

2015 HOSPITALITY LAW CONFERENCE

FEBRUARY 9-11, 2015,

HOSPITALITY INSURANCE & LOSS PREVENTION SUMMIT

Presented by:

Darin J. McMullen, Esq. of Anderson Kill P.C.



PRESENTER



Darin J. McMullen

Shareholder, Anderson Kill P.C.

- ❖ Served on the 2008 ABA/TIPS Task Force on Disaster Insurance Coverage in 2005
- ❖ Extensively involved with insurance recovery efforts following Hurricanes Katrina and Rita and, as a result, has served on the American Bar Association's Task Force on Disaster Insurance Coverage.



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MAKE SURE YOUR EMPLOYMENT
PRACTICES LIABILITY INSURANCE
COVERS THE RIGHT RISKS

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Disclaimer

The views expressed by the participants in this program are not those of the participants' employers, their clients, or any other organization. The opinions expressed do not constitute legal advice, or risk management advice. The views discussed are for educational purposes only, and provided only for use during this session.

Employment Claims: A Runaway Train



2012 EEOC

- 99,412 discrimination charges – down approx. 500 from 2011.
- Retaliation – 38.1%⁺
- Race-Based Discrimination – 33.7%⁻
- Gender-Based Discrimination – 30.5%⁺
- Disability Discrimination – 26.5%⁺
- Age-Based Discrimination – 23.0%⁻



Source: EEOC FY 2012 Enforcement Statistics, <http://www.eeoc.gov/eeoc/statistics/enforcement/>

What Are The Exposures?

- Race Discrimination
- Age Discrimination
- Gender Discrimination
- National Origin Discrimination
- Sexual Harassment
- Wrongful Termination
- Retaliation
- Wage & Hour Claims (FLSA)



What Is It Going To Cost Me? --Awards

- Discrimination Actions
 - Median - \$198,322
 - Average - \$600,690
- Retaliation Actions
 - Median - \$200,000
 - Average - \$722,179
- Wrongful Termination
 - Median - \$259,975
 - Average - \$789,184*



* Jury Verdict Research: Employment Practices Liability, Jury Awards and Trends, 2011 ed.

What Is Defense Going To Cost Me?

Can Often Outweigh Awards, Settlements

- Alleged race discrimination in failure to promote case
 - 4 years of Litigation:
 - Settlement amount = \$75,000
 - Defense costs = \$272,000
- Alleged age discrimination in failure to promote case
 - 3 Years of Litigation:
 - Settlement amount = \$45,000
 - Defense costs = \$175,000



* M. Leone, Buying Bias Coverage: Risk Doesn't Discriminate, CFO.com, March 31, 2005.

What about Social Media?



So What's The Problem?

- Reputational Risks
- Business Torts
- Employment Risks
- Intellectual Property Risks
- Privacy Risks



Employment Risks

- Harassment and Discrimination Claims
- Using social media in employment investigations
- Unlawful monitoring of employees
- Passwords



Mitigating Social Media Risks

- Social Media Policies
- Enforcement, Monitoring and Response
- Insurance for Social Media Risks



Create A Social Media Policy

- Incorporate HR, Legal, IT and Marketing departments
- Address social media risks and policies with employees
- Train employees continually on social media
- They are not “One size fits all”
- What to do about personal use?





THINK INSURANCE

- Insurance as an asset – need to think about how to get most out of that asset
- Much of maximizing insurance is about being prepared ahead of time
- Ultimately you do not want to pay



EPLI Insurance

- Covers more than the typical discrimination and harassment suits
- Know your policy inside and out
 - Endorsements
 - Exclusions
 - Reporting Periods



EPLI: Best Source Of Coverage

Available since early 1990's



- Specifically designed to provide coverage for employment practices liability
- Typically include arbitration provisions so most disputes hidden from public eye – very few reported decisions interpreting EPLI provisions
- Often manuscript form although there is an approved ISO form. Many different versions of coverage

Who is Covered?

- Employees, which may include full-time, part-time and temporary employees of the Organization
- Independent Contractors, clients and customers
- Directors and Officers
- Managers and Supervisors
- “Acting in Capacity”



What is Covered?

- Most EPLI policies cover more than the typical discrimination and sexual harassment suits.
- Breach of employment contract
- Whistleblower retaliatory measures
- Defamation
- Failure to promote, negligent evaluation
- Wrongful termination, wrongful discipline
- Workplace torts



Policy Language - Indemnification

“The Underwriter shall pay on behalf of the **Insureds** all **Loss** for which the **Insureds** become legally obligated to pay on account of any **Claim** by or on behalf of a past, present or prospective **Employee** of the **Company** for a **Wrongful Employment Act** taking place before or during the **Policy Period** if such **Claim** is first made against the **Insureds** . . . during the **Policy Period**”



Policy Language - Defense

- “The Underwriter shall have the right and duty to defend **Claims** against the **Insureds**, even if the allegations in the **Claim** are groundless, false or fraudulent.”
- “The Underwriter’s duty to defend any **Claim** . . . ends when the Limit of Liability applicable to such **Claim** or to the **Policy Period** in which such **Claim** is first made has been exhausted.”



Trigger of Coverage

- “Claim” triggers an EPLI policy i.e., when to give notice
- Typical definition of “claim”:
 - “written demand for monetary or non-monetary relief (including request to toll statute of limitations)”
 - “a civil, administrative or arbitration proceeding for monetary or non-monetary relief which is commenced by:
 - (i) service of a complaint or similar pleading; or
 - (ii) receipt or filing of a notice of charge”



When to Give Notice

- “Claims-made” coverage: insurance applies to claims first made during the policy period and reported as soon as practicable thereafter
- “Claims-made and reported” coverage: insurance applies to claims first made during the policy period and reported within the policy period or a fixed reporting period
- WHEN IN DOUBT, GIVE NOTICE!!!



GIVE NOTICE!



Beware of Exclusions And Endorsements

- Punitive Damages and multiple damage awards
- Intentional Acts Exclusion
- Statutory Benefits Exclusions
 - ERISA, COBRA, OSHA, Workers Compensation
- ADA Exclusion
- Contractual Liability Exclusion
- Criminal, Fraudulent or Malicious Acts
- Class Actions



- Consent To Settle



- Cooperation Clauses



What To Do When You Have a Claim

1. Notice



2. Investigation



- Determine the scope of the loss and the location of the stolen assets
- Identify all documents that shed light on the scheme, determining the amount of the loss
- Terminate dishonest employees
- Do not cede claim investigation responsibility to the insurance company
- Do not settle with dishonest employees (without approval)
- Never interview the dishonest employees alone

What To Do

When You Have A Claim (cont'd)

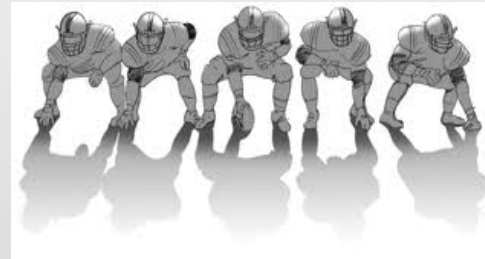
3. Identify potentially applicable insurance policies
- Commercial Crime Policies
 - Dishonesty, disappearance and destruction policies
 - “Blanket” bonds
 - Financial Institution Bonds
 - All-risk Policies
 - Property Policies
 - Comprehensive general liability policies with credit card and depositor’s forgery endorsements
 - Computer crime coverage



What To Do

When You Have A Claim (cont'd)

4. Promptly submit the Proof of Loss
5. Cooperate with your insurance company
 - Promptly respond to information requests
 - Never say “no”
 - Insist on attendance at all employee and third-party interviews
6. Stay on the offensive



What To Do

When You Have A Claim (cont'd)

7. Take the direct approach to insurance company defenses
8. Duty to Mitigate: Do you have to chase the wrongdoers FIRST?
9. Don't take "no" for an answer.
10. Sue?



Challenging Denials

- Be Aware of Tone
- Force A Position
- Compartmentalize what is disputed and what is not
- Put it in Writing!



Thank You

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