

EXECUTIVE RISK

Spotlight on the EPL Market

The Perfect Storm: The COVID Economy and the Movement for Racial Justice

The Employment Practices Liability (EPL) market made swift adjustments at the onset of the COVID-19 pandemic. Layoffs, furloughs, pay reductions, and remote work arrangements had EPL underwriters anticipating a significant increase in employment litigation. In anticipation of the increased risk, EPL insurers began increasing rates and retentions, reducing capacity, tightening coverage terms and enhancing the underwriting process. Just as the EPL market was starting to adjust to the COVID economy, a powerful social justice movement, demanding the dismantling of systemic racism, began to gain significant support and substantial momentum. The movement for racial justice has pushed the topic of diversity and inclusion to the top of everyone's minds and legislators are responding.

On September 30, 2020, the Governor of California enacted a new law mandating that publicly traded corporations headquartered in California appoint directors from "underrepresented" communities to their boards. This is the first law in the country to dictate the racial composition of corporate boards. It was inspired by another first-of-its-kind California legislation enacted in 2018, a byproduct of the #MeToo Movement, that requires a minimum number of women on corporate boards.

The continuing motion behind the #MeToo Movement, the powerful momentum behind the racial justice movement coupled with rising unemployment disproportionately affecting minorities, is setting the stage for the perfect storm of employment claims in multiple categories: race and gender discrimination, harassment, retaliation, pay equity to name a few. Employment Practices Liability underwriters are bracing for a significant rise in claims activity over the next 12-18 months.

Impact on the Market

When 2018 saw a 13.6% year-over-year increase in sexual harassment charges filed with the EEOC, it wasn't because the wrongful act itself was suddenly on the rise, but rather because people's awareness of it was due to the #MeToo movement. However, the current racial justice movement has the potential to be more impactful to the EPL marketplace, because not only is awareness raised, but so is the risk factor, with the rise of terminations.

As we already feel the effects of EPL insurance carriers anticipating an increase in claims, we now question if the intersection between the fight for equality and the COVID-19 pandemic's economic downturn will create a long-lasting impact on the Employment Practices Liability insurance market.

The good news is that regardless of the challenging EPL environment now, the insurance market is cyclical. As the economy improves, more capital will be infused into the insurance market, driving competition which will in turn help improve rates and terms. How long before we see things start to turn back around in the EPL market, will first depend on the recovery of our economy.

In the meantime, insureds need to be prepared for the changes that may impact their Employment Practices Liability programs. Here are some ways in which carriers are looking to making adjustment at EPL renewals:

- Reduction in capacity. Carriers who previously provided \$10M layers may look to reduce capacity to \$5M. For larger towers of EPL insurance this means more smaller layers, which can add to the complexity, cost and time required to build a program.
- Premium increases. These vary greatly by industry class, but even insureds who have not conducted, nor anticipate the implementation of, furloughs or layoffs are experiencing the rise in rates.
- Raise in retentions. In addition to a possible increase in single plaintiff retentions, underwriters are seeking separate higher retentions for mass and class action claims, for more challenging venues (i.e. California and New York), for high wage earners and for certain categories of employees (i.e. physicians for healthcare insureds).
- Restrictive coverage. This is coming in the form of biometric exclusions, COVID-19 discrimination exclusions and parameters around the implementations of reductions in force as a prerequisite for coverage to apply in the event of a resulting claim.
- Enhanced underwriting. Underwriters are requiring insureds to complete additional questionnaires regarding COVID-19, reductions in force and taking a closer look at the immediate financial health of the organization, with a request for interim financials.



While the current shift in the EPL market is going to make for more challenging terms and pricing for insureds, the adjustments reflect the anticipation of this coverage's utilization in the coming 12-18 months. While insureds do need to brace for these changes, the procurement of EPL insurance remains a valuable risk transfer solution.

During these uncertain times, given the current economic and social climate, one thing is for certain, challenging roads are ahead for risk managers and insurance buyers. Organizations that are prepared and ready to adapt to the changing risk environment will be in the best position to manage and transfer their exposures. EPL underwriters are more likely to present favorable terms to organizations that are able to demonstrate an awareness of the changing risk environment and a commitment to managing the exposure.

Key take-aways for Risk Managers and Insurance Buyers

- Review, evaluate and consider updating your company's policy on workplace discrimination together with any public statements or commitments on the topic. Is your company following its own policy? Does the policy need to be updated? Are your public statements consistent with your company's actions?
- Contemplate your third-party discrimination risk. Is your organization providing equal accommodations and opportunities for all customers, clients, vendors, etc.?
- Keep up to date on evolving legislative action. Watch what happens in California, as they are often the leader in new employment legislation.
- Don't try to do it all yourself. Consider hiring an HR consulting firm or outside counsel to guide your organization, offer best practices solutions and help with the implementation of mitigating tactics.
- Consult with your insurance broker to determine if your current EPL insurer offers loss mitigation services. Oftentimes these services are offered at no additional charge.

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