Pandemic-Related Suits Against Employers Are Likely Insured

By **Stephen Raptis, Melissa Goodman and Michael Stoner** (July 21, 2020)

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The COVID-19 pandemic has dramatically altered the day-to-day operations of businesses in virtually every sector of the economy.

For many of these businesses, the pandemic has already had, and continues to have, profound impacts on their employees and sites of operation. Some businesses have been forced to lay off or furlough employees. Others have had to cut employee hours, pay or both.

As a result of these changes, employers should be prepared to address potential claims by current and former employees whose jobs were, and continue to be, affected by the pandemic. Even the most fair-minded employers may find themselves with claims from employees who believe they have been treated unfairly.

For many businesses, employment practices liability, or EPL, insurance policies provide the first line of defense against these types of claims. Unlike some other types of insurance policies, EPL policies are not written on a standard industry form and, as a result, can vary from insurer to insurer and from policy to policy.

That said, most EPL policies protect against loss arising from employment practices wrongful acts, or some similar designation. Employment practices wrongful acts typically include not only traditional workplace claims like discrimination, harassment and retaliation, but other types of workplace claims as well, including wrongful termination, breach of employment contract, and numerous other types of claims.

In our experience, employers do not always appreciate the full scope of coverage provided by their EPL policies, sometimes thinking of it as being limited to discrimination, harassment and related claims.

Where employers experience employment claims associated with the COVID-19 pandemic that are not necessarily discrimination-related — for instance, where the claimant alleges unfair or inconsistent treatment as a result of workplace changes necessitated by COVID-19 — they may not believe that they have EPL coverage and fail to tender such claims to their EPL insurers. In our view, this would be serious mistake, as illustrated by the following examples.

Example 1: Employees Terminated Due to Economic Conditions Associated With COVID-19

Generally, wrongful termination claims — even where discrimination is not alleged — should be covered because EPL policies nearly universally insure against wrongful discharge or termination of employment. "Wrongful" is not defined in most EPL policies, and therefore should be interpreted broadly to include any alleged improper termination.

In any event, under most EPL policies, there generally is no basis in the policy language to conclude that wrongful is synonymous with discriminatory. Moreover, the substantive merits

of the claim are irrelevant because most EPL policies define employment practices wrongful act to include actual or alleged conduct. Thus, the mere allegation that the employee's termination was wrongful in some way is all that is required to trigger EPL coverage.

Further, because most EPL policies include coverage for constructive termination as well as actual termination, EPL coverage may also extend to claims by employees who were furloughed or had their hours cut substantially but were not officially terminated. To the extent that such employees allege that they effectively were terminated and the reasons for their termination were improper, their claims also should be covered.

Example 2: Hands-On Employees

Many jobs, by their nature, require an employee's physical presence at a business location. If employees with such jobs refuse to return to the workplace once restrictions have been lifted — perhaps out of concern for contracting COVID-19 — the employer may terminate the employee for not returning to work.

The employee may assert that the employer discriminated against the employee, possibly by failing to accommodate an alleged disability or interfering with the employee's rights under the Family and Medical Leave Act. But such situations do not necessarily involve discrimination.

For instance, an employee with no disability may simply allege that the employee's refusal to physically return to work was based on legitimate, albeit generalized, health concerns concerning COVID-19, and therefore, that the employee's termination was improper for reasons other than discrimination. In such cases lacking allegations of discrimination and related conduct, an employer may be less likely to tender the claim to its EPL insurer. In our view, this would be a mistake for the same reasons as the previous example.

Example 3: Employees Who Refuse to Submit to COVID-19 Testing

Claims could also arise if an employee either is terminated or the employee's job functions are substantially reduced or redirected as a result of refusing to submit to COVID-19 testing required by the employer. In addition to other claims, the employee might allege that the employer is improperly seeking to, or will, obtain private medical information. Because most EPL policies specifically cover employment-related invasion of privacy, this claim should be covered.

EPL Policies Are Unlikely to Contain Exclusions Applicable to COVID-19

Unlike certain other policies potentially implicated by COVID-19-related losses, we are not aware of exclusions in EPL policies specifically applicable to viruses. While some EPL policies have exclusions applicable to pollutants or contaminants, many EPL policies do not define those terms to include viruses.

Nevertheless, even if there were an exclusion that could implicate viruses, the insurer likely would have the burden of proving that COVID-19, rather than the economic fallout caused by COVID-19 or some other cause, was the proximate cause of the employer's loss. We believe that would be a difficult burden for most insurers to meet.

Likewise, most EPL policies contain bodily injury exclusions that could be invoked if employees allege they contracted COVID-19 at work, although such claims typically would be covered by general liability or workers compensation/employer's liability policies rather

than EPL policies.

Finally, most EPL policies exclude wage-and-hour claims. However, this exclusion only applies to claims for allegedly unpaid wages and related benefits for work already performed, such as claims under the Fair Labor Standards Act and similar state laws. But wage-and-hour exclusions do not apply to other types of claims, including claims seeking front pay and back pay, which the employee alleges were sustained due to an employment practices wrongful act.

Insureds should recognize that, just because an employee's measure of alleged damages is stated in hourly wages that would have been received but for the employer's allegedly wrongful conduct does not mean that the wage-and-hour exclusion is applicable. In fact, front pay and back pay for which the employee allegedly was deprived is at the heart of the coverage provided by EPL policies.

Full Defense of Claims Should Be Available Even if Some Allegations Are Not Covered

Like most other liability insurance, one of the primary benefits of EPL coverage is to protect against the costs of defending a claim. Even if an employee's claim is without merit, costs of defense can be high and may ultimately exceed any settlement or judgment. Many EPL policies are written on a duty-to-defend basis. In most jurisdictions, this means that the EPL insurer must defend an employee's entire lawsuit, even if some or most of the claims in the lawsuit are not covered.

In other words, as long as there is any possibility of coverage for any claim alleged, the insurer typically must defend the entire case. In many EPL policies, this obligation is stated expressly in the so-called allocation provision.

An Employee's Measure of Alleged Damages Does Not Determine Whether a Claim Is Covered

Many EPL policies purport to limit coverage available through carveouts from the definition of otherwise covered loss. While such carveouts should not affect the insurer's defense obligation, they may limit coverage for certain components of settlements and/or judgments. For example, EPL policies may purport to carve out "amounts due under any employment contract" from the definition of "loss," even though the policy includes breach of employment contract within the definition of a triggering employment practices wrongful act.

In this regard, some contract employees may allege that their damages should be measured by amounts due under their contract. However, just because an employee's measure of alleged damages references amounts allegedly due under an employment contract does not mean that such damages are not covered, particularly where the employee seeks damages arising from other, noncontractual claims.

In any event, settlements of employment-related claims often are entered into on a lump-sum basis, which may require an allocation between covered and noncovered claims. Employers should argue that covered losses predominate over uncovered losses, and should be particularly mindful of allocation issues when structuring settlement agreements.

Employers Should Be Highly Skeptical of any Denial or Limitation of Coverage

In sum, employers should not assume they lack EPL coverage merely because a claim lacks allegations of discrimination or harassment, or because the COVID-19 pandemic may have been a causative or contributing factor in the circumstances underlying the claim. Most employee claims — including those lacking any allegations of discrimination or harassment — will still at least potentially trigger EPL coverage, and will not be excluded merely by virtue of being associated with COVID-19.

Therefore, employers should be highly skeptical of denials or limitations of coverage their EPL insurers seek to impose on employment-related claims, regardless of the extent to which the COVID-19 pandemic may be at issue.

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