

# **BLAIS EXCESS & SURPLUS** **AGENCY OF TEXAS, LLC**



## **PRESS RELEASE**

**FOR IMMEDIATE RELEASE – AUGUST 9, 2004**

### **EPLI INSURANCE – FORTIFYING COVERAGE**

Look for these six provisions in writing an employment practices liability policy.

Although not even available until the late 1980s, insurance for employment practices liability has become an important part of nearly every organization's insurance protection portfolio.

Underwriters at Lloyd's are credited with originating the first EPL insurance policy, which generally was regarded as awkward: coverage for defense expenses for allegations of liability, with a low limit, a hefty premium and coinsurance participation by insureds. Few employers actually purchased these early policies. But then, 1991 brought its "triple whammy" of events that set the stage for both claims and insurance coverage as we know them today.

#### **The Events of 1991**

When Congress passed legislation generally known as the Civil Rights Amendments of 1991, it had far-reaching implications for both employers and employees: Workers generally were guaranteed a jury trial if requested and upon presentation of suits against employers alleging discrimination, harassment or wrongful termination. Additionally, damages generally were capped at \$300,000 plus back pay for suits filed in federal courts. There were many other aspects of this critical legislation, which amended the Civil Rights Act of 1964, and today, many labor law attorneys will confirm that this is the most important piece of recent legislation relating to employment law.

Other pivotal events of 1991 were the Clarence Thomas Supreme Court confirmation hearings and the Tailhook convention of military aviators. The hearings for Clarence Thomas produced sworn testimony involving superior-subordinate treatment and discourse that brought new levels of examination to office relationships. The Tailhook scandal involved allegations of improper conduct by both "insurers" and a few "outsiders" and resulted in the U.S government paying more than \$8 million to settle the resulting litigation. These three events in 1991 set the stage for a wave of allegations from employees, as well as a volume of new insurance products to address the EPL exposure.

## Emerging Insurance Products

In the early 1990s, insurance giants Chubb and American International Group introduced EPL products written on both a monoline basis and in conjunction with other management liability products. Many more insurers joined in, and soon almost every insurer willing liability exposures had some version of EPL insurance. Plaintiff attorneys saw opportunity, as well, and allegations proliferated. Labor law defense counsel saw increasing workloads, as employers looked to deny responsibility or to settle those allegations that seemed worthy. Workplace department changed: employees became more formal in their interactions, and employers scrambled to reissue employee handbooks and “no tolerance for discrimination” policies and procedures.

The early, basic insurance policies provided coverage for allegations of harassment, discrimination and wrongful termination, each clearly defined. Per-claim deductible amounts were relatively low, and although premiums were considered high, larger employers realized the value of the risk transfer represented by the insurance coverage, and policies were written, initially by the larger insurance brokers.

Coverage slowly evolved in the ensuing years to broaden the perils insured against: negligent evaluation, deprivation of a career opportunity and retaliation came into policy definitions of coverage. Insurers also moved toward “duty to defend” language, so that selection of defense counsel and per diem defense costs were controlled – at least on policies written to protect larger employers, those generally defined as having 1,000 or more employees. Some policies covered punitive damages, and some didn’t. Additionally, the concept of insuring “third party” allegations of harassment and discrimination – those brought by persons other than employees – evolved into coverage. Now, as we approach 15 years of refinement in EPL insurance coverage, the product is becoming well defined and much more predictable than in the early years.

## The Most Important Aspects

The purpose many buyers give for having EPL insurance is to respond to claims. With that context in mind, here is a list of arguably the most important provisions contained within EPL policies – not in any particular order:

1. Whether coverage is provided on a “duty to defend” or “no duty to defend” basis. Each has strengths or weaknesses, depending on the insured’s situation, as well as the circumstances surrounding the claim. Generally, larger insureds with house counsel seem to prefer the “no duty to defend” approach, and smaller, less sophisticated insureds seem to favor the “duty to defend.” The latter can confer a higher a higher degree of defense responsibility upon the insurer. Conversely, coverage provided on a “no duty to defend” basis can allow the insured more freedom in claims management. Either way, the ultimate control and major decision-making authority rests with the insurer.
2. An affirmative coverage grant for punitive damages, except where prohibited by law, and with “most favorable jurisdiction” language. Often, when punitive damages are excluded from coverage, underwriters are willing to remove the exclusion. Look under the policy’s definition of “loss” or “damages,” rather than under the listing of “exclusions.” But the absence of an exclusion obviously does not bear the same effect,

contractually, as an affirmative coverage grant. And with the number of possible jurisdictions (home office of the insured; location of the incident; home state of the employee; home office of the insurer; etc.), having “most favorable jurisdiction” language can be a real boost to a claim situation.

3. Specific inclusion of coverage for allegations of “breach of privacy.” The whole issue of privacy will spawn potentially unlimited allegations against employers – not solely from employees, but from past and current customers and others. Other insurance policies will necessarily have to address the issue of other types of allegations of breach of privacy, but it is of some importance that the EPL policy covers such allegations from employees, and not all policies currently available provide this important protection.

4. An option for an extension of coverage to address “third party” claims. Almost a misnomer in the context of EPL, many insurers developed an endorsement that was extended to risks thought deserving by underwriters. Such an extension would address allegations of harassment or discrimination brought by a customer, vendor or other third party. Some insurers define “third party” as any party other than an employee of the insured organization. When underwriters are willing to extend coverage in this manner, there is generally an additional premium charge of 15% to 20% of the annual policy premium.

5. A policy definition of “subsidiary” that does not require that the subsidiary be a corporation or corporate entity. Increasingly, this language is being adopted by EPL as well as errors and omissions insurers. Since many organizations have subsidiaries that are limited liability companies, or even partnerships, the language in question is problematic at best, and potentially is highly exclusionary. Of course, all parties to the transactions should be very familiar with the insured’s organization chart, but without special attention, mandating that a subsidiary must be a corporation could conceivably leave larger or more complex organizations with uncovered claims.

6. A dedicated limit for EPL claims. This is especially important to private or closely held organizations, where EPL insurance commonly is sold in combination with directors and officer’s liability insurance. Surveys consistently have indicated that for smaller or private company operations, allegations from employees relating to discrimination, harassment and wrongful termination are much more likely than allegations of general mismanagement of the organization – primarily because of a lack of large numbers of shareholders in many private businesses. So, when D&O is combined with EPL insurance with one aggregate limit that must function to cover all directors and officers and all defense costs, and usually within an annual policy period, the more volatile EPL exposures can function to erode policy limits. The 2003 Tillinghast-Towers Perrin D&O Survey indicates that for smaller employers, almost 75% purchase EPL insurance combined with D&L insurance. Thus, at least periodically, it would be wise to place a cost/benefit factor on a private organization’s purchase of “stand alone” EPL insurance, as opposed to combined EPL and D&O coverage.

## Other Considerations

Although it should go without saying, it probably needs repeating that there are other considerations for astute buyers and sellers of EPL insurance. The financial stability, reputation and ongoing viability of the insurer should get strong consideration, especially since there are far more insurers offering EPL insurance than, say, D&O insurance.

In 2003, there were two major writers of EPL insurance that effectively ceased operations – at least in terms of offering EPL insurance on a new or renewal basis. Neither left its customers without any coverage, but the need to make the change from being a major market to no longer offering coverage was disconcerting to the serious student of the insurance business. With the loss experience claimed by many writers of EPLI insurance, more significant changes could well be on the way. Understanding the financial viability of insurers of all types of risks should be import to all concerned parties.

The individual insurer's specific reputation as claims payer also should be important to the buyer of EPL insurance. Many insurance buyers and sellers have developed experience they are more than willing to share. All that's needed to form an opinion is to ask a variety of affected parties. The voice of experience would likely say that paying slightly more premium may be well worth it in the long run, as opposed to paying less but having poor claims-handling experience in an exposure area as critically important as current and former employees.

Experience is almost always the best teacher. We should necessarily learn more from our mistakes than for our successes. EPL insurance is no exception. There are several aspects of coverage that may be more important than others when reviewing an EPL insurance policy. The idea of planning how a claim will be handled in advance of actually experiencing the claim has merit for even the largest of insurance buyers and would certainly include much smaller buyers of EPL insurance. It would always be preferable to prevent EPL claims where possible, but given our litigious society, making sure that the EPL insurance in place is understood and has been examined carefully seems like a preferable approach for most buyers.

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Contact: Philip L. Blais  
[Phil@blaisexcess.com](mailto:Phil@blaisexcess.com)

**Houston Office**  
820 Gessner, Suite 1750  
Houston, Texas 77024  
(713) 780-7787 Phn (713) 780-3533 Fax

**Dallas Office**  
4570 Westgrove, Suite 245  
Addison, Texas 75001  
(972) 818-4090 Phn (972) 818-4088 Fax

**Austin Office**  
P.O. Box 92824  
Austin, Texas 78709  
(512) 894-3460 Phn (512) 858-1266 Fax