



Newer alternatives for obtaining legal representation in employment matters

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Hoteliers must comply with an ever-increasing number of employment laws covering a broad range of areas, such as wage/hour, employee leaves of absence, discrimination, labor relations, and safety. More and more lawsuits and administrative actions are being filed by current and former employees. In this operating environment, many hoteliers are looking for cost-effective ways to make more informed employment-related decisions on the front end as a preventive measure. For problems that arise after the decision has been made, hoteliers are seeking to minimize their liability and expenses when they find themselves embroiled in a legal dispute. This article discusses options to which hoteliers have turned to accomplish these objectives.

Before the employment decision is made

Depending on the size of the workforce, a hotelier will make hundreds to thousands of employment decisions each year. Some decisions may be complex on their face, such as determining whether an employee's condition qualifies as a disability under the Americans with Disabilities Act and, if so, what accommodations are reasonable. Some decisions may seem innocuous at first glance, but may have far-reaching consequences if they run afoul of a law or regulation of which the hotelier was unaware.

As Ben Franklin once said, "An ounce of prevention is worth a pound of cure." Many hoteliers have taken that adage to heart, and are searching for different, inexpensive ways to gain access to legal advice to help them avoid employment actions that could result in tens or hundreds of thousands of dollars of liability. Typically, when a hotelier retains an attorney, the hotelier will pay the attorney's regular hourly rate and the expense will depend on how much time the attorney devotes to the matter. While most hoteliers believe that sound legal counsel is a business necessity and value added, many hoteliers see two drawbacks to the typical arrangement discussed above. One, there may not be a significant degree of cost certainty. Two, it is expensive.

In an effort to come up with alternate arrangements to avoid those two drawbacks, while still maintaining access to sound legal advice, one concept that has become more popular in recent years is a "hotline." Hotline arrangements provide hoteliers with two main advantages: (1) greater cost certainty; (2) at lower rates. For example, a typical hotline arrangement will give the participating hotelier access to an attorney for up to "X" number of hours throughout the year at a set price. Even if the hotelier uses the maximum allotted time, the amount the hotelier pays still will not go above the set amount, thus providing greater cost certainty. With respect to the second factor, hoteliers who frequently utilize hotlines will pay effective rates for the use of an attorney's time that are typically a fraction of what an attorney's regular hourly rate is.

While the immediate potential benefits of a hotline arrangement from a hotelier's perspective are cost certainty and lower rates, there are additional benefits as well. The longer term, and much greater, potential benefit is that it may encourage and/or enable the hotelier to take preventive steps ahead of time to avoid employment decisions that could result in substantial legal liability. We live in a more litigious world. Employees are more apt to file suit. Similarly, plaintiff's lawyers are more likely to take on lawsuits on behalf of employees. Certain employment-related class actions – such as wage-hour cases – are becoming more prevalent. In sum, the costs of making a mistake are higher, and many hoteliers are looking at newer alternatives to ensure they have access to the legal representation they need.

After the decision is made

Some hoteliers are looking to minimize their potential exposure by purchasing what is called employment practices liability insurance ("EPLI"). A hotelier's decision whether to purchase EPLI will often boil down to whether or not the hotelier believes that the possibility that it could be sued is significant enough to make the premium expenditure a sound purchase. Like most other forms of liability insurance, EPLI policies typically are "duty to defend" policies requiring the carrier to

defend any covered claims made against its insureds. The policies also usually provide indemnity for any settlements or judgments of covered claims. Consequently, in most cases, the purchase of EPLI allows an employer to limit the potential costs of a covered claim — both for the defense and indemnity — to the amount of the deductible.

Like most other liability insurance policies, EPLI policies differ depending on the insurance carrier. Experience has shown that most carriers are willing to work with their insureds to craft EPLI policies that meet the needs and desires of the insured. The time of purchase or the time of renewal is the best time to try to customize provisions of an EPLI policy. If you are considering the purchase of EPLI insurance or if you are about to renew your EPLI policy, consider the following issues before finalizing your policy:

- 1. Selection of Counsel:** Typically, law firms not on a carrier's panel are not permitted to handle cases covered by the carrier's EPLI policies. Therefore, if you purchase an EPLI policy from a carrier on whose panel your usual law firm does not appear, that firm may not be allowed to handle any employment matters covered by your insurance policy, even if they handle most of your day-to-day labor and employment law issues. If you wish to avoid this possibility, many EPLI carriers will allow you to designate your usual firm as defense counsel for any employment litigation matters covered by the policy if you ask at the time of policy renewal or purchase. However, *this designation must be negotiated at the time of policy renewal or initial purchase* — once the policy is issued, it is very difficult to convince an insurance carrier to allow you to use counsel that is not on their approved panel.
- 2. Deductible Amounts:** Most carriers have varying deductible amounts. A deductible is the actual amount the insured is required to pay before the carrier's financial obligations commence. Typically, the amount of the deductible is negotiable; however, you will almost always pay a higher premium for a lower deductible. Additionally, as a general rule, most carriers allow their insureds more control over litigation strategy, including settlement, while the costs of the litigation remain within the insureds' deductible. Thus, *a higher deductible usually allows the insured more say in the course of litigation for a longer period of time.*
- 3. Settlement Decisions:** Some hoteliers may not want to settle cases and pay even nuisance value settlements because they did nothing wrong, they do not want to set a precedent, they don't want to encourage other claims, or other equally valid reasons. Under most EPLI policies, the decision of whether to settle a matter rests with the insurance carrier. In many cases, the policies have what is known as a "hammer clause" which allows the carrier to shift responsibility for the defense costs and indemnity (the amount of any adverse judgment should one occur) to the hotelier if, in the carrier's opinion, the hotelier has unreasonably withheld its consent to a settlement. Additionally, most policies also provide that, once the insured's deductible is exhausted, the carrier has full authority to enter into a settlement without obtaining the insured's consent. Therefore, *if you want to maintain some level of control over the possible settlement of cases brought against you, you should carefully examine the settlement provisions of the EPLI policies you are considering and discuss them in detail with your insurance broker.*

Hoteliers' bottom line

EPLI insurance can be an effective safeguard and risk management tool for a hotelier looking to protect against spikes in defense costs and liability exposure in our increasingly litigious society. However, as a potential purchaser of EPLI, you need to discuss your needs with the EPLI broker and/or carrier to obtain the type of EPLI policy that is best for you. ✧

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