cir. 1993), found that a D&O policy did not cover claims against the insured country club based on race and sex discrimination in its membership policies. This followed as the suit was based on the club's own policies, not on the specific acts of its directors and officers.

## **IX. WORKERS' COMPENSATION/EMPLOYERS LIABILITY INSURANCE AND EMPLOYMENT DISPUTES**

### **A. Workers' Compensation**

Workers' compensation insurance is statutorily mandated and includes either a direct purchase or a self-insurance plan approved by regulatory authorities. The coverage and statutory benefits are specified under California statutes. Under California law workers' compensation is the exclusive remedy available to an injured employee against his or her employer.

- A civil damage suit for wrongful termination in violation of public policy is not pre-empted by the exclusive remedy provisions of the workers' compensation law.<sup>53</sup>
- Where the employee's injury is caused by the employer's willful physical assault.
- Where the employee's original injury or occupational disease is fraudulently concealed from him/her by the employer, and the condition is aggravated by that concealment, the employer will be liable to the extent of the aggravation.
- Where the employee's injury results from a defective product manufactured by the employer, but only after the product has been transferred to a third person, enters the stream of commerce, and thereafter is provided to the employee by one other than the employer.
- Where the injury or death is caused by the employer's removal of a point of operation guard on a power press.

Workers' compensation will respond to an employee's claims of emotional distress resulting from employment-related events, typically arising out of discrimination or sexual harassment up to the amount of the state statutory benefit level.<sup>54</sup>

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<sup>53</sup>*Gantt v. Sentry Ins.*, 1 Cal. 4th 1083, 1100, 1101 (1992) (Such an employee is entitled to receive "compensatory and punitive damages under normal tort principles" when the "employer's decision to discharge an employee results from an animus that violates the fundamental policy of [California.]").

<sup>54</sup>*Producers Dairy Delivery Co. v. Sentry Ins. Co.*, 41 Cal. 3d 903, 906-07 (1986) (Workers' compensation coverage will not replace the employee's full salary and other benefits, nor will it cover the additional compensatory damages now permitted under federal law.); *La Jolla Beach & Tennis Club, Inc. v. Industrial Indem. Co.*, 9 Cal. 4th 27, 42,

## **B. Employers Liability**

Employers liability (“EL”) coverage is purchased as a separate coverage part of a standard workers’ compensation policy. It serves as “gap filler” coverage. The EL portion of the policy provides coverage for liability relating to bodily injury by accident or disease to employees. It protects employers from liability in those instances where an employment relationship gives rise to a tort action for civil damages against an employer. In the absence of an express exclusion, it may obligate the insured to defend such claims.<sup>55</sup>

In the late 1980s a number of insurers added exclusions for “bodily injury arising out of termination of employment” and “bodily injury arising out of coercion, demotion, reassignment, discipline, defamation, harassment, or humiliation of or discrimination against any employee.” Where the suit is one for an employee’s wrongful acts against another employee, it may not fall within the scope of this exclusion as is true of commercial general liability coverage.

## **X. CONCLUSION**

A range of different policies may respond to employment-related claims. The coverage is broader than that conceived by attorneys who litigate employment practice claims because there are aspects of the coverage that are rarely litigated but yet create coverage opportunities. One example is that commercial general liability policies may include an employee-employee exclusion but such provisions are rarely part of standard form policies. In those cases in which employee-based claims are a legitimate source of liability and otherwise trigger coverage for a form of disparagement, defamation, privacy invasion, bodily injury, or other covered claims, a defense may be compelled, even if an employment practices liability exclusion is otherwise included in the policy.

Similarly, Directors & Officers and Errors & Omissions policies, written on a claims-made basis, may not have comprehensive employment liability exclusions because they are either intended to extend to cover employee risks or are in fact employment liability policies.

With the addition of wage and hour coverage to many employment practices liability policies, even with sublimits, the possible coverage may range beyond that anticipated by employment attorneys and typically relied on in their past experience. This is an era when careful review of employment practices liability policies is not the end of coverage analysis but merely the beginning. As plaintiffs’ attorneys become more astute about coverage available for employment claims, a broader range of policies may become considered in the mediation of coverage disputes, and the full coverage opportunities under these policies will be clarified either by policy language or case law analyzing coverage disputes.

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36 Cal. Rptr. 2d 100, 108 (1994) (No duty to defend civil suit for wrongful termination and discrimination under workers’ compensation coverage because a civil suit is not a claim for “benefits.”).

<sup>55</sup>*Republic Indem. Co. v. Superior Court (Alpha Therapeutic Corp.)*, 224 Cal. App. 3d 492, 499 (1990); *but see B&E Convalescent Center v. State Compensation Ins. Fund*, 8 Cal. App. 4th 78 (1992).

## APPENDIX “A”

### GENERAL INSURING LANGUAGE

#### Insuring Agreement – What We Will Cover

*A. What We Will Pay*

We will pay damages that the insured is legally required to pay as a result of sexual harassment, discrimination, or wrongful discharge that arise out of a wrongful employment practices.

*B. Defense of Claims*

We will defend any claim brought against the insured alleging sexual harassment, discrimination, or wrongful discharge in seeking damages that are covered by the policy.

*C. When Claims are Covered*

We will pay and defend a claim only when the claim is first made against an insured during the policy period and reported to us as soon as practicable after the claim is made (but in no event more than 60 days following the end of the policy period).

#### DEFINITIONS

##### Who Is Insured:

*Corporations*

If you are a corporation or organization other than a partnership or joint venture, you are an insured. Your executive officers and directors are insured. But each is an insured only while acting within the scope of their duties to you. Your stockholders are also insured but only with respect to their liability as stockholders.

*Employees*

Your employees, other than your executive officers and directors are insured while acting within the scope of their duties to you.

“Discrimination” means the unlawful treatment of persons based on their race, color, religion, age, sex, sexual orientation or preference, marital status, pregnancy, disability, national origin, or any other similar status that is prohibited by law.

“Sexual harassment” means unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature that:

- are made a condition of employment;
- are used as a basis for employment decisions;
- create a work environment that interferes with performance; or
- create an intimidating, hostile, or offensive work environment

“Wrongful discharge” means the unfair or unjust termination of an employment relationship that:

- breaches an implied agreement to continue employment; or
- inflicts emotional distress on the employee, defames the employee, invades the employee’s privacy, or is a result of fraud.

“Wrongful discharge” does not include termination or breach of an express written contract of employment or the breach of an express obligation to make payments in the event of the termination of employment.

## EXCLUSIONS

### *Intentional Acts*

We do not covers claim for harm that is expected or intended by the insured. But this does not apply to the liability of an insured that did not:

- directly participate in the conduct that caused the harm; or
- knowingly allowed the wrongdoer to commit or continue to commit the conduct that caused the harm

### *Fines, Multiplied Damages, or Non-Monetary Relief*

We do not cover:

- fines, taxes, penalties or liquidated damages;
- the multiplied portion of any damage award that is subjected to a multiplier;
- non-monetary relief; or
- any other uninsurable amounts

### *Contractual Liability*

We do not cover the liability of others assumed by the insured in the contract or agreement. If this does not apply to liability that the insured would have had in the absence of the contract or agreement.

### *Prior Knowledge Exclusion*

We do not cover any facts or circumstances known to the insured prior to the inception of Policy Period which facts or circumstances would cause a reasonable person to believe that a claim alleging a wrongful employment practice might be made.

### *Retaliation in Violation of Public Policy*

We do not cover any liability arising out of:

- retaliatory action by an insured against an employee who decides to perform an act would require a violation of a mandate of public policy as reflected in legislation, administrative rules, regulations or decisions, judicial decisions, and professional codes of ethics;
- retaliatory action by an insured against a claimant for filing a complaint or a claim, giving testimony, or otherwise participating in proceedings related to a wrongful employment acts; or
- retaliatory action by an insured against an employee who engages in or threatens to engage in whistleblower activities

### *Accommodations and Expenses*

This insurance does not apply to claims . . . for any damages, costs, or expenses incurred by the insured in making physical changes, modifications, alterations, or improvements as part of an accommodation pursuant to the Americans with Disabilities Act . . . or any similar federal, state, or local law or regulation

## APPENDIX “B”

### CGL HYPOTHETICALS

#### 1. A Corporation Founder Terminated Following a Change of Management

After his termination, a corporation founder goes to work for a competing corporation. He then pursues various claims alleging his improper ouster from the corporation he previously ran. Defamatory statements were directed against the former founder by the current CEO of the original company, negatively commenting upon the performance of the founder, who was now the officer of the competitor. The insurer relied upon exclusion 1.4: “11. Other employment-related practices, policies, acts or omissions, representations or relationships in connection with any insured at any time.”

Under the exclusion defamatory statements, made after the disgruntled former employee was terminated, would be a statement about his capacity as a competitor and thus outside the scope of any exclusion for an “employment-related act, omission or practice.”<sup>56</sup> The “employment-related practice” exclusion would not relate to post-employment termination in pursuit of litigation which could be deemed to constitute, in and of itself, an abuse of process (a form of malicious prosecution) under applicable California law.<sup>57</sup>

#### 2. In a Demand Letter Which Preceded an EEOC Action and Lawsuit It Was Alleged by a Female Hispanic Employee that the Work Environment of the Company Was Permeated with Pornography

Co-workers posted pornographic pictures and other sexually explicit magazines of women on the walls and in the forklifts in plain view of a female Hispanic employee and management. Pornographic magazines were in the kitchen, above the refrigerators, and on the floor. In January of 2006 a co-worker of the claimant placed a pornographic magazine in her work area and inside an open freezer where the claimant put her things. When she complained to her supervisor she was given permission to tear the magazines up and throw them away, but this did not solve the problem; she continued to have to dispose of the magazines without assistance from her employer.

The employment-related exclusion stated any claim or suit “alleging or asserting in any respect loss, injury or damage in connection with the . . . sexual harassment . . . . Sexual harassment means . . . verbal and physical conduct of a sexual nature that . . . (3) creates a work environment that interferes with performance.”

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<sup>56</sup>*Moore v. Hudson, Ins. Co.*, No. B189810, 2007 WL 172119, at \*7 (Cal. Ct. App. Jan. 24, 2007) (Limiting an analogous exclusion to “situations of employment, former employment, or prospective employment.”).

<sup>57</sup>*Electronics for Imaging, Inc. v. Atlantic Mut. Ins. Co.*, No. C 06-03947 CRB, 2006 WL 3716481, at \*5, \*6 (N.D. Cal. Dec. 15, 2006) (“EFI also argues that Atlantic had a duty to defend pursuant to the Ninth Circuit's decision in *Lunsford v. American Guarantee & Liability Ins. Co.*, 18 F.3d 653 (9th Cir.1994). In *Lunsford*, the Ninth Circuit held that under California law ‘a general liability insurance policy which promises to defend an insured against “malicious prosecution” includes a duty to defend against an “abuse of process” claim.’ *Id.* at 654-56. . . . This district court is bound by *Lunsford*. See *Zuniga v. United Can Co.*, 812 F.2d 443, 450 (9th Cir.1987) (stating that district courts are bound to follow the precedents of their own circuit) . . . .”)

Here, there is no obvious relationship between the co-employees and the supervisor's failure to properly intervene in an effective manner and stop the inappropriate conduct as passive rather than active conduct. The physical place in which the objectionable conduct occurred has no linkage to the employer/employee relationship.<sup>58</sup>

Absent an "employee/employer" exclusion, suits brought by one employee based on conduct of another employee that is allegedly the result of inadequate supervision but not directly promoted by the employer or done with the employer's express permission may trigger a defense. So here, there was no analogous wrongful act directly related to the excluded conduct.<sup>59</sup> Looking to a defamation scenario, the court stated: "[I]t appears that other factors relevant to that ultimate determination include (1) the nexus between the allegedly defamatory statement (or other tort) at issue and the third party plaintiff's employment by the insured, and (2) the existence (or nonexistence) of a relationship between the employer and the third party plaintiff *outside* the employment relationship."

Facts evidencing that any privacy invasion was made in such a way that would not implicate this exclusion would fall within the scope of potential coverage outside the exclusion so as to trigger a defense. Leaving pornographic magazines where they could intrude upon claimant's seclusion of space such as her individual refrigerator, where she reasonably anticipated privacy, not only invaded her privacy, and did so in a way that was individually invasive, but not connected with any employer/employee interaction within the meaning of the *Peterborough* analysis and outside the scope of employment-related practices exclusion.<sup>60</sup> This is especially the case as the conduct at issue is the failure to monitor co-employee conduct.

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<sup>58</sup>*Maine State Academy of Hair Design, Inc. v. Commercial Union Ins. Co.*, 699 A.2d 1153, 1158-60 (Me. 1997) (The insurer had a duty to defend its sexual harassment claim because some injuries pled may have arisen outside of work – some injuries constituting disparagement and invasion of privacy might be covered under the language of the policy under the facts herein.).

Taken together, both clues strongly suggest the common-sense conclusion that the term "employment-related" has a relatively narrow meaning: it is intended to refer to matters that directly concern the employment relationship itself, such as the demotion, promotion, or discipline of employees by employers, and tortious acts that may accompany such personnel decisions, such as discrimination, harassment, or defamation. Conversely, it is not intended to refer to all matters that concern or relate to employees.

<sup>59</sup>*Low v. Golden Eagle Ins. Co.*, 104 Cal. App. 4th 306, 314, 128 Cal. Rptr. 2d 423, 428-29 (2002).

<sup>60</sup>*Peterborough Co., Inc. v. Great American Ins. Co.*, 397 F.Supp.2d 230, 238-39 (D.Mass.2005) (The court limited the scope of employment-related practices exclusion which covered coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, or discrimination directed at that person. The court reasoned, "That [reference list above] consists almost entirely of events that concern the relationship between an employer and an employee – in other words, not events in the workplace generally, or events concerning the job duties of an employee, but events concerning personnel management, employee discipline, and similar matters. A second clue derives from the two other provisions of the exclusion, one of which excludes injuries arising out of a 'refusal to employ' a person (i.e., hiring), and one of which excludes injuries arising out of the 'termination of [a] person's employment' (i.e., firing).").

### **3. Interference with the Ability of the Claimant to Testify in a Workplace Proceeding**

Testimony elicited that was contrary to that sought by the employer and detrimental to its economic interests, as well as retaliatory because of alleged protests about workplace safety, falls within the personal injury coverage for “malicious prosecution” as a form of abuse of process.

Counsel retained by the insured reportedly attempted to block the claimant’s testimony before Cal OSHA. Insured’s counsel allegedly misrepresented that the claimant was a current employee entitled to return to work. It was also a misstatement that the company intended to keep that employee to continue serving in that capacity when it had no such intention. The employer’s counsel thus allegedly misrepresented facts to the court in order to avoid penalties otherwise awardable after a successful proceeding brought against the employer for failure to grant rest breaks.

A physical assault and threat by one employee who proclaimed himself to be a street gang member, calling the claimant a “f\_\_\_\_\_ snitch” because of purported whistleblower activity, triggered a potentially covered claim. Such statements defamed the employee following the employee’s complaints about workplace safety. Similarly, assault with emotional distress implications evidenced bodily injury. Where these injuries were not intentionally caused by the employer but rather were the result of the co-employee’s acts, which were attributed to the employer but not directly caused by the employer, a defense arose.

## **APPENDIX “C”**

### **PREFERRED EPLI POLICY PROCEDURES**

Knowledgeable brokers who appreciate the range of possible EPLI policies and can select one which best meets the insured’s particular needs is key.

Desirable features for an EPLI policy include:

- A broad description of the EPLI claim which includes claims common in employer/employee disputes.
- Coverage for administrative proceedings and civil actions.
- Coverage for arbitrations as well as civil actions.
- Definitions inclusive of current and former officers, directors, supervisors, managers, and full- and part-time employees.
- A “notice of circumstances” provision which permits the insured to notify of potential claims so that these are not barred from any subsequent policy because of the awareness exclusion within EPLI policies.
- Full prior act coverage with either no, or an extremely early, retroactive date.
- An opportunity to choose between various panel counsels offered by an insurer.
- No exclusion for punitive damages.
- No exclusion for retaliation claims.
- A stand-alone policy where possible.
- EPLI policies should be thoughtfully evaluated to discern which form is best for a specific business.

## APPENDIX “D”

A typical question in an EPLI application is the following:

Is any management or supervisory employee aware of any facts, incidents or circumstances that may result in claims being made against you? For example . . . we consider it reasonable for you to perceive that a claim may be brought against you if a current or former employee . . . has expressed dissatisfaction . . . by:

- Making a formal complaint to a supervisory employee of discrimination, harassment or unfair employment practice;
- Threatening to hire an attorney;
- Asking for a severance package in excess of what is being offered;
- Complaining of discrimination, harassment or unfair treatment and threatening to do something about it;
- Frequently complaining of discrimination, harassment or unfair treatment; or
- Complaining of failure to accommodate per ADA law.

## APPENDIX “E”

The common form of policy entitling a company to insurance coverage for its administration of employee benefits plans is set forth in the “Employee Benefits Liability Insurance Endorsement.” It provides in pertinent part:

### INSURING AGREEMENT

- (1) COVERAGE V-EMPLOYEE BENEFITS LIABILITY. **To pay** on behalf of the Insured **all sums** which the Insured shall become legally obligated to pay as a result of damages sustained by an employee, former employee, prospective employee or the beneficiaries or legal representatives thereof and caused by any **negligent act, error or omission of the Insured**, or any other person for whose acts the Insured is legally liable in the **administration of the insured’s Employee Benefit Programs** as defined herein, and the Company shall have the right and duty to defend any suit against the Insured seeking such damages, **even if such suit is groundless, false or fraudulent . . . .** [Emphasis added.]

### CONDITIONS

. . . .

- (2) DEFINITIONS APPLICABLE TO THIS INSURANCE
  - (a) Insured. The unqualified word “Insured,” wherever used, includes not only the Named Insured, but also any partner, executive officer, director, stockholder or employee, provided such employee is authorized to act in the administration of the Insured’s Employee Benefit Programs.
  - (b) Employee Benefit Programs. The term “Employee Benefit Programs” shall mean group life insurance, group accident or health insurance, profit sharing plans, pension plans, employee stock subscription plans, workers’ compensation, unemployment insurance, salary continuation plans, social security, disability benefits insurance, savings, vacation plans, or any other similar Employee Benefit Programs.
  - (c) Administration. The unqualified word “administration,” wherever used, shall mean:
    - (1) giving counsel to employees with respect to the Employee Benefit Programs;
    - (2) interpreting the Employee Benefit Programs;
    - (3) handling of employee records in connection with the Employee Benefit Programs;
    - (4) effecting enrollment, termination or cancellation of employees under the Employee Benefit Programs; providing all such acts are authorized by the Named Insured.
  - (d) Contract. The word “contract” means a policy of insurance issued to the Named Insured by an insurer or an agreement or arrangement entered into between the Named Insured and a health maintenance organization.