Employment Practices Liability Insurance

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I. INTRODUCTION

The scope of this outline is limited to a discussion of Employment Practices Liability Insurance ("EPLI"). Although EPLI coverage has been available in the marketplace for more than 20 years, it was not widely purchased until recently. For that and other reasons, there is a significant lack of case law interpreting these policies.

Additionally, unlike other coverages, there is a significant variance in the policy language used by the insurance carriers. This lack of case law, combined with significant differences in policy language, makes it very difficult to make any generalized statements about EPLI coverage.

Historically, and in the present day, EPLI coverage has been written in three different ways. First of all, it can be written through an endorsement to the general liability policy purchased by the insured, typically either a Commercial General Liability Coverage Form ("CGL Form") or a Businessowners Policy ("BOP").

Secondly, EPLI coverage can be written on a "standalone" basis, through an EPLI policy. Finally, coverage can be written as part of a "package," which usually includes other "management liability" policies such as Directors & Officers ("D&O"), professional liability, and other "errors and omissions" coverages.

The primary author of policy language in the marketplace today is the Insurance Services Office, Inc. ("ISO"). ISO has issued both EPLI endorsements to its general liability forms (e.g. BP 05 89) and a "standalone" EPLI policy (EP 00 01).

However, the ISO forms, for whatever reason, have not been used significantly, as most insurance carriers have preferred to draft their own policy language. In many (perhaps most) cases, those EPLI policy forms provide broader coverage with fewer exclusions. The reason for the lack of acceptance of the ISO forms in the marketplace may relate to this fact. It may also relate to the fact that EPLI coverage remains a "niche" market and many general liability carriers have not entered that marketplace. Because of the dominance of those carriers who drafted their own broader coverage, other carriers (who might use ISO forms) have simply chosen not to participate.

The subject of EPLI coverage cannot be discussed without first discussing the Employment-Related Practices Exclusion ("ERP Exclusion"). The ERP Exclusion predates EPLI coverage. Thus, employment claim risks were excluded before they were separately covered. EPLI coverage was specifically intended to fill that void, such that the scope of the exclusion may be used to define the scope of coverage. Thus, this outline will discuss the history of employment related claims coverage and the interrelationship between the ERP Exclusion and EPLI coverage.

It is, of course, impossible to make any definitive—or even worthwhile—conclusions regarding coverage for any particular claim without reference to the language of the policy at issue. However, as noted, there is no "standard" EPLI policy. Therefore, the author can only

refer to some EPLI forms as *examples* of the type of language used. A specimen policy (chosen arbitrarily from several options) is attached as Exhibit "A." Because of its importance to this discussion, the ISO ERP Exclusion is attached as Exhibit "B."

The specimen EPLI policy will be discussed as if it is applicable to the coverage issues under discussion. However, again, the author cannot stress frequently enough that confirmation must be made as to the policy language at issue before any definitive conclusions can be drawn.

II. THE HISTORY OF THE EPLI POLICY

While insurance companies are in the risk business, they despise *unpredictable* risk. It is only when an insurer can predict the frequency and amounts of its "claims expense"[1] that an insurer can set a premium that will allow it to be profitable on that line of business and for that risk pool. Until statistical data is collected with regard to claim frequency and amounts, the industry cannot predict its claim expense.

The ERP exclusion was introduced as a reaction to the explosion of employment-related claims which began in the 1960's, following enactment of statutes intended to address discrimination in employment. The insurance industry reacted to that unexpected volume of claims with the ERP exclusion. As data then developed on the frequency and amount of claims, the insurance industry began to write those risks through EPLI coverage.

The ISO ERP Exclusion (CG 21 47) is the predominant version of that exclusion in the marketplace. It is widely used today and (whether by endorsement or part of the CGL Form or BOP) is applicable to the vast majority of general liability policies issued today.

A. <u>The Employment Claim "Explosion</u>

The core pillars of most employment related claims are various statutes enacted by state and federal governments which prohibit discriminatory employment practices and which also provide for a private cause of action in cases of statutory violations. These include the following:

1961 Minnesota Human Rights Act

1964 Title VII of the Civil Rights Act

1967 Age Discrimination in Employment Act

1978 Pregnancy Discrimination Act

1990 Americans With Disabilities Act (ADA)

[1] "Claims expense" is a term of art in the insurance industry that generally includes the cost of paying claims and the *external* cost of investigating and defending claims. Contrary to popular belief, the profit margin of insurers is not based on the difference between premiums and claims expense. Rather, most insurers strive for a premium/claims expense "loss ratio" of 1:1 and make their profits on the investment of premium dollars between the time of receipt and the date on which claims are paid.

1993 Family Medical Leave Act (FMLA)

Of course, these statutes are not the exclusive remedies of a claimant, nor is a claim of "discrimination" the only basis for "employment-related" claims. However, the enactment of these statutes, beginning in the mid to late 1960's, stimulated a dramatic increase in the number of employment-related claims brought and in the number of such claims tendered to insurance carriers.

Even without the ERP Exclusion, coverage issues are raised with regard to employment-related claims under the CGL Form or BOP. Until the mid-70's, these policies provided coverage only for claims of "bodily injury" and "property damage." The latter is typically defined as "bodily injury, sickness or disease, including death." The term "property damage" is generally defined to mean physical injury to tangible property and the loss of use of tangible property.

In the typical discrimination claim, *physical* bodily injury is not alleged. The loss of wages and similar economic damages do not constitute *tangible* property damage. Thus, many claims were denied on that basis.

Additionally, the usual CGL Form requires that any "bodily injury" and "property damage" arise out of an "occurrence," a word that is defined to mean an "accident." Most policies also exclude "bodily injury" or "property damage" expected or intended by the insured. Many employment-related claims involve intentional conduct by the business or its owners and the "occurrence" and "expected or intended" issues may provide another basis for a coverage denial.

Finally, the standard CGL Form excludes "bodily injury" sustained by an employee of the insured in the course and scope of employment. The Minnesota courts have applied this exclusion in the case of employment-related claims of the type under discussion. *Meadowbrook, Inc. v. Tower Insurance Co*., 559 N.W.2d 411 (Minn. 1997); and *St. Paul Fire & Marine Insurance Co. v. Seagate Technology, Inc.,* 570 N.W.2d 503 (Minn. App. 1997).

Thus, the impact of employment-related claims did not have an impact that precisely followed the arc in the growth of employment litigation. However, beginning in the late 70's insurers began offering "personal injury" coverage (first by endorsement and then as "Coverage B" under the 1982 revision to the CGL Form). That coverage applied to, among other things, claims of defamation.

Additionally, a number of courts around the country began issuing decisions which found that emotional distress was "bodily injury." This includes the Minnesota Supreme Court in its decision in *Garvis v. Employers Mut. Cas. Co.*, 497 N.W.2d 254, 257 (Minn. 1993) ("We do not think the term 'bodily injury,' as ordinarily understood, would draw a nice distinction between emotional distress and its harmful physical consequences, if any; rather, 'bodily injury' would be thought of as encompassing both because they are so closely interrelated. Particularly do we think this is so when the term 'bodily injury' appears in an insurance policy designed to protect the insured against tortious conduct, and where there is tort law recognizing infliction of emotional distress as a viable cause of action if accompanied by physical manifestations.")

Savvy employment lawyers then began including counts of intentional infliction of emotional distress and defamation in order to trigger, if nothing else, a duty to defend on the part of the insurer. The combined effect of these two factors, together with a steady growth in the volume and verdict range of employment-related claims, finally had an effect on claims expense that could not be ignored by the insurance industry.

As a result, the insurers experienced unexpected claims expense. Additionally, because claims "experience" is used to set premiums at a profitable level, the absence of data regarding projected claims expense made underwriting difficult if not impossible. Thus, the insurance industry reacted to this situation by crafting an exclusion for employment-related claims.

Good data is not available (at least to this author) with regard to the volume of claims brought under these statutes before 1997. The Equal Employment Opportunity Commission ("EEOC") maintains statistics with regard to the volume of complaints made to and litigation commenced by the EEOC with regard to Title VII, the ADA, the FMLA, and similar statutes. However, the readily available statistics begin in 1997 and show essentially a consistent volume from that date to the present.

However, the fact remains that claims and litigation based on these statutes could not have been brought until the enactment of those statutes. All of the applicable statutes allow for recovery of attorneys' fees, provisions which had the desired effect of attracting attorneys to pursue these claims. Today, there are many law firms which specialize in handling employment-related claims on the plaintiffs' side. Although a precise growth curve cannot be plotted, there is no question that the frequency of employment-related claims went from essentially zero in 1960 to a significant volume sometime in the next ten to 15 years.

ISO issued its first ERP Exclusion sometime around 1980. That event created an immediate market for EPLI coverage. Insurers then began to respond to that demand, cautiously. Early EPLI policies provided limited coverage, high deductibles, and low limits. As claims experience increased, so did predictability. As predictability increased, premiums could be set more precisely and insurers then began to compete for this business. With this competition, premiums dropped, coverage expanded, and the number of insureds buying the coverage increased.

The increased size of the risk pool further depressed premiums and allowed insurers to expand coverage. All of these factors have had an impact on the marketplace in the last 15 to 20 years such that EPLI coverage is now common and reasonably priced. It is therefore expected that policy language will become more standardized and that case law will begin to develop in this area.

B. The ERP Exclusion

The ERP Exclusion (CG 21 47) applies to "bodily injury" and/or "personal and advertising injury" to:

(1) A person arising out of any:

(a) Refusal to employ that person;

(b) Termination of that person's employment; or

(c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation discrimination or malicious prosecution directed at that person; or

(2) The spouse, child, parent, brother or sister of that person as a consequence of "bodily injury" to that person at whom any of the employment-related practices described in Paragraphs **(a), (b),** or **(c)** above is directed.

This exclusion applies:

(1) Whether the injury-causing event described in Paragraphs **(1), (2)** or **(3)** above occurs before employment, during employment or after employment of that person;

(2) Whether the insured may be liable as an employer or in any other capacity; and

(3) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

In general, the ERP Exclusion has been accepted by the courts and applied in most cases where there is more than an insignificant connection between the claim at issue and the employment relationship. *Alexandra House, Inc. v. St. Paul Fire & Marine Insurance Co.*, 419 N.W.2d 506 (Minn. App. 1988).

However, the courts have not been willing to extend the exclusion to any case where an employee sues the employer. These cases tend to follow two distinct lines. Some courts have taken the approach that if the specific act is not listed in the exclusion, or is not "similar enough" to the listed examples, it is not an "employment-related" act. *Perkins v. Maryland Cas. Co.*, 2010 WL 2813438 (9th Cir. 2010) (Exclusion was ambiguous and it was unclear whether false imprisonment was similar enough to examples listed in exclusion for exclusion to apply); *Rite Aid Corp. v. Liberty Mut. Fire Ins. Co.*, 414 F.Supp.2d 508, 516 (M.D.Pa. 2005) (Pre-employment fraud not encompassed by exclusion as only pre-employment act specifically

enumerated is "refusal to hire"). Other courts have not restricted the ERP endorsement to its specifically enumerated elements, stating that "the exclusion's use of the term 'such as' indicates that the list of employment-related practices is neither exhaustive nor exclusive." *Parts Inc. v. Utica Mut. Ins. Co.*, 602 F.Supp.2d 617, 623 (D. Md. 2009).

In a similar vein, other courts have centered in on the words "practices" and "policies," which imply intentional conduct, and have held that the exclusion only applies to claims arising from an "employer's act or omission intended to result in coercion, harassment, humiliation, or discrimination." *Cornett Management Co., LLC v. Fireman's Fund Ins. Co.*, 332 Fed.Appx. 146, 149 (4th Cir. 2009), citing *Bowyer v. Hi-Lad, Inc.*, 609 S.E.2d 895, 913 (2004). Other courts have disagreed, noting that the exclusion expressly includes "acts or omissions," and concluding that the showing of an employment-related "practice" or "policy" is unnecessary for enforcement of exclusion. *LDF Food Group, Inc. v. Liberty Mut. Fire Ins. Co.*, 146 P.3d 1088, 1094-95 (Kan. App. 2006).

A good, recent summary of the law in this area was given by the United States District Court for the Northern District of West Virginia in *Erie Ins. Prop. & Cas. Co. v. Edmond*, 785 F. Supp. 2d 561, 570–72, as follows:

> Courts addressing policies containing this exclusion are divided about whether the language of the exclusion is ambiguous . . . .[2] Their disagreement focuses on the breadth of the phrase "arising out of any . . . employment-related practices, policies, acts or omissions."
>
> Courts adopting a narrow reading of this phrase have concluded that, although the term "employment-related" could be read broadly to apply to every act related to an employee, the better view is to read it more narrowly as applying

[2] [Court's n. 4] "*Compare LDF Food Group, Inc. v. Liberty Mutual Fire Insurance Company,* 36 Kan.App.2d 853, 146 P.3d 1088, 1095 (2006) (holding under Kansas law that an ERP exclusion precluded coverage for invasion of privacy, false imprisonment and defamation); *Capitol Indemnity Corporation v. 1405 Associates, Inc.,* 340 F.3d 547, 550 (8th Cir.2003) (holding under Missouri law that an ERP exclusion precluded coverage for false arrest, false imprisonment and slander); *Cornett Management Company, LLC v. Fireman's Fund Insurance Company,* 332 Fed.Appx. 146, 149 (4th Cir.2009) (unpublished) (holding under West Virginia law that an ERP exclusion precluded coverage for false imprisonment when a manager's acts "clearly ha[d] an effect on the employment relationship," and when the complaint included allegations of "*intentional* coercion, harassment, and humiliation." (emphasis in original)); *Auto–Owners Insurance Company v. Childersburg Banccorporation, Inc.,* No. CV–97–PT–2952–E, 1998 WL 1802908 (N.D.Ala. May 27, 1998) (unpublished) (holding that an ERP exclusion precluded coverage for various sexual harassment-related claims) *with HS Services, Inc. v. Nationwide Mutual Insurance Company,* 109 F.3d 642, 647 (9th Cir.1997) (holding under California law that an ERP exclusion did not apply because the acts forming the basis for a defamation claim did not "arise out of" an employment relationship); *Peterborough Oil Company, Inc. v. Great American Insurance Company,* 397 F.Supp.2d 230, 243 (D.Mass.2005) (holding under Massachusetts law that an ERP exclusion was ambiguous as applied to a claim for malicious prosecution and that it did not preclude coverage); *Zurich Insurance Company v. Smart & Final Inc.,* 996 F.Supp. 979, 988 (C.D.Cal.1998) (holding under California law that an ERP exclusion was ambiguous as applied to a claim for false imprisonment and that it did not preclude coverage); *Acuity v. North Central Video, LLLP,* No. 1:05–CV–010, 2007 WL 1356919, at *17–*18, 2007 U.S. Dist. LEXIS 33540, at *53–*54 (D.N.D. May 7, 2007) (unpublished) (holding under North Dakota law that an ERP exclusion was ambiguous as applied to claims for false imprisonment and that it did not preclude coverage); *Barnes v. Employers Mutual Casualty Company,* 1999 WL 366587, 1999 Tenn.App. LEXIS 354, at *9–*10 (Tenn.App. June 8, 1999) (unpublished) (holding under Tennessee law that an ERP exclusion was ambiguous as applied to a malicious prosecution claim and that it did not preclude coverage for that claim)."

only to personnel-related acts. In *Peterborough Oil Company, Inc. v. Great American Insurance Company,* for example, that court held that the text of the exclusion suggests the phrase refers "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." 397 F.Supp.2d at 238. The court also noted that "[a] corporate employer can only act through human agents, principally its employees," and that "[i]f every injury arising out of an act that somehow related to an employee were to be excluded, the exclusion would effectively swallow the coverage. The term is therefore necessarily narrower." *Id.* at 238.

Similarly, in *Acuity v. North Central Video, LLLP,* the court reasoned that, had the drafters of the exclusion intended to "exclude coverage for employer acts or omissions directed to an employee and occurring during the course of employment," they could have used more general language exempting all injuries suffered by employees arising out of the insured's acts. 2007 WL 1356919, at *14, 2007 U.S. Dist. LEXIS 33540, at *38–*39. Instead, the ERP exclusion at issue contained only a narrow range of personnel-related acts. *Id.* at *14, 2007 U.S. Dist. LEXIS 33540, at *40 (citing *Peterborough Oil*, 397 F.Supp.2d at 238–39).

Because the exclusions at issue in *Peterborough Oil* and *Acuity* plausibly supported either a broad or narrow reading, the courts reviewing those exclusions concluded that they were ambiguous and rejected the broad reading urged by the insurers. *Peterborough Oil.*, 397 F.Supp.2d at 243; *Acuity*, 2007 WL 1356919, at *17–*18, 2007 U.S. Dist. LEXIS 33540, at *53–*57.

Courts adopting a broad reading of the phrase have found the language of ERP exclusions to be unambiguous. In *Capitol Indemnity Corporation v. 1405 Associates, Inc.*, for example, the Eighth Circuit held that, under Missouri law, the term "arising out of" means "'originating from,' or 'having its origins in' or 'growing out of' or 'flowing from.'" 340 F.3d at 550 (quoting *Colony Ins. Co. v. Pinewoods Enters., Inc.,* 29 F.Supp.2d 1079, 1083 (E.D.Mo.1998)). Because the claims of false imprisonment and false arrest at issue in the case "arose out of" employment with the insured, the Eighth Circuit applied the ERP exclusion. *Id.* at 550–51.

Some courts have imposed a "temporal" restriction on the ERP endorsement. As an example, in one case, because certain invasions of plaintiff's privacy did not occur "on the job," the court held that they were not "employment-related practices." *Lawson v. Straus*, 673 So.2d 223 (La. App. 1996). However, in light of the holding of the Supreme Court in *Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411 (Minn. 1997), it is unlikely that Minnesota would adopt a similar limitation.

Finally, most courts have held that claims by third parties who are not current, former, or prospective employees (e.g. claims of harassment by a vendor's representative) are not

encompassed by the ERP endorsement, in part, because its "title suggests that the endorsement only pertains to those practices that relate to employment issues of the insured." *North American Bldg. Maintenance, Inc. v. Fireman's Fund Ins. Co.*, 642 40 Cal.Rptr.3d 468, 480 (Cal. App. 2006); *Moore v. Hudson Ins. Co.*, 2007 WL 172119 (Cal. App. 2nd Dist. 2007).

Historically, a reoccurring issue with regard to the ERP Exclusion was whether pre-employment and post-termination conduct is "employment-related." *HS Servs. v. Nationwide Mut. Ins. Co.,* 109 F.3d 642 (9th Cir. 1997) (defamation not clearly employment related because, while statement's contents related to employment, the statements were not made in the context of employment, but rather to competitors to discourage business dealings with former employee); *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 561, 614 S.E.2d 611, 614 (2005) (same); *Frank and Freedus v. Allstate Ins. Co.,* 45 Cal.App.4th 461, 52 Cal.Rptr.2d 678 (1996) (was post-termination statement directed to performance while employed and made in employment context); and *Adams v. Pro Sources,* 231 F.Supp.2d 499 (M.D. La. 2002). However, in *Capitol Indem. Corp. v. Wonder* Years *Pre-School, Inc.*, 2009 WL 57044, the United States District Court for the District of Minnesota held that the "fact that the allegedly defamatory statements were made after [Plaintiff's] tenure . . . does not preclude a finding that the statements fall under the exclusion."

It should be noted that pre-employment and post-employment coverage issues are largely moot under the current edition of the ERP Endorsement which now applies "[w]hether the injury-causing event . . . occurs before employment, during employment or after employment." This amendment was intended to specifically address case law holding that pre- and post-employment acts were not encompassed by the exclusion. However, these cases may be instructive as they seem to hold that pre-employment and post-employment conduct has a sufficient "nexus" to the employment relationship where it is not personally motivated or gratuitous. *Owners Ins. Co. v. Clayton*, 614 S.E.2d 611 (S.C. 2005) ("gratuitous" post-employment defamation not encompassed by exclusion). That holding may have broader applicability, specifically, to the question of what acts or omissions are "employment-related."

C. EPLI Coverage

1. General Provisions

Every insurance policy has a policy period and, for coverage to apply, certain events must occur during the policy period. In the case of liability coverage, policies are either written on an "occurrence" basis or a "claims made" basis. Under an "occurrence policy," the "bodily injury" or "property damage" must occur during the policy period or the offense that constitutes "personal injury and advertising injury" must have been comitted during the policy period. As long as that condition is satisfied, the date on which the claim is first presented, or the insured is sued, is irrelevant for coverage purposes.

In the case of "claims made" policies, the date on which the claim is "first made" is the critical event. The date on which the damage occurred is largely irrelevant, although some "claims made" policies also contain a "retroactive date." Damage that occurred prior to the retroactive date would not be covered, even if the claim arising out of that damage was first made during the policy period.

From the perspective of the insurance company, "claims made" coverage provides certain advantages. Litigation arising out of an event can be made years after that event occurred, such that the insurer cannot "close the books" on any policy period with certainty that it will not have to pay claims under the policy in force when the event occurred.

With a "claims made" policy, once the policy period expires and the insurer has not been notified of a claim, the insurer can safely assume that no claims will be paid under that policy period. Some "claims made" policies allow a claim to be reported (and covered) after the expiration of the policy period, but this "extended reporting" period also has a definitive end date.

From the insured's perspective, "claims made" coverage has some disadvantages. These primarily relate to a change from "claims made" to "occurrence" coverage and maintaining coverage after the business ceases active operations. Take, for example, a business that carries "claims made" coverage in year one and then switches to "occurrence" coverage in year two. If a claim is made during year two, arising out of events that occurred in year one, neither policy would provide coverage.

In the case of a business that ends operations, and then faces claims made a year or two after it ceased operations, there would be no coverage unless the business maintained "claims made" coverage at the time the lawsuit is commenced. Some employment-related claims are subject to very short statutes of limitations, but others are not. In Minnesota, a business would have to maintain claims made coverage for a period of at least six years in order to be assured of coverage for all claims that could be made arising out of operations conducted during the period of time that the business was active.

Significantly, most EPLI policies are written on a "claims made" basis. While "occurrence" based policies are sold, they are rare and pricing is likely to be an issue. For that reason, any business buying EPLI coverage should be aware of the implications of a "claims made" policy.

Under some of the specimen EPLI forms used as examples here, coverage applies to the claims made by "employees," which is defined to mean a current employee or prospective employee. However, employment-related claims can be made by third parties who are not employees or prospective employees. For example, a regular customer or vendor of the insured can be harassed by an employee of the business. Thus, some of the specimen policies allow for "elective" coverage which would extend to such third-party claims.

Typically, "insured persons" include only officers and directors of the insured. Some EPLI forms include the "past, present, or future employee" of the insured as an insured (if sued in that capacity). Some EPLI policies expand that definition to include "an Independent Contractor working for an Insured Entity, but only while acting in his or her capacity as such and only to [the] extent that such Insured Entity agrees to indemnify the Independent Contractor in the same manner as to the Insured Entity's employees for liability arising out of a Claim."

Finally, most EPLI policies include defense costs within the limit of liability. What this means is that defense costs "erode" the limit of liability. As the litigation progresses, the insured has less coverage available to pay the cost of any settlement or judgment.

Of course, if the claim is successfully defended, and the limit is not exhausted through defense costs, this erosion is of little concern. However, if the claim has merit, and indemnity will be required, the interest of the insured would be to resolve the claim quickly so as to preserve the limit and avoid erosion through payment of defense costs.

The insurer, on the other hand, may be less willing to pay settlement costs until its investigation is complete and/or discovery is concluded in any litigation. This disparity of interests can lead to conflict and defense counsel is often caught in the middle of that conflict.

On that topic, most EPLI policies give the insurer the "right" to defend covered claims. This means that the insurer has the right to designate defense counsel and that the insured is forced to accept designated counsel. Under those circumstances, substantial tensions can arise.

2. The Coverage Grant

Most EPLI policies provide coverage for "loss" arising from a "claim" for a "wrongful act" by an insured (sometimes called a "employment practices wrongful act"). The term "loss" is generally defined to include such things as compensatory damages (including front pay and back pay), pre- and post-judgment interest, costs, and, in some cases, punitive damages, multiplied damage awards (e.g., treble damages), and/or liquidated damages.

Excluded from the word "loss" would be taxes, fines, or penalties; non-monetary relief (e.g., compliance with an injunction, mandatory training, etc.); employment benefits; future compensation for anyone hired, promoted, or reinstated as a result of the claim; costs associated with providing ADA accommodation; and other non-monetary or uninsurable damages.

The term "wrongful act" is generally defined to include such things as:

- Wrongful dismissal, discharge, or termination;
- Wrongful failure or refusal to employ or promote;
- Wrongful discipline or demotion (including failure to grant tenure);
- Negligent employment evaluation;
- Wrongful deprivation of career opportunity;
- Sexual or other workplace harassment (including bullying);
- Employment discrimination, including discrimination based upon age, gender, race, color, national origin, religion, creed, marital status, sexual orientation or preference, gender identity or expression, and gender makeup;
- Refusal to submit to genetic makeup testing, pregnancy, disability, HIV or other health status;
- Retaliation;
- Breach of any oral, written, or implied employment contract; and
- Violation of FMLA.

Some EPLI policies extend coverage for the following, if alleged in addition to or as part of a "wrongful act" claim:

- Infliction of mental anguish or emotional distress;
- Failure to create, provide for, or enforce adequate or consistent employment-related policies and procedures;
- Negligent retention, supervision, hiring, or training;
- Invasion of privacy, defamation, or misrepresentation; and
- Data privacy "wrongful acts."

It should be noted that some EPLI policies are more restrictive in what constitutes a "wrongful act." Some limit that term to traditional employment-related claims such as wrongful termination, discrimination, harassment, retaliation, and "workplace torts," such as employment-related defamation, invasion of privacy, false imprisonment, and wrongful discipline. Again, there is significant disparity in policy language on this issue.

The breadth of the "examples" of "employment-related acts" is likely to reduce the number of disputes over whether the event at issue is "employment-related." As noted above, this was a consistent issue with the ERP Exclusion. That said, the specificity of acts will likely support the argument that an "employment-related" act must either be mentioned or must be very similar to those that are mentioned in order for coverage to apply. It should also be noted that EPLI policies do not always have the "catch-all" description used in the ERP Exclusion (i.e. "Employment-related practices, policies, acts or omissions, *such as* . . .")

3. Exclusions and Limitations

Typically, claims for "bodily injury," "property damage," and the "personal and advertising injury" offenses of false arrest or imprisonment, malicious prosecution, wrongful entry or eviction, and, in some cases, defamation are excluded except with regard to that aspect of "bodily injury" that results from mental anguish or emotional distress and/or "personal and advertising injury" offenses that arise out of an "employment practices wrongful act." The intent of this exclusion is to carve out the coverage that remains under a CGL Form after application of the ERP Exclusion. EPLI policies do provide additional, broader coverage than the CGL Form, but, at a minimum, would be seen as a replacement for coverage deleted under the CGL Form.

Additional exclusions include the following:

- Wage and hour violations;
- Breach of independent contractor agreements;
- Labor law violations such as improper conduct in a labor dispute and/or violation of a collective bargaining agreement;
- Obligations assumed for the liability of others (e.g. indemnity agreements);
- Amounts owed for unpaid wages, Workers' Compensation benefits, unemployment compensation, disability benefits, or Social Security benefits; and
- ERISA violations.

The ISO EPLI policy form contains 10 exclusions. Some are similar to those found in most EPLI forms, while others are not. These include the following:

1. Criminal, Fraudulent, or Malicious Acts

   An insured's liability arising out of criminal, fraudulent, or malicious acts or omissions by that Insured, or arising out of that insured's knowing acquiescence or failure to act, or instruction, direction, or approval given to another concerning such acts or omissions.

2. Violation of Laws Applicable to Employers

   A violation of your responsibilities or duties required by any other federal, state or local statutes, rules or regulations, and any rules or regulations promulgated therefore or amendments thereto, except for the following: Title VII of the Civil Rights Act of 1964 and amendments thereto, the Age Discrimination in Employment Act, the Equal Pay Act, the Pregnancy Discrimination Act of 1978, the Immigration Reform Control Act of 1986, and the Family and Medical Leave Act of 1993 or any other similar state or local statutes, rules, or regulations to the extent that they prescribe responsibilities or duties concerning the same acts or omissions.

3. Strikes and Lockouts

   'Injury' to any striking or locked-out 'employee,' or to an 'employee' who has been temporarily or permanently replaced due to any labor dispute.

4. Sexual Harassment

   Liability of that insured who commits a 'sexual harassment' offense. This exclusion does not affect our duty to defend that insured prior to determining, through the appropriate legal processes, that that insured has committed a 'sexual harassment' offense, other than an assault or battery.

5. Employment Termination or Relocation Due to Business Decisions

   'Injury' arising out of termination of employment, job relocation, or reassignment, if the action is taken for one of these reasons:

   - *You have filed for bankruptcy protection, or you are placed in receivership or liquidation.*
   - *You have merged with or been acquired by another business entity.*
   - *You have closed an operation or a business location.*
   - *Your business location is partly closed or the size of an operation must be reduced because of fire or other disasters beyond your control.*

6. Intentional Injury

Liability of that insured who commits an act of intentional 'discrimination' or coercion.
This exclusion does not affect our duty to defend that insured prior to determining, through the appropriate legal processes, whether the insured committed such act.

7. Retaliatory Actions

Liability arising out of an insured's retaliatory action against a person because the person has:

- *Declined to perform an illegal or unethical act;*
- *Filed a complaint with a governmental authority or a 'suit' against you or any other insured in which damages are claimed;*
- *Testified against you or any other insured at a legal proceeding; or*
- *Notified a proper authority of any aspect of your business operation that is illegal.*

III. COVERAGE ISSUES AND PRACTICE TIPS

A fair amount of case law has been developed which interprets the ERP Exclusion. Given the history of EPLI coverage, and the way in which EPLI coverage is defined, it is likely that a court will view EPLI coverage to be the "mirror image" of the exclusion, at a minimum. That is, EPLI coverage should be viewed as providing coverage for whatever is excluded under the CGL Form by the ERP Exclusion.

This is not to say that EPLI coverage applies to *all* employment-related claims. EPLI coverage has exclusions and what it excludes likely would not be covered under the CGL Form, regardless of the ERP Exclusion. Economic loss caused by violations of an employment contract or labor laws, for example, would not constitute "property damage" and would not be covered under the CGL Form or BOP. Compliance with orders for injunctive relief, costs incurred by the insured to provide ADA accommodations and the like, would also not be covered under the CGL Form or BOP.

Thus, one should not jump to the conclusion that everything excluded under a general liability policy with an ERP Exclusion is now covered under the EPLI policy. The more accurate way of summarizing the interrelationship between these coverage forms is to say that everything that would be covered under a general liability policy *but for* the ERP Exclusion is *likely* covered under the EPLI policy.

Beyond this, it is difficult to predict how the courts will react to EPLI coverage or even what issues may arise. While litigation over the ERP Exclusion may give some insight, EPLI coverage is specifically broader that the ERP Exclusion. Additionally, coverage grants are interpreted in favor of the insured. *Columbia Heights Motors, Inc. v. Allstate Ins. Co.*, 275

N.W.2d 32, 36 (Minn. 1979) (Any "ambiguity must be resolved in favor of the insured.") However, exclusions are construed strictly against the insurer. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 880 (Minn. 2002); *American Family Ins. Co. v. Walser*, 628 N.W.2d 605, 613 (Minn. 2001); and *Bob Useldinger & Sons, Inc. v. Hangsleben,* 505 N.W.2d 323, 327 (Minn.1993).

Thus, it is unlikely that the same ERP issues will arise and disputes will like center over whether the event triggers one of the specifically identified "employment related" acts and/or whether exclusions apply to the unique facts of the claim at issue. The author also anticipates litigation over whether "claims made" coverage has been triggered and conflict issue given the fact that legal expense erodes the limit.

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