I. Origins and Evolution of Employment Practices Liability Insurance

Employment practices liability insurance (EPL) is a relatively recent phenomenon in the property-casualty insurance industry, tracing its origins only to the late 1980s. Indeed, the first policies offered were limited in scope and amounted to a cautious testing of the waters by the insurance industry. The policies offered coverage only for the costs of defense, for a limited period (typically for four years), and were subject to a monetary limit of liability. To the extent these policy forms are still available today, the demand for them would be minimal, given the expansion of the coverage since the 1980s. And the coverage has expanded. In 1991, there were approximately five carriers for EPL
insurance.¹ Now, there are more than fifty carriers with a volume of business of $1.72 billion just in the United States.²

In the 1990s, three major insurers began offering traditional liability policies covering not only defense expenses, but also “indemnity” amounts such as settlements and judgments coverage. The now-defunct Reliance Insurance Company was perhaps the first of the three to market a product that was designed for and limited to claims alleging a wrongful discharge from employment. Lexington Insurance Company, a member of the American International Group (AIG), and Federal Insurance Company, one of the Chubb Group of Insurance Companies, soon followed suit with policies covering not only wrongful terminations but also events of discrimination and sexual harassment, regardless of whether an employment termination had occurred.

Two seminal events occurred shortly thereafter that caused sales of the EPL product to increase dramatically and continue to sell with increasing frequency to the present. First, the Civil Rights Act of 1991 was enacted, and, for the first time, plaintiffs were able to recover significant compensatory and punitive damages for violations of Title VII of the Civil Rights Act of 1964. From a practical point of view, this energized plaintiffs’ lawyers to bring more of these suits, because the damages caps could be as high as $300,000, in the case of the largest employers, and would be available in addition to back-pay awards and other nonmonetary and injunctive relief.

The second event was more in the nature of atmospherics, but one that certainly put the issue of workplace sexual harassment in the forefront of the business, legal, and general news media. In October 1991, the nation became fixated on the televised hearings for the nomination of Clarence Thomas to the U.S. Supreme Court. Regardless of the political overtones and ramifications of Justice Thomas’s nomination,

² Id.
sexual harassment as a workplace phenomenon became widely known. As sexual harassment was actionable as a form of Title VII discrimination, the hearings, coupled with the newly available damages for these claims, caused the number of charges of discrimination involving sexual harassment filed before the Equal Employment Opportunity Commission (EEOC) to soar beginning in 1992. There was a concomitant rise in other discrimination claims as well, the amount of which continued to increase throughout the decade and has now leveled off at an amount far above the number of claims filed in 1991 and earlier years. Various state agencies having jurisdiction parallel to the EEOC, such as the California Department of Fair Employment and Housing, saw a similar rise in allegations of harassment and discrimination. As neither the EEOC nor the various state agencies directly precluded a claimant’s ultimate right to sue, the number of matters in litigation also increased dramatically.

Sales of the EPL insurance product grew with claims and litigation until the insurance expanded in scope to the form discussed throughout the remainder of this chapter. Appendices to this chapter include a specimen policy form, along with application, declarations, and endorsements, of Chubb Insurance. Although forms and endorsements can and do vary from one insurer to another, the Chubb form is fairly typical of the core product on the market today.

II. Fundamentals of the EPL Policy

The following is an overview of a typical EPL policy form, focusing on certain claim triggers and features that differentiate the EPL form from coverages that the practitioner outside the insurance arena may find more familiar, such as commercial general liability or a homeowner’s or automobile policy.

The EPL policy is typically written on a claims-made basis. This means that the coverage is triggered when a claim is first made against an insured under and during the term of the policy. This differs from the typical automobile liability policy, which is triggered by the date
of an accident, even though the actual claim may be made after the policy has expired.

In addition to this claims-made trigger, the claim itself must also be reported to the insurer within a certain time period. The most open-ended of these reporting requirements simply states that the claim must be reported to the insurer as soon as practicable. A very small minority of courts has held that an insurer can only deny coverage for late reporting under the “as soon as practicable” language if it can establish that the insured’s late reporting of the claim prejudiced the insurer.3 Prejudice is often difficult to establish because the test is generally whether the insurer would have done anything differently had it received more timely notice of the claim.4 The majority of courts, however, confine such “notice-prejudice” rules to occurrence policies or third-party claims, rather than the typical claims-made EPL policy covering first-party claims.5

An alternative reporting requirement, and one at the opposite end of the spectrum from “as soon as practicable,” mandates that claims be made and reported during the policy period. Under a strict interpretation, this would require an insured to report a claim first made in the waning hours of the last day of the policy period to the insurer before the clock literally struck midnight on that day. Once commonplace,


4. See, e.g., Guardian Trust Co. v. Am. States Ins. Co., No. 95-4073-SAC, 1996 WL 509638, at *6 (D. Kan. July 30, 1996) (insurer must show it would have handled claim differently if it had had timely notice and the different handling would have reduced the loss exposure).

these harsh provisions are much less prevalent in EPL and other claims-
made policy forms today.

The most typical reporting requirement requires reporting as soon
as practicable, but in no event later than a fixed date after the policy
has expired. The most common fixed-date provision is a “bright line”
drawn sixty days after policy expiration. Courts have routinely enforced
such provisions, and most jurisdictions will not require the insurer to
establish that it has been prejudiced in the event of noncompliance
with the reporting requirement.⁶

It is important to note that, where there is both a “claims-made”
and “claims-reported” trigger to be satisfied, compliance with one and
not the other will result in an absence of coverage under the policy in
which the claim is first reported, as well as under the policy in which
the claim was first made.

In addition to reporting requirements, another prominent feature of
EPL policies is that coverage for defense expenses is part of the limit of
liability. This is contrasted with a general or automobile liability policy
in which the insurer has an unlimited duty to defend despite settlement
and judgment amounts often being capped by the contract. As such,
the EPL buyer must be prudent in obtaining sufficient policy limits to
cover the combined indemnity and defense exposures it faces. Further,
as EPL policies are typically written with an annual aggregate limit
of liability, the purchasing decision must be made with both expected
frequency and severity of claims in mind.

Also, unlike the general liability arena, defense expenses under an
EPL policy are typically subject to a deductible or retention amount.
Setting this amount is typically a matter of negotiation between the
insurer and the policyholder, but many insurers will set minimum reten-
tion amounts to avoid exposure to relatively routine and nonsevere
claims. Likewise, the buyer who seeks only protection from the more

⁶ See, e.g., Burns, 929 F.2d at 1425; see also Heydar v. Westport Ins. Corp., 158
catastrophic claims will seek a higher retention to keep premium costs down. Retentions of $25,000 or less per claim will generally require the insurer's focused involvement in all such claims, whereas a minimum retention of $250,000 will likely result in the vast majority of employment claims being resolved solely at the policyholder's expense, even when defense expenses are added to indemnity amounts.

As is the case with most claims-made forms in other product lines, EPL policies contain an “awareness provision” that allows an insured to “report” potential claims during the policy period. Awareness reporting is not mandatory on the part of the insured, but it affords the insured an opportunity to “lock in” coverage for actual claims that may arise later. Awareness provisions require a certain amount of specificity to support the possibility of a claim before coverage is locked in. For example, a list of all workers terminated in a recent reduction in force will be insufficient to secure coverage for a future claim by any of the terminated employees after the EPL policy has expired. If the insured can produce evidence that a particular employee threatened suit on the basis of age discrimination, however, that may well trigger the awareness provision and lock in later coverage.

It is important to understand the benefit of reporting potential claims to the incumbent EPL insurer, particularly if that policy is not going to be renewed. In applying for a replacement EPL policy, the applicant will be asked if it is aware of any act, error, omission, or circumstance that might give rise to a claim. If such acts, errors, omissions, or circumstances exist, any claim arising therefrom will be excluded from coverage under the new policy. Thus, if the insured has not locked in coverage, the insured would be left without coverage entirely.

7. See FDIC v. Mijalis, 15 F.3d 1314, 1332 (5th Cir. 1994) (general demand for regulatory compliance does not qualify as notice of a specific wrongful act); see also Sapp v. Greif, 961 F. Supp. 243, 247 (D. Kan. 1997), aff’d, No. 97-3200, 1998 WL 165116 (10th Cir. 1998) (insured must provide details concerning circumstances and reasons for anticipating a future claim).
For similar reasons, under certain conditions EPL policies also offer “discovery” or “extended reporting” periods. Essentially, in exchange for an additional premium, the insured can extend the policy for a fixed period (typically one year at a percentage of the actual policy premium), during which it can report claims that arise from acts that took place while, or in some cases even before, the policy was in force. Purchasing an extended reporting period is beneficial when the insured may be moving coverage to another insurer who is unwilling to grant coverage for wrongful acts committed prior to the inception of its policy period.

Similarly, many carriers now offer prior-acts coverage. Prior-acts coverage is a valuable protection that used to be difficult to obtain because underwriters were reluctant to insure the prior activities of an employer. As carriers competed for business, however, prior-acts coverage became an attractive coverage for insureds. As carriers became more comfortable with the coverage, it became easier to offer the coverage even to new insureds. For many carriers, there is now no additional cost for prior-acts coverage.³

III. Defense Issues

Both among different insurers and even among alternative forms and endorsements offered by the same insurer, the areas in which EPL policy forms vary greatly regard who has the duty to defend and the concomitant right to select defense counsel.

The selection of defense counsel has been a source of controversy. Insurers generally prefer to appoint counsel on their regular defense panels because of that counsel’s familiarity with the insurers’ practices and procedures and because of the counsel’s willingness to handle employment-related cases at a set hourly rate. Insureds, on the other hand, often prefer to have claims against them handled by their regular employment law counsel because of their familiarity with the law and with the insureds’ operations.

³ Betterley, supra note 1, at 12.
Generally, if the policy provides that the insurer has the right and duty to defend, it will also expressly, or by implication of law, also provide that the insurer has the right to select defense counsel on behalf of its insureds. This is no different from most other business and personal liability forms available on the market today. If there is a conflict in interest between insured and insurer, state law may require the insurer to relinquish its right to select counsel and to allow the insured to select its own counsel, to be paid by the insurer pursuant to the terms and conditions of the policy.9

The other major variation in this area is a policy form that permits the insured to select its own defense counsel, subject to prior notice to and consent by the insurer, “which shall not be unreasonably withheld.” This is similar to the language in most directors’ and officers’ (D&O) liability policies. Though this latter variation appears to be, prima facie, the more attractive, the insured should bear in mind the following:

- Under duty to defend policies, many jurisdictions will require the insurer to defend the entire matter, even though only a small number of counts or allegations may be within the scope of coverage.10 Under the non-duty to defend variation, however, the insurer will more likely be able to secure an allocation of defense costs as between covered and noncovered claims.11
- The ability to choose one’s counsel does not come with an unfettered license. The insurer can legitimately refuse to consent to counsel who is not sufficiently experienced or otherwise qualified, and the insurer will typically only be required to pay the rates in place for its own approved employment litigators in that

---

jurisdiction. This could mean that the insured may find itself bearing a significant portion of the defense expenses if its chosen counsel will not adjust rates.

- Responsible EPL insurers use pre-approved counsel with employment litigation experience and qualifications. Thus, an insured’s fear of being provided with less-qualified representation is often unfounded.
- The ability to select counsel does not necessarily mean that the insurer will consent to multiple counsel, where individual or multiple defendants are named, if there is no demonstrable conflict of interest between or among insured defendants.

When the insured insists on using its own counsel and a negotiated rate cannot be agreed upon, one approach is to permit the insured to use its own counsel if the insured agrees to pay the difference between the highest rate the insurer is willing to pay and the lowest rate the insured’s counsel is willing to accept.

In a duty to defend situation, the insurer typically also retains the right and obligation to settle the claim in appropriate circumstances. In forms in which the settlement obligation may be reserved to the insured along with the duty to defend, there may be a “consent to settle” provision, which is sometimes referenced pejoratively as a “hammer clause.”

A hammer clause typically provides that if the insurer obtains an opportunity to settle—an offer that the plaintiff has stated he or she would accept—then, if the insured refuses to consent to the insurer settling the claim, the insurer’s liability under the policy will be capped at the amount of the foregone settlement plus defense expenses incurred through that point. In effect, the insurer would have no further financial liability should the insured elect to continue with litigation.

---

Hammer clauses have been criticized as giving undue leverage to the EPL insurer, although they create a situation that is no different from other liability policies in which the insurer can always elect to settle regardless of the wishes of its insured. Nonetheless, in the current EPL market, this provision is often removed or significantly limited by endorsement.

Because hammer clauses are criticized, some policies now contain a so-called soft hammer clause. A soft hammer clause calls for the insurer and insured to share any costs exceeding the amount for which the case could have been settled if not for the insured’s refusal. This clause addresses the fact that, at times and for a multitude of reasons, it is in the mutual interest of insurer and insured to continue to litigate a case that could have been settled at a favorable cost, and that they should both share the risk of an unfavorable outcome.

Most EPL policies also provide that the insureds have a duty to cooperate with the insurer in the defense of a claim. This is usually not problematic in the case of a duty to defend form, but, in other variations, securing the cooperation of defense counsel not selected by the insurer is often an issue. This may occur for a number of the following reasons, not all of which may be legitimate as a matter of the policy and applicable law:

- Counsel is unfamiliar with insurance defense work, and the insurer needs to receive frequent reporting to maintain adequate case reserves and to assess litigation continuously, including settlement strategy.

---

13. The primary criticism is that the insured is arguably penalized if it “bets wrong” and insists the case not be settled. There is no concomitant penalty on the insurer for insisting that the case be settled at too high a price because such a fact can never be objectively established. Of course, an insurer always faces the specter of potential exposure beyond its policy limits whenever it can reasonably be established that it refused to settle within its policy limits.
• Counsel is concerned that factual information developed in the course of investigating and defending the claim may be used adversely by the insurer with regard to coverage issues. It should be noted that most jurisdictions would impose the same ethical constraints on both counsel selected by the insurer and independent counsel selected by the insured.

• Counsel and the insured do not want to alarm the insurer regarding the severity of the claim because the policy is due for renewal.

• Counsel believes it has no obligation to report to the insurer because it is not its client. Jurisdictions differ on this issue, but the practical bottom line is that the insurer needs to make an informed decision about whether to settle, including when and for what amount, or make other litigation-related tactical and strategic decisions.

IV. What Constitutes a Covered Claim?
The earliest EPL policy forms somewhat simplistically limited their coverage solely to matters in suit. Over the years, EPL insurers came to realize that their early intervention in the dispute process ensured more control and better results from the resolution process. Particularly after the enactment of the Civil Rights Act of 1991, insurers thought it better to provide coverage for EEOC and state agency proceedings and, thus, to become involved in the selection of counsel and possible opportunities to settle at an early, prelitigation stage.

Today, the typical EPL form deems a covered claim to be first made when any of the following first takes place:

• The insured receives a written demand for relief that is within the scope of the policy’s coverage. This can be from the claimant or someone on behalf of the claimant, but most policies will not

---

14. See infra chapter 12.
15. Newcomb v. Meiss, 116 N.W.2d 593, 598 (Minn. 1962) (the lawyer who represents an insured owes him “undeviating and single allegiance” whether the lawyer is compensated by the insurer or the insured).
recognize oral demands because of issues of proof as to content and timing of receipt.

- A written demand or request for mediation or arbitration.
- Receipt by the insured of a Notice of a Charge of Discrimination from the EEOC or similar notice from another federal, state, or local agency.
- A civil proceeding commences by service of a complaint or similar pleading. It is important that the claim is only deemed to be first made upon receipt of a summons or similar filing. The mere filing of a complaint can have legal effects, such as tolling of a statute of limitation, but it would be unfair to encumber the insured with a duty to report something about which it does not know or reasonably should not know. Of course, if an insured receives a “courtesy copy” of a filed, but not served, complaint, the courtesy copy serves as a written demand.

As a general rule, the broader the definition of the term claim in this respect, the more advantageous it is to the insured. One caveat is that once a claim is made, the time frame within which to report it to the insurer begins to run.

V. What Constitutes a Covered Loss?

EPL policies are generally worded broadly to cover all amounts that must be paid as a defined “loss.” Although each policy must be carefully reviewed in its entirety, generally speaking, a loss will include the following:

- Judgment amounts;
- Settlement amounts;
- Amounts in the nature of back or front pay;
- Pre- and post-judgment interest awards;
- Awards of plaintiff fees and costs; and
- Defense expenses.
Though the above items constitute a basic inventory of what is covered under most EPL policy forms, scrutinizing the actual policy definitions, exclusions, and conditions is critical to determining what may not be covered in the first instance or otherwise carved out from the broad coverage grant described above.

Among the items typically not covered as a loss are the following:

- Wages, salaries, benefits, or expenses of any individual or entity insured under the policy.
- Punitive, exemplary, or multiplied damages. Many forms allow for such coverage if permitted by the most favorable and applicable law. Many states prohibit coverage for punitive damages, however, so most carriers offer separate coverage, either through a most favorable venue provision or with an offshore wraparound in a jurisdiction that does not frown on the coverage.\(^\text{16}\)
- Fines, penalties, or taxes.
- Amounts due under an express employment contract.
- Stock options, deferred compensation, and other items constituting compensation or benefits.
- Injunctive relief, including the cost of complying with an award of or settlement in the nature of injunctive relief.

Whether wage awards under the Fair Labor Standards Act (FLSA) or similar state laws constitute a covered loss has been hotly debated.\(^\text{17}\) Currently, the majority position is that a well-drafted exclusionary

---

\(^{16}\) Betterley, supra note 1, at 10.

provision in an EPL policy will bar an insurer’s duty to indemnify FLSA claims and state minimum wage and overtime claims. An open question, though, is whether a broadly worded exclusion referencing the FLSA and “similar provisions of any federal, state or local statutory or common law” will relieve an insurer of its indemnification obligation for state claims outside the minimum wage and overtime arena. More clear is the proposition that the insurer’s duty to defend is triggered by mixed claims, including the potentially covered claims under the “similar” provision, which form a part of the suit together with clearly excluded claims. The majority position here is that the insurer is obligated to defend the whole action. insurers are now arguing with some success, though, that they are entitled to reimbursement for the cost of defending the wage and hour portion of the suit.

Because of the controversies regarding coverage of wage and hour claims, insureds are increasingly seeking endorsement for wage and hour claims. Though often requested by insureds, wage and hour coverage continues to be rare because carriers are unwilling to cover what many

18. See Admiral Ins. Co. v. Kay Automotive Distributors, Inc., 82 F. Supp. 3d 1175, 1179 (C.D. Cal. 2015) (holding that a provision excluding claims “based upon, arising out of, ... resulting from or in consequence of, or in any way involving any federal, state, local or foreign wage and hour laws, including, without limitation, the Fair Labor Standards Act,” excluded all state wage and hour laws, even ones that were not “similar” to the FLSA).

19. Cf. PHP Insurance Service, Inc. v. Greenwich Insurance Co., 2015 WL 4760485 at *8-9 (N.D. Cal. Aug. 12, 2015) (holding that California Labor Code § 226, which subjects employers failing to furnish employees with itemized wage statements to statutory penalties, was not a “similar provision” and therefore claims under the statute were not barred by the policy’s exclusionary clause; the Court, however, ultimately held that while the insurer was obligated to defend the claim, it had no duty to indemnify, as the insured could not prove violation of Section 226 was a covered “wrongful employment act” under the policy).

20. E.g., Hanover Insurance Co. v. Poway Academy of Hair Design, Inc., 2016 WL 6698936 at *4-5 (S.D. Cal. Nov. 14, 2016) (holding that insurer must defend entire action where five of six claims clearly fell within the wage and hour exclusion but the sixth claim was potentially outside the exclusion).

21. Cf. id. at *5 (finding that insurer could seek reimbursement of defense costs related to potentially excluded claim but holding the insurer failed to meet its burden of proof on this issue).
see as a business risk under the control of the employer. Moreover, some courts may find such provision unenforceable as a moral hazard.

VI. What Are the Covered Perils?

Although not denominated specifically as such in the policy language, it is helpful to view the policy in terms of what “perils” are being insured. Many early policy forms were limited to coverage for employment terminations. The forms have evolved to include a range of perils, limited only by the definitions, exclusions, other provisions of the policy, and applicable insurance law and public policy on the insurability of certain hazards.

Wrongful termination remains among the principal covered perils, and most forms include it in covered termination events such as constructive discharge or retaliatory discharge from employment.

Discrimination is another major covered peril. Though many forms detail the types of discrimination covered, this may be more a limitation than an enhancement to the policyholder because the law in this area continues to expand, and certain acts of discrimination may be actionable in some jurisdictions but not others. Where discrimination types are listed as covered, it is always in the policyholder’s interest to have included an omnibus clause such as “or other protected class or characteristic established under applicable federal, state, or local law.”

Another principal peril is harassment. Of course, under Title VII and many state laws, sexual harassment is actionable as a form of prohibited sex discrimination. Nonetheless, it should be listed separately as an

22. Betterley, supra note 1, at 8.
23. Cf. Farmers Auto. Inc. Ass’n v. St. Paul Mercury Ins. Co., 482 F.3d 976, 978-79 (7th Cir. 2007) (The purpose of a wage and hour exclusion “is to avoid ‘moral hazard,’ which, in its most extreme form, is the temptation of an insured to precipitate the event insured against if the insurance goes beyond merely replacing a loss…. Insurance against a violation of an overtime law, whether federal or state, would enable the employer to refuse to pay overtime and then invoke coverage so that the cost of the overtime would come to rest on to the insurance company. The employer would have violated the overtime law with impunity, unjustly enriching itself by the difference between the overtime wage for the hours in question and the straight wage”).
insured peril and expanded to include quid pro quo sexual harassment, hostile work environment harassment, and harassment based on race or other classes and characteristics set forth in the applicable federal, state, and local laws.

Though many EPL insurers have backed away from coverage for “all other workplace torts” or similar language, EPL policies will generally respond to the following perils:

- Refusal to hire.
- Refusal to promote or grant tenure.
- Wrongful discipline or demotion.
- Employment-related defamation or invasion of privacy. It should be noted that this might overlap with coverage provided by a commercial general liability policy.
- Violations of the Family and Medical Leave Act (FMLA).

It is rare that an employment-related claim does not involve one or more of the three major perils or the lesser perils discussed above. Nonetheless, insurers may be willing to entertain an endorsement to the policy to provide coverage for a particular peril specific to an industry or jurisdiction and not otherwise adequately addressed in the policy form.

For instance, one optional coverage that has become increasingly popular with insureds is third-party coverage. Third-party coverage essentially provides coverage for claims of discrimination, including harassment, brought by a company’s vendors or customers, or employees of those customers or vendors. An example of such a claim would be the servers at Texas Roadhouse suing their employer for permitting

24. Quid pro quo harassment occurs when (1) job benefits, including employment, promotion, salary increases, shift or work assignments, performance expectations, and other conditions of employment are made contingent on the provision of sexual favors, or (2) the rejection of a sexual advance or request for sexual favors results in a tangible employment detriment. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).
Employment Practices Liability Insurance

The rise in this type of coverage follows the concomitant rise in third-party claims. Coverage initially applied only to discrimination, but owing to the rise in third-party claims, it now applies to both discrimination and harassment. As of 2015, all major carriers offer third-party coverage as part of their EPL form. Some, however, restrict coverage to business relationships. Others limit to sexual harassment.

In addition to concerns about the increase in third-party claims, there has been a great deal of discussion about social networking and bullying and their relationship to EPL coverage. Though both social networking and bullying represent new avenues for exposure, it is arguable whether there needs to be any change in terms of policy drafting to cover these claims.

VII. Key Policy Exclusions

As with all liability insurance policies, the typical EPL form contains a number of important exclusions. The most common exclusions are discussed below.

An important caveat to bear in mind is that not all exclusions are contained in the “Exclusions” section of the policy. This is not to suggest attempts on the part of insurers to obfuscate or trick, but rather it is an evolution of customary practice and usage in the business.

Most policies will use the definition of the term loss to set forth an exclusion for items such as penalties, fines, and taxes. Punitive and exemplary (including other multiplied) damages are also addressed here, as well as matters uninsurable under the applicable law. This latter provision is often subject to some debate as to what is the applicable law.

26. See, e.g., Beckford v. Dep’t. of Corr., 605 F.3d 951 (11th Cir. 2010).
27. Betterley, supra note 1, at 11.
28. Id.
29. But see infra Section X.
Furthermore, it could be argued that the insurer will be precluded from covering uninsurable conduct, regardless of what the insurance policy does or does not say. For example, Section 533 of the California Insurance Code has been interpreted to “read into” every liability insurance policy an exclusion for intentional or willful wrongdoing.

In the exclusions section, most policies exclude claims for bodily injury, property damage, and certain personal injury claims to avoid, among other things, duplicate coverage already provided under a general liability policy. The EPL insurer, however, will typically not seek to apply this exclusion to allegations of emotional distress or mental anguish in connection with a covered wrongful act. In cases in which there are allegations of rape or physical assault, the insurer may insist upon an allocation between covered and noncovered aspects of the claim, such that the EPL insurer may be unwilling to fund the entire amount of any judgment or settlement. The insurer could also seek an allocation of defense expenses.

The EPL form is not intended to provide coverage for claims for benefits that arise under a number of statutory claims, and these are evidenced under exclusions that pertain to unemployment compensation, disability, pension and other welfare benefits, workplace safety, and plant closings.

Further, it is against the public policy of most states to provide coverage for intentionally caused injuries. In line with this public policy, some EPL policies contain exclusions eliminating coverage for dishonest, fraudulent, criminal, or malicious acts. A few, however, also exclude coverage for intentional acts. Because most employment-related claims involve intentional (as opposed to negligent) conduct, “intentional act” exclusions in EPL policies will likely be construed to bar coverage only when the injury (not the act that produced it) is intended. Otherwise, a risk exists that the policies will be held to provide illusory coverage.

Also, the exclusion is typically applied severally to each insured. Thus, it may be applied to exclude coverage for a supervisor who sexually assaults a subordinate but may not necessarily be applicable to the liability of the employer that may be based solely on negligent hiring or negligent retention of that supervisor.

Claims for nonmonetary and other relief not in the nature of compensatory damages are typically excluded, and these may include claims seeking job reinstatement, physical accommodation pursuant to the Americans with Disabilities Act (ADA), and disgorgement of ill-gotten gain. Most policies provide that the EPL insurer will cover defense expenses in such situations.

Finally, EPL forms typically exclude claims for amounts allegedly due under an express and written employment contract. Typically, this will not include claims in which the employee seeks to defeat his or her “at will” status by alleging that an employment handbook constitutes a contract of employment. The intent of most EPL insurers is to avoid often contentious and expensive disputes involving highly paid executives working under an employment contract.

VIII. “Other Insurance” Clause

The application of insurance policies other than EPL to employment-related claims is discussed in-depth in Chapter 2, but the interplay between those policies and the EPL policy is largely dependent on the other insurance provisions in the respective policies.

Generally, other insurance clauses can be one of three major types. The first, and perhaps the most common among EPL insurers, is one


32. Many EPL policies limit their contractual liability exclusion, which often is incorporated into the policy’s definition of loss, to contracts that are both written and express. Though an employees’ handbook likely meets the written qualification, few employment lawyers would consider it an express contract. At best, assuming there is no disclaimer to the contrary, a plaintiff’s lawyer may argue that the handbook constitutes an implied contract.
that provides that the EPL policy will be excess over other available insurance.\textsuperscript{33} This version does not give the EPL insurer an “escape” that is found in the second version below; it simply provides that both policies will apply, but that the EPL will not apply until the other policy’s limits are exhausted. Thus, the insured gains the full benefit of the policies for which it paid. Two important and practical benefits in having a policy such as general liability apply on a “primary” basis are illustrated as follows:

- A general liability policy typically has an unlimited duty to defend that does not erode the available limits of liability. Therefore, the insured can enjoy the defense under the general liability policy, knowing that the limits of that policy \textit{and} the EPL will be available to fund any covered judgment or settlement.

- A general liability policy often provides a duty to defend without any applicable deductible amount. The significance of this benefit can be enormous, particularly as six-figure deductibles or retentions are becoming commonplace in the EPL arena. Although the insured will ultimately have to bear the EPL deductible or retention if it wants to apply that policy to a settlement or judgment amount, there is a good chance that the general liability policy may cover the loss, including defense expenses, in its entirety.

A second variation, and perhaps least common, is the provision that no coverage exists under the policy when other insurance exists. Such a provision is commonly referenced as an exclusionary or escape clause; courts have not favored its enforceability.\textsuperscript{34} If it is enforced, the insured is, essentially, being told that it cannot obtain the benefit of obtaining the coverage for which it paid premium because of the fortuity of the


\textsuperscript{34} See, e.g., Auto. Underwriters, Inc. v. Fireman’s Fund Ins. Cos., 874 F.2d 188, 191 (3d Cir. 1989).
existence of another policy (such as a commercial general liability) for which it also paid premium.

The final variation specifically states that the policy is intended to be primary and will prorate with other applicable primary policies. For example, where two policies have this provision and one has a $2M limit and the other $5M, they will share the loss on a 2/7 and 5/7 basis. If one policy has this provision and the other is of the “excess” version discussed immediately above, the former will apply without any contribution from the latter unless the former’s limits of liability become exhausted.

Problems in the area of other insurance typically occur when there are “mutually repugnant” clauses. The most common example occurs when each policy states it is excess over other available insurance. In most jurisdictions, the courts will require the insurers in those cases to prorate their liability according to their policies’ respective limits.35

IX. Application Issues
In a claims-made policy situation, the insurer wants to assure itself that it is not writing insurance for a ship that is already sinking. Thus, as stated, there will be a question in most application forms as to whether the applicant is aware of any act, error, omission, fact, or circumstance that could give rise to a claim. If such act, error, omission, fact, or circumstance exists—regardless of whether it is disclosed in response to this question—the insurer will typically provide that it is entitled to one or both of the following remedies:

- It can deny coverage for any claim arising from what the applicant failed to disclose. In this case, the policy remains in force and the insured loses coverage only for the subject claim.

- It can rescind the policy or, in other words, hold it to be void *ab initio*. In such cases, the insurer will typically be required to return any premium that has been paid, perhaps with an added interest factor. The insured, however, loses coverage for all claims, regardless of whether they arose from application misrepresentation or omission.

Rescission, and even denials of coverage, can be harsh remedies. To afford a degree of protection to “innocent insureds,” many EPL policy forms offer a limited form of severability protection with regard to representations made in or in connection with the application for insurance.

Each severability provision must be carefully examined because there is no standard approach in this area. There may be pertinent language in both the policy form and the application itself, as well as in the case law.

Typically, the employer will not enjoy the benefit of severability if one of its executive-level officers knew of the pre-existing situation that gave rise to the claim. There may be, however, a grant of severability in which prior knowledge is possessed solely at a lower level in the organization. Insured individuals will generally enjoy severability as long as they personally were not aware of the situation that gave rise to the claim at issue.

**X. Future of EPL Insurance**

After twenty-five years of broad-based EPL insurance, it is safe to assume the product is here for the long term. An increasing number of buyers, including small to midsized employers, appear to be emerging yearly with the insurance becoming less of a “discretionary” purchase.

As with any insurance product, the breadth of coverage offered tends to ebb and flow with the cycles of the market. In soft markets, rates fall and terms and conditions broaden as insurers become more competitive for business. In a soft market, one can look for
Employment Practices Liability Insurance

features such as third-party coverage to be offered with increasing frequency. Further, premiums will continue to be largely stagnant, perhaps increasing only 5 to 10 percent for some of the larger carriers. A soft market, combined with a higher than expected claims frequency, however, is costly for insurers. This effect, when coupled with increasing defense costs and the need to keep premiums low, results in some carriers instituting mandatory higher deductibles. As markets harden, rates increase and the coverage constricts. During a hard market, underwriting gets more stringent. In addition, there is less competition among insurance carriers and employers see higher insurance premiums.

Carriers continue to struggle with mass, or multiple-plaintiff, claims. Mass claims are claims in which well-known, large businesses are targeted by multiple plaintiffs who threaten litigation unless the defendant settles quickly. Carriers have incurred large settlements for claims the insured was reluctant to fight, fearing damage to the insured’s reputation. Mass claims make it difficult for insurance companies to price EPL insurance at a rate attractive for these large companies. Alternatives include large mandatory deductibles, co-insurance, or single-claim deductibles. Most carriers require large retentions for mass claims. For now, the United States Supreme Court’s decision in Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011), which made it more difficult for employee plaintiffs to bring class action lawsuits against their multinational, multi-organizational employers, has made this issue less pressing.

New employment risks continue to emerge, and EPL carriers are still determining their approach. First, the National Labor Relations Board (NLRB) has taken an aggressive regulatory approach on employer social

36. Betterley, supra note 1, at 8.
media policies. The NLRB may bring unfair labor practice charges against employers with policies that too tightly regulate an employee’s online activities. In one recent case, the NLRB found that terminating an employee for violating a social media policy considered unlawful by the Board constituted a separate unlawful retaliatory action. Retaliation claims may not fall squarely within an EPL policy’s NLRA exclusion and therefore may trigger an insured’s defense and indemnity obligations.

Second, and more concerning, is the NLRB’s recent decision in *Browning-Ferris Industries of California, Inc.*, holding that franchisors with “indirect” or even “potential” control over the activities of franchisee employees may be considered joint employers for purposes of collective bargaining. This decision is concerning for franchisors, as their EPL policies would not likely provide coverage for the acts of the joint-employer franchisee. EPL carriers, on the other hand, are concerned about the ambiguity and are determining whether the new legal standard requires express exclusions or whether current policy exclusions are sufficient to avoid defense and indemnification obligations.

While it is almost certain an NLRB appointed by President Donald Trump will overturn *Browning-Ferris*, the case remains in effect, and employers should obtain insurance based on current law.

---

40. Id.
41. 362 NLRB No. 186 (Aug. 27, 2015).
42. Betterley, supra note 1, at 18-19.
43. See *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017) (overturning *Browning-Ferris*).
44. See *Hy-Brand Industrial Contractors, Ltd.*, 366 NLRB No. 26 (Feb. 26, 2018) (finding that one of the NLRB Members should have been disqualified from participating in the proceedings, therefore vacating its decision in 365 NLRB No. 156; accordingly, its overruling of *Browning-Ferris* is of no force or effect).
What is clear is that EPL insurance is now a mature business. In the near term, industry efforts will be focused less on understanding how to underwrite the risks and more on managing profitability. As defense costs increase, insurers and defense attorneys will hone case management strategies in a fascinating back-and-forth.\textsuperscript{45}

\textsuperscript{45} Id. at 16.
APPENDIX IA

SPECIMEN EMPLOYMENT PRACTICES LIABILITY POLICY
THIS IS A CLAIMS MADE POLICY
WITH DEFENSE EXPENSES INCLUDED IN THE LIMIT OF LIABILITY.
PLEASE READ THE ENTIRE POLICY CAREFULLY.

EXECUTIVE RISK INDEMNITY INC.

ABA EMPLOYERS EDGESM
An Employment Practices Liability Insurance Policy for Law Firms
Endorsed by the American Bar Association

Executive Risk Indemnity Inc. (the "Underwriter") and the Insureds, subject to all
of the terms, conditions, and limitations of this Policy, agree as follows:

I. INSURING AGREEMENT

The Underwriter will pay on behalf of the Insureds Defense Expenses and Loss in
excess of the applicable retention set forth in ITEM 4 of the Declarations resulting from
Claims first made against any Insured during the Policy Period or, if applicable, the
Extended Reporting Period, for Employment Practices Wrongful Acts occurring
subsequent to the Retroactive Date stated in ITEM 5 of the Declarations and before the
expiration of the Policy Period.

II. DEFINITIONS

(A) "Application" means the application attached to and forming part of this Policy,
including any materials submitted in connection with such application, all of which
are on file with the Underwriter and are a part of this Policy, as if physically
attached.

(B) "Claim" means:

(1) any written notice received by any Insured that any person or entity
intends to hold an Insured responsible for an Employment Practices
Wrongful Act;

(2) any judicial, administrative or other proceeding against any Insured for an
Employment Practices Wrongful Act; or

(3) any written request to toll or waive a statute of limitations relating to a
potential judicial, administrative or other proceeding against any Insured
for an Employment Practices Wrongful Act;

provided, that Claim does not include any labor or grievance arbitration or other
proceeding pursuant to a collective bargaining agreement, or any criminal
proceeding against an Insured.
(C) "Defense Expenses" means reasonable legal fees and expenses incurred in the investigation, defense or appeal of any Claim; provided, that Defense Expenses does not include remuneration, salaries, wages, fees, expenses, overhead or benefit expenses of any Insured.

(D) "Discrimination" means any failure or refusal to hire any person, any failure or refusal to promote any person, any failure or refusal to offer any person a partnership or shareholder interest or to name any person as a partner or shareholder, the demotion or discharge of any person, employment-related defamation, wrongful failure to grant tenure, or any limitation, segregation or classification of Employees or applicants for employment in any way that would deprive or tend to deprive any person of employment opportunities or otherwise adversely affect his or her status as an Employee because of such person's race, color, religion, age, sex, national origin, disability, pregnancy, sexual orientation or preference or other status that is protected pursuant to any applicable federal, state or local statute or ordinance.

(E) "Employee" means any individual whose labor or service is engaged by and directed by the Firm. This includes part-time, seasonal and temporary Employees as well as any individual employed in a supervisory or managerial position. Employee also includes any partner, principal, director, officer, or shareholder of the Firm. In addition, Employee includes any volunteer working for the Firm, but solely for conduct within the scope of his or her duties as a volunteer for the Firm; any independent contractor working solely for the Firm, but solely for conduct within the scope of his or her duties as an independent contractor for the Firm; and any leased employee working solely for the Firm, but solely for conduct within the scope of his or her duties as a leased employee for the Firm.

(F) "Employment Practices Wrongful Act" means any actual or alleged: (1) Wrongful Termination; (2) Discrimination; (3) Harassment; (4) Retaliation; (5) Third Party Discrimination; (6) Third Party Harassment; or (7) Workplace Tort.

(G) "Firm" means the organization(s) engaged in the practice of law under the name first set forth in ITEM 1 of the Declarations whether as a partnership, professional corporation or association or otherwise, and also will include its predecessors as set forth in ITEM 1 of the Declarations.
"Harassment" means:

(1) unwelcome sexual advances, requests for sexual favors, or other verbal, visual or physical conduct of a sexual nature that is made a condition of employment at the Firm, is used as a basis for employment decisions at the Firm, creates a work environment at the Firm that interferes with performance, or creates an intimidating, hostile, or offensive working environment; or

(2) workplace harassment (i.e., harassment of a non-sexual nature) which creates a work environment at the Firm that interferes with performance or creates an intimidating, hostile, or offensive working environment.

"Insured" means the Firm and each person who was, is or becomes:

(1) a partner, a principal, a director, an officer, or a shareholder of the Firm;

(2) a full-time or part-time salaried Employee of the Firm or of an incorporated partner of the Firm; or

(3) "counsel" or "of counsel" to the Firm, solely with respect to conduct or actions within the scope of their employment at the Firm.

"Loss" means any damages (including back pay awards, front pay awards, compensatory damages and punitive damages if insurable under the law pursuant to which this policy is construed), pre-judgment interest, post-judgment interest, and settlements which an Insured is legally obligated to pay as a result of a Claim; provided, that Loss does not include:

(1) civil or criminal fines, sanctions, liquidated damages, taxes or penalties, the multiplied portion of any multiplied damage award (except for multiplied damages awarded pursuant to the Age Discrimination in Employment Act), or matters which are uninsurable under the law pursuant to which this Policy is construed;

(2) any costs associated with the modification of any building or property in order to provide any reasonable accommodations required by, made as a result of, or to conform with the requirements of the Americans With Disabilities Act and any amendments thereto or any similar federal, state or local statute, regulation, or common law;
(3) any other non-monetary relief awarded against any Insured, including without limitation any costs associated with compliance with any injunctive relief of any kind or nature;

(4) severance pay or damages determined to be owing under an express written contract of employment or an express written obligation to make payments in the event of the termination of employment;

(5) payment of insurance plan benefits; and

(6) amounts awarded pursuant to a labor or grievance arbitration or other proceeding pursuant to a collective bargaining agreement.

(K) "Policy Period" means the period from the Inception Date to the Expiration Date in ITEM 2 of the Declarations or to any earlier cancelation date.

(L) "Potential Claim" means any person or entity alleging an Employment Practices Wrongful Act by an Insured. "Alleging" as used in this paragraph means lodging a complaint or charge that does not constitute a Claim, but which may subsequently give rise to a Claim, with a Supervisory Employee, the Firm’s human resources department, or the Firm’s department that provides a similar function to a human resources department.

(M) "Related Claims" means all Claims based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving the same or related facts, circumstances, situations, transactions, events, or Employment Practices Wrongful Acts or the same or related series of facts, circumstances, situations, transactions, events, or Employment Practices Wrongful Acts.

(N) "Retaliation" means retaliatory treatment against an Employee of the Firm on account of such Employee’s exercise or attempted exercise of his or her rights under law.

(O) "Supervisory Employee" means a partner, a principal, a director, an officer, or a shareholder of the Firm or the personnel director or any other Employee of the Firm having management-level responsibility for personnel matters.

(P) "Third Party Discrimination" means any disparate treatment or classification of clients or other individuals based on race, color, religion, age, sex, national origin, disability, pregnancy, sexual orientation or preference, or other status that is protected pursuant to any applicable federal, state or local statute or ordinance.
“Third Party Harassment” means:

1. unwelcome sexual advances, requests for sexual favors, or other verbal, visual or physical conduct of a sexual nature that is made by an Employee to a client or other individual; or

2. any other harassment of a client or other individual, by an Employee, that creates an intimidating, hostile, or offensive environment.

“Workplace Tort” means employment-related misrepresentation, negligent evaluation, wrongful discipline, or wrongful deprivation of career opportunity.

“Wrongful Termination” means the actual or constructive termination of the employment of, or demotion of, failure or refusal to promote, failure or refusal to offer a partnership or shareholder interest to, or to name as a partner or shareholder, any Employee at the Firm, which is in violation of law or is against public policy, or is in breach of an implied agreement to continue employment or, subject to EXCLUSION (B)(4), is in breach of an express written agreement to continue employment.

III. EXCLUSIONS

(A) The Underwriter will not pay Defense Expenses or Loss for any Claim:

1. arising out of any actual or alleged violation of the Employee Retirement Income Security Act of 1974 and any amendments thereto or any similar provisions of any federal, state or local statutes, ordinances, regulations, or common law;

2. arising out of any actual or alleged bodily injury to, or sickness, loss of consortium, disease or death of, any person, or damage to or destruction of property, including the loss of use thereof; provided, that this EXCLUSION (A)(2) does not apply to Claims for emotional distress, mental anguish or humiliation actually or allegedly resulting from an Employment Practices Wrongful Act;

3. arising out of:

   (a) any fact, circumstance, situation, transaction or event of Employment Practices Wrongful Acts about which any Supervisory Employee had knowledge prior to the inception date of the first Employment Practices Liability Insurance Policy issued to the Firm by the Underwriter and continuously renewed by the Underwriter; or

   (b) any Claim or fact, circumstance, situation, transaction, or event, of Employment Practices Wrongful Acts which, before the
Specification

Inception Date of this Policy as set forth in ITEM 2 of the Declarations, was the subject of any notice given under any other insurance policy, including but not limited to any policy of which this Policy is a renewal or replacement, or which was identified in any summary or statement of claims or circumstances which could give rise to a claim submitted in connection with the Application or an application for any policy of which this Policy is a renewal or replacement;

provided, however, that if EXCLUSION (A)(3)(a) is applicable because of any Employment Practices Wrongful Acts committed by a Supervisory Employee, and if no other Supervisory Employee had knowledge thereof prior to the inception date of the first Employment Practices Liability Insurance Policy issued to the Firm and continuously renewed by the Underwriter, EXCLUSION (A)(3)(a) shall apply only to the Supervisory Employee who committed such Employment Practices Wrongful Acts and shall not bar coverage for any other Insured;

(4) resulting in Loss that an Insured is obligated to pay by reason of the assumption of another person's liability for an Employment Practices Wrongful Act in a contract or an agreement provided, that the EXCLUSION (A)(4) will not apply to Loss resulting from an Employment Practices Wrongful Act that would have been sustained even in the absence of such contract or agreement;

(5) arising out of a lockout, strike, picket line, hiring of replacement workers or other similar actions in connection with labor disputes or labor negotiations;

(6) by or on behalf of, in the name or right of or for the benefit of any partner, principal, director, officer, or shareholder of the Firm arising out of a partnership agreement, allocation of shares, ownership interests in the Firm, distribution of profits or capital, or any other similar financial relationship among Insureds; and

(7) by any person or entity arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any actual or alleged act, error, omission, misstatement, misleading statement or breach of duty by any Insured under this Policy in connection with the rendering of, or actual or alleged failure to render, services to others as an attorney or a notary public or as an administrator, conservator, executor, guardian or committee or in any similar fiduciary capacity incidental to the practice of law.

Subject to all of its other applicable terms, conditions, limitations and endorsements, this Policy will provide coverage for Defense Expenses only (but not for Loss) for Claims:

Form C26029 (4/98 ed.)
Catalog No. ABAp-I
Form 14-02-3610

SPECIMEN

Inception Date of this Policy as set forth in ITEM 2 of the Declarations, was the subject of any notice given under any other insurance policy, including but not limited to any policy of which this Policy is a renewal or replacement, or which was identified in any summary or statement of claims or circumstances which could give rise to a claim submitted in connection with the Application or an application for any policy of which this Policy is a renewal or replacement;

provided, however, that if EXCLUSION (A)(3)(a) is applicable because of any Employment Practices Wrongful Acts committed by a Supervisory Employee, and if no other Supervisory Employee had knowledge thereof prior to the inception date of the first Employment Practices Liability Insurance Policy issued to the Firm and continuously renewed by the Underwriter, EXCLUSION (A)(3)(a) shall apply only to the Supervisory Employee who committed such Employment Practices Wrongful Acts and shall not bar coverage for any other Insured;

(4) resulting in Loss that an Insured is obligated to pay by reason of the assumption of another person's liability for an Employment Practices Wrongful Act in a contract or an agreement provided, that the EXCLUSION (A)(4) will not apply to Loss resulting from an Employment Practices Wrongful Act that would have been sustained even in the absence of such contract or agreement;

(5) arising out of a lockout, strike, picket line, hiring of replacement workers or other similar actions in connection with labor disputes or labor negotiations;

(6) by or on behalf of, in the name or right of or for the benefit of any partner, principal, director, officer, or shareholder of the Firm arising out of a partnership agreement, allocation of shares, ownership interests in the Firm, distribution of profits or capital, or any other similar financial relationship among Insureds; and

(7) by any person or entity arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any actual or alleged act, error, omission, misstatement, misleading statement or breach of duty by any Insured under this Policy in connection with the rendering of, or actual or alleged failure to render, services to others as an attorney or a notary public or as an administrator, conservator, executor, guardian or committee or in any similar fiduciary capacity incidental to the practice of law.

Subject to all of its other applicable terms, conditions, limitations and endorsements, this Policy will provide coverage for Defense Expenses only (but not for Loss) for Claims:
(1) arising out of any actual or alleged violation of the Workers' Adjustment and Retraining Notification Act and any amendments thereto, or any similar provisions of any federal, state or local statutes, ordinances, regulations, or common law;

(2) seeking only injunctive or non-monetary relief, regardless of whether a prevailing claimant may be entitled to recover attorneys’ fees and costs;

(3) arising out of any actual or alleged violation of any workers’ compensation law, any unemployment compensation law, any social security law, the Consolidated Omnibus Budget Reconciliation Act of 1985 and any amendments thereto, any disability benefits law, or any similar provisions of any federal, state or local statutes, ordinances, regulations, or common law; and

(4) for actual or constructive termination of the employment of, or demotion of, or failure or refusal to promote any Employee at the Firm which is in breach of an express written employment agreement.

IV. EXTENSIONS OF COVERAGE

(A) Extended Reporting Period:

(1) In the event that the Underwriter fails or refuses to renew this Policy, or in the event the Firm cancels or declines to renew this Policy, the Firm may purchase for an additional premium an Extended Reporting Period for a period of either:

   (a) one (1) year following the expiration of the Policy Period or termination, for a premium equal to seventy-five percent (75%) of the then current annual premium for this Policy; or

   (b) two (2) years following the expiration of the Policy Period or termination, for a premium equal to one hundred fifty percent (150%) of the then current annual premium for this Policy.

The coverage otherwise afforded under this Policy will be extended to apply for the Extended Reporting Period, subject to all of this Policy’s terms, conditions, limitations and endorsements, to Defense Expenses and Loss from Claims first made against any Insured during the Extended Reporting Period for Employment Practices Wrongful Acts occurring subsequent to the Retroactive Date set forth in ITEM 5 of the Declarations and before the expiration of the Policy Period or termination. The Firm must notify the Underwriter in writing by certified mail at the address set forth in the Declarations of its decision to purchase such an
Extended Reporting Period and must pay the applicable additional premium for the length of the Extended Reporting Period selected by the Firm within thirty (30) days after the expiration of the Policy Period or termination. Payment of the full additional premium by the due date is a strict condition precedent to the right to purchase an Extended Reporting Period. The Firm may not change its election regarding the length of the Extended Reporting Period purchased once that election has been made by tendering the applicable premium.

(2) The maximum aggregate Limit of Liability set forth in ITEM 3(b) of the Declarations shall be the maximum aggregate Limit of Liability for the Policy Period and, if applicable, the Extended Reporting Period. The Policy’s maximum aggregate Limit of Liability is not increased, reinstated or renewed by virtue of the applicability of any Extended Reporting Period.

(B) Changes in Risk:

(1) If, during the Policy Period, the total number of Employees in the Firm increases by more than twenty percent (20%) or twenty-five (25), whichever is less, as the result of the Firm’s merger with or acquisition of any other law firm or any group of employees who practiced together at another law firm, the Firm must promptly give the Underwriter written notice thereof, together with such information as the Underwriter may require, and the Underwriter will be entitled to impose such additional coverage terms and charge such additional premium in connection therewith as the Underwriter, in its sole discretion, may require.

(2) In the event of the death, incapacity or bankruptcy of an Insured, a Claim against the estate, heirs, legal representatives, or assigns of such Insured will be deemed to be a Claim against such Insured.

(3) Bankruptcy or insolvency of an Insured or an Insured’s estate will not relieve the Underwriter of any of its obligations hereunder.

V. CONDITIONS

(A) Territory:

This Policy applies to any Employment Practices Wrongful Act occurring and any Claim made anywhere in the world.
(B) Reporting of Claims and Potential Claims:

(1) If a Claim is made against any Insured, the Insured or the Firm shall give written notice thereof to the Underwriter as soon as practicable and in no event later than sixty (60) days after such Claim is first made as determined pursuant to CONDITION (C)(1) and shall immediately forward to the Underwriter every demand, notice, summons, complaint or other process received by any Insured or his/her/its representatives. Compliance with this notice requirement is a strict condition precedent to coverage under this Policy.

(2) If during the Policy Period, an Insured becomes aware of a Potential Claim and the Insured during the Policy Period:

(a) gives the Underwriter written notice of such Potential Claim, including a description of the Potential Claim in question, the identities of the potential claimants, the consequences which have resulted or may result from such Potential Claim, the damages which may result from such Potential Claim, and the circumstances by which the Insured first became aware of such Potential Claim;

(b) requests coverage under this Policy for any Claim subsequently resulting from such Potential Claim;

then the Underwriter will treat any such subsequently resulting Claim as if it had been made against the Insured during the Policy Period. Notice of any such subsequently resulting Claim must be given in accordance with CONDITION (B)(1).

(3) All notices of Claims required under CONDITION (B)(1) and all notices of Potential Claims permitted under CONDITION (B)(2) must be sent by certified mail to the address set forth in the Declarations.
(C) **Timing and Interrelationship of Claims:**

1. A Claim as defined in DEFINITIONS (B)(1) and (B)(3) is first made when the Firm's management committee (or similar committee or board), any partner, principal, director, officer or shareholder of the Firm, the Firm's human resources director, the Firm's administrator, or anyone designated by the Firm to receive employment related complaints receives a written notice or request as set forth therein; and a Claim as defined in DEFINITION (B)(2) is first made when the Firm's management committee (or similar committee or board), any partner, principal, director, officer or shareholder of the Firm, the Firm's human resources director, the Firm's administrator, or anyone designated by the Firm to receive employment related complaints first becomes aware, through service of process or otherwise, of the filing of a complaint, motion for judgment or similar document or pleading commencing a judicial, administrative or other proceeding against an Insured.

2. All Related Claims will be treated as a single Claim made at the time the first of such Related Claims was made in accordance with CONDITION (C)(1), or when the first of such Related Claims is treated as having been made in accordance with CONDITION (B)(2), whichever is earlier.

(D) **Defense and Settlement of Claims:**

1. The Insureds will have the right and duty to retain qualified counsel of their choosing to represent them in the defense or appeal of Claims, but no Defense Expenses may be incurred without the Underwriter's consent, such consent not to be unreasonably withheld. It shall not be unreasonable, if more than one Insured is involved in a Claim, for the Underwriter to withhold its consent to separate counsel for one or more of such Insureds unless there is a material actual or potential conflict of interest among such Insureds.

2. The Underwriter will, upon written request, pay Defense Expenses owed under this Policy on a current basis. As a condition of any payment of Defense Expenses before the final disposition of a Claim, the Underwriter may require a written undertaking on terms and conditions satisfactory to it guaranteeing the repayment of any Defense Expenses paid on behalf of any Insured if it is finally determined that this Policy would not cover Loss incurred by such Insured in connection with such Claim. Except for Defense Expenses paid in accordance with this CONDITION (D)(2), the Underwriter will have no obligation to pay any Loss before the final disposition of a Claim.

3. No Insured may admit any liability for any Claim or settle any Claim without the Underwriter's consent; provided, however, that the Insureds
may settle any Claim without the Underwriter's consent where Defense Expenses and the settlement amount in respect of such Claim, in the aggregate, do not exceed fifty percent (50%) of the applicable retention. The Underwriter will have the right to make investigations and conduct negotiations and, with the consent of the Insureds, enter into such settlement of any Claim as the Underwriter deems appropriate. If the Insureds refuse to consent to a settlement acceptable to the claimant in accordance with the Underwriter's recommendation, then the Underwriter's liability for such Claim will not exceed (i) the amount for which the Claim could have been settled plus any Defense Expenses incurred with the Underwriter's consent up to the date the Insureds refuse to settle such Claim, plus (ii) fifty percent (50%) of any amounts (including Loss and Defense Expenses) in excess of the amount set forth in clause (i) above, incurred in connection with such Claim; subject, in all events, to the applicable retention and the maximum aggregate Limit of Liability. The remaining fifty percent (50%) of all amounts in excess of the amount for which the Claim could have been settled will be carried by the Insureds at their own risk and will be uninsured.

(4) The Underwriter may, in its sole discretion and without any obligation to do so, undertake investigations and conduct negotiations with respect to any Potential Claim and, with the consent of the Insureds, enter into such settlement of any Potential Claim as the Underwriter deems appropriate. Any such settlement of a Potential Claim shall be treated as the settlement of a Claim made during the Policy Period in which the Potential Claim was reported to the Underwriter. If the Insureds refuse to consent to a settlement acceptable to the potential claimant in accordance with the Underwriter's recommendation, then the Underwriter's liability for any Claim resulting from such Potential Claim will not exceed (i) the amount for which the Potential Claim could have been settled, plus (ii) fifty percent (50%) of any amounts (including Loss and Defense Expenses) in excess of the amount set forth in clause (i) above, subject, in all events, to the applicable retention and the maximum aggregate Limit of Liability. The remaining fifty percent (50%) of all amounts in excess of the amount for which the Potential Claim could have been settled will be carried by the Insureds at their own risk and will be uninsured.
(E) **Limits of Liability; Retention:**

1. The amount stated in ITEM 3(a) of the Declarations will be the maximum Limit of Liability of the Underwriter under this Policy for all **Defense Expenses and Loss** from any **Claim** or **Related Claims** for which this Policy provides coverage, regardless of the number of **Related Claims**, the number of persons or entities included within the definition of "**Insured,**" the number of claimants who make **Claims** against the **Insureds,** or the number of **Insureds** named as defendants in any **Claim**.

2. The amount stated in ITEM 3(b) of the Declarations will be the maximum Limit of Liability of the Underwriter under this Policy for all **Defense Expenses and Loss** from all **Claims** for which this Policy provides coverage, regardless of the number of **Claims**, the number of persons or entities included within the definition of "**Insured,**" the number of claimants who make **Claims** against the **Insureds,** or the number of **Insureds** named as defendants in any **Claim**.

3. **Defense Expenses** will be part of and not in addition to such Limit of Liability, and payment of **Defense Expenses** by the Underwriter will reduce, and may exhaust, the Limit of Liability.

4. The obligation of the Underwriter to pay **Defense Expenses and Loss** in connection with any **Claim** will only be in excess of the retention. The **Insureds** must bear the amount of the retention. The Underwriter will have no obligation whatsoever, either to the **Insureds** or to any other person or entity, to pay all or any portion of the retention amount on behalf of any **Insured**. The Underwriter will, however, at its sole discretion, have the right and option to do so, in which event the **Insureds** must repay the Underwriter any such amounts promptly upon demand.

(F) **Cancelation:**

1. The Underwriter may not cancel this Policy except for failure to pay a premium when due, in which case twenty (20) days' written notice will be given.

2. **The Firm** may cancel this Policy by surrendering this Policy or by mailing or delivering to the Underwriter written notice stating when thereafter such cancelation will be effective. If this Policy is canceled by the **Firm**, the earned premium will be computed in accordance with the customary short rate table and procedure. Premium adjustment may be made either at the time cancelation is effective or as soon as practicable after cancelation becomes effective.

3. The Underwriter will not be required to renew this Policy upon its
expiration. If the Underwriter elects not to renew this Policy, the Underwriter will deliver or mail to the Firm written notice to that effect at least sixty (60) days before the Expiration Date set forth in ITEM 2(b) of the Declarations.

(G) **Exhaustion:**

If the Limit of Liability is exhausted by the payment of Defense Expenses and/or Loss, all obligations of the Underwriter under this Policy will be completely fulfilled and exhausted, and the Underwriter will have no further obligations of any kind or nature whatsoever under this Policy, and the premium will be fully earned.

(H) **Cooperation and Subrogation:**

1. In the event of a Claim, or after giving the Underwriter notice of a Potential Claim, the Insureds must provide the Underwriter with all information, assistance and cooperation as the Underwriter may reasonably request.

2. The Insureds may do nothing to prejudice the Underwriter's position or the Underwriter's potential or actual rights of recovery in the event of a Claim.

3. In the event of payment under this Policy, the Underwriter will be subrogated to, and entitled to an assignment of, all of the rights of recovery therefor of the Insureds. The Insureds shall execute all papers and do everything that may be necessary to secure such rights, including the execution of such documents as may be necessary to enable the Underwriter effectively to pursue and enforce such rights and to bring suit in the name of the Insureds.

4. The obligations of the Insureds under this CONDITION (H) will survive the Policy.
(I) **Representations:**

The **Insureds** represent that the particulars and statements contained in the **Application** are true, accurate and complete, and agree that this Policy is issued in reliance on the truth of that representation and that such particulars and statements, which are deemed to be incorporated into and to constitute a part of this Policy, are the basis of this Policy and are material to the Underwriter's acceptance of this risk. This Policy shall not, however, be avoided as to any **Insured** on account of the untruth of the particulars and statements contained in the **Application** unless:

1. such **Insured** knew of the untruth of such particular or statement, in which event such knowledge shall be imputed only to such **Insured**; or
2. the person providing such particular or making such statement in the **Application** knew of its untruth, in which event such knowledge shall be imputed to all **Insureds**.

(J) **No Action against the Underwriter:**

1. No action may be taken against the Underwriter unless, as a condition precedent thereto, there has been full compliance with all of the terms of this Policy and the amount of the obligation of the **Insureds** to pay has been finally determined either by judgment against the **Insureds** after adjudicatory proceedings or by written agreement of the **Insureds**, the claimant and the Underwriter.

2. No person or entity will have any right under this Policy to join the Underwriter as a party to any **Claim** against any **Insured** to determine the liability of such **Insured**: nor may the Underwriter be impleaded by any **Insured** or any **Insured's** legal representative in any such **Claim**.

(K) **Arbitration of Coverage Disputes:**

Notwithstanding CONDITION (J), any coverage dispute or other controversy regarding the rights or obligations of the Underwriter and the **Insureds** under this Policy shall be submitted to binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA"). The Underwriter or the **Insureds** may invoke this arbitration procedure by giving written notice to that effect by certified mail to the other party. The Underwriter and the **Insureds** will attempt to agree upon a single arbitrator. If agreement regarding selection of a single arbitrator is not reached within thirty (30) days after the initial demand for arbitration, each party shall, within thirty (30) days thereafter, name an arbitrator. Those two arbitrators shall, within thirty (30) days after they both have been named, select a third arbitrator, who shall serve as the Chair of the arbitration panel. If the two party-selected arbitrators are unable to
agree upon a third arbitrator, then the AAA shall appoint a person who is neutral to the parties to act as the Chair of the arbitration panel. None of the arbitrators may be former or current partners, principals, directors, officers, shareholders or employees of the Underwriter or of any Insured.

The Underwriter and the Insureds each shall file a written submission with supporting documents to the single arbitrator or, if applicable, to the arbitration panel (hereinafter, references to “arbitration panel” shall include a single arbitrator agreed upon by the parties) within ninety (90) days after appointment of the last member of the arbitration panel, which period may be extended by the arbitration panel. The arbitration hearing shall be held in the city where the Firm has its principal office, at a site and at a time designated by the arbitration panel, at which time the arbitration panel will receive oral evidence. The parties shall have at their disposal the same pre-trial discovery rights available under the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the District in which the arbitration hearing will be held; provided, that the arbitration panel may shorten the time permitted by those Rules for any discovery procedure in light of the ninety (90) day timetable for the parties’ submissions specified above, and provided further that any dispute regarding discovery shall be submitted for decision to the arbitration panel. The arbitration panel shall be relieved of judicial formality and need not adhere to formal rules of evidence. The majority of the arbitration panel will issue a written decision resolving the controversy within thirty (30) days after the close of the hearing, which decision will state the facts reviewed, conclusions reached and reasons for the conclusions. The decision will be binding upon the Underwriter and the Insureds in any court of competent jurisdiction and will not be subject to appeal. The arbitration panel also shall allocate the fees and expenses of the arbitration panel between the Underwriter and the Insureds. Any finding of liability by the arbitration panel against the Underwriter shall not exceed the Policy’s applicable remaining Limit of Liability after deduction of all Defense Expenses and Loss that the Underwriter has paid or is obligated to pay, plus the fees and expenses of the arbitration panel to the extent allocated solely to the Underwriter by the arbitration panel.

(L) **Authorization and Notices:**

1. The person or entity first named in ITEM 1 of the Declarations will act on behalf of the Insureds with respect to all matters under this Policy, including but not limited to giving and receiving notices and other communications, effecting or accepting any endorsements to or cancelation of this Policy, the payment of premium and the receipt of any return premiums, and the purchase of any Extended Reporting Period.

2. Unless otherwise specified, all notices permitted or required by this Policy shall be given in writing and shall be sent by first class or certified mail to the respective addresses of the person or entity first named in ITEM 1 of
the Declarations, if to the Insureds, or of the Underwriter, if to the
Underwriter, as set forth in the Declarations.

(M) Changes:

Notice to any agent or knowledge possessed by any agent or other person acting
on behalf of the Underwriter will not effect a waiver or change in any part of this
Policy or estop the Underwriter from asserting any right under its terms,
conditions and limitations.

(N) No Transfer or Assignment of Insured Interest:

No transfer or assignment of interest under this Policy or of any cause of action
against the Underwriter arising out of its performance of, or alleged failure to
perform in accordance with, the terms and conditions of this Policy will be
effective without the Underwriter’s written consent.

(O) Headings:

The descriptions in the headings and sub-headings of this Policy are solely for
convenience, and form no part of the terms, conditions and limitations of the
Policy.

(P) Entire Agreement:

The Insureds agree that this Policy, including the Application and any
endorsements, constitutes the entire agreement existing between the Insureds
and the Underwriter or any of its agents relating to this insurance and that the
terms, conditions, limitations and endorsements of this Policy may not be waived
or changed except by written endorsement issued to form a part of this Policy.

(Q) Underwriter’s Signature:

In witness whereof the Underwriter has caused this Policy to be executed by its
authorized officers, but this Policy will not be valid unless countersigned on the
Declarations Page by a duly authorized representative of the Underwriter.

[Signature]
Secretary

[Signature]
President

Form C26029 (4/98 ed.) 16
Catalog No. ABAP1
Form 14-E2-3810