

Employment Practices Liability: Protection Against Personnel-Related Lawsuits

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One has to look hard these days for a smart businessperson who takes risks lightly. Nearly all business owners and managers know, for instance, that an essential part of protecting the company's assets is to take the utmost care in providing a safe product or service and then protecting those assets against the unexpected

calamity. They know how to protect their product or service from theft, damage or abuse, and to insure against loss when, despite all their efforts, that happens anyway. They also know they need to provide a safe environment in which the people they employ can work and to have adequate insurance for their company, should an accident happen despite all their care.

In short, good, smart business leaders today are effective risk managers. But an essential part of being an employer, hiring, maintaining and firing employees, has grown over the past decade as an area in which some of the greatest risks, and subsequent losses, have set back or permanently crippled otherwise successful businesses because they did not insure against potential losses. Like all other areas of risk management, employment practices requires a business leader to know all the rules, follow them carefully and have the resources to fight it out in court, if needed, should something go wrong anyway. In many cases, defending such actions requires a new type of insurance.

The Newly Defined Art of Saying, "You're Fired."

There was a time, not long ago, when one of the easiest parts of employing others was "unemploying" them. The concept was called employment-at-will. Whether it was a simple "You're fired," a final counseling session or the non confrontational pink-slip-with-the-paycheck method, getting an employee out the door for the last time was uncomplicated and final.

But time and, in many cases, progress has changed the scenario of both hiring and firing, and often the very process of keeping current employees from filing lawsuits. Business managers in the 1990's know, either through painful experience or reading about the woes of

others, that they must follow the rules carefully today or be sued.

The rules were set by legislation that was written to protect workers and remedy situations that fostered abuse laws such as The Americans with Disabilities Act, The Age Discrimination in Employment Act and The Civil Rights Act of 1991. And as is so often the situation when new law is interpreted in the courts, most of the cases that make the news the multimillion-dollar settlements or judgments are the ones in which the law was taken in a direction that wasn't intended nor anticipated by its authors.

Still, the threat of lawsuits and the massive costs of defending them and, in some cases, settling or losing them, is a reality today for all businesses. The employer today has to be extremely careful in how hiring is done, avoiding promises that imply a contract; laying out all the rules for employment and not deviating from them for any employee; carefully documenting all examples of improper or inadequate work and making sure performance reviews reflect the real record of each employee; following a complicated and often seemingly illogical formula for terminating an employee, and making sure of what is and isn't done after that act has been completed.

And even if all the rules are followed with excruciating care, there's still no guarantee that the fired employee won't sue anyway, triggering unforeseen legal costs and, possibly, an unfavorable judgment.

An Unsettling Rise in Employment-Related Complaints.

Here are some unsettling statistics reported recently by the Chubb Group of Insurance Companies:

Over a recent nine-month period, the Equal Employment Opportunity Commission (EEOC) received 65,000 complaints of employment discrimination, resulting in judgments of more than \$104 million against employers and that number, the EEOC estimates, will only increase;

More than 40 million Americans qualify under the provisions of the Americans with Disabilities Act, according to a study by the U.S. Congress and in the early days of the law, about 1,000 claims per month were filed under

its provisions

Multimillion dollar settlements or judgments are no longer exceptions in such cases Shoney's Inc. settled a race discrimination suit for \$105 million, and State Farm Insurance Co. settled for \$157 million in a sex discrimination case;

Wrongful termination cases that went to trial cost U.S. employers more than \$500 million over a recent five-year period and this doesn't take into account the many such cases that are settled before trial.

The laws under which the above have been happening are constantly evolving, and as it takes form, a number of areas are being identified under which lawsuits are being brought, sometimes successfully. The buzz words that describe them many of them synonymous read like a minefield across the personnel landscape: harassment; wrongful termination; discrimination; defamation; libel; slander; wrongful infliction of emotional distress; negligent evaluation; employment-related misrepresentation; breach of employment contract; failure to employ or promote; deprivation of a career opportunity.

A Good Defense Now Can Prevent Problems Later.

As in all cases where potential liability exists, employers should be prepared to deal with situations such as these. An important way to avoid these problems, say many human resource experts, is to develop personnel policies that keep those responsible for employee supervision informed of all employment laws in these areas and any changes that redefine them policies that not only usually head off any legitimate complaints but develop a strong defense, if needed, for seemingly unjustified complaints. Here are some of the areas that deserve close attention:

Prehiring- Avoid asking in either verbal or written form any questions dealing with age, race, sex, national origin, disabilities or marital status. In addition, avoid implied or actual promises that could be interpreted later as a contract. Any tests should reflect skills actually needed to perform the job in question.

Post-hiring- Employee handbooks should be carefully drafted to avoid any implication of an employment contract that exists for conforming to prescribed policies.

Harassment- Set a policy that defines harassment and set up a procedure for filing a grievance and make sure each employee has read and understands it.

Documentation- Evaluations as well as disciplinary actions should be done in writing, should be objective and consistent and should be honest. If termination is being considered, the employee's personnel file should be reviewed before taking any action to see if there are enough documented grounds for firing. In most cases, it is best if the termination is performed by the company's

human resources executive to avoid confrontations or possibly misinterpreted comments.

Downsizing- Identify essential positions, not essential people, when planning layoffs, then determine who stays by applying a set of objective criteria. Use of outplacement assistance often diminishes the chances of a wrongful-termination suit.

References- Due to the spread of defamation and invasion-of-privacy suits, many employers now only verify dates of employment, and do so only through authorized human resources personnel.

Insurance Policies That Cover Your Personnel Policies.

As we mentioned earlier, however, even the best personnel policies can't prevent a lawsuit, especially the type that is designed to extract revenge or as a part of a fishing expedition. That's where insurance that covers this type of liability becomes even more important. Many employers erroneously believe their general liability, directors' and officers' and/or workers' compensation policies will protect them in such circumstances. In most cases, they're wrong and they're facing a risk they wouldn't otherwise tolerate.

In the past, the above mentioned insurance coverages might have been adequate. But with the rise in employment practices litigation and the large amounts being awarded plaintiffs, many insurers are specifically excluding such legal matters under their policies. Specific employment practices liability insurance policies, in many cases, are the only effective protection against personnel-related lawsuits today.

An Emerging Marketplace.

Such policies are being offered by a number of insurance companies now, and because they are so relatively new to the market, they can vary widely. Generally, however, they are activated early in the complaint process to allow proper defense representation and cover legal costs, settlements and judgments, to a specified limit, in cases related to hiring, employment and termination.

Lacking insurance policies such as these, companies often have found themselves having to dig deeply into their resources to come up with the money for legal services and/or settlements. Many don't have those resources, and the potential for disaster in such cases is enormous.

Each insurer has different criteria for writing a employment practices liability policy, varying deductibles and limits of coverage. Employers who haven't yet done so are strongly urged to review the personnel issues outlined in this document and correct any potential problem areas as soon as possible.

The vast majority of businesses are not insured for employment practices liability exposures. Obviously, they need to be. The problem has developed so quickly and is so complicated that many simply aren't aware of the real exposures that exist. We will be working closely with you to help manage and insure these risks cost-effectively.

We hope you've found this update, a part of our "Professional Client Care" program, helpful in better understanding the issues. As always, we're ready to assist you further, should you have questions or wish to review your present risk management programs.