



EPL: What You Need to Know

To participate in today's webinar:

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You will hear music until 2:00pm

Topics We Will Cover Today

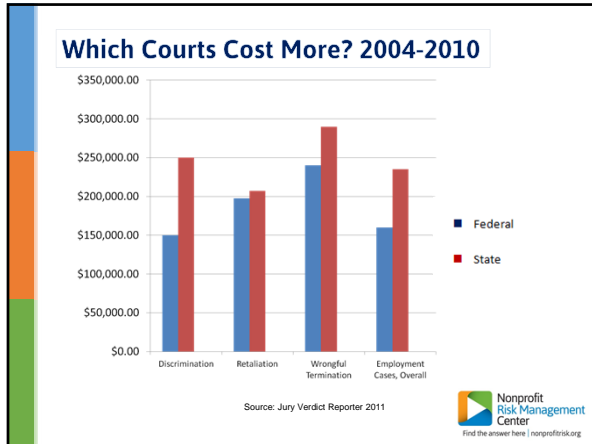
- What is **EPL** and what is **Employment Practices Liability Insurance**?
- What are some of the **trends** in EPL claims and EPLI coverage?
- What are some of the **nuances** in common EPLI policy forms?
- Key considerations in selecting **appropriate EPL coverage for your nonprofit**.



What is EPL?

- **Employment Practices Liability** refers to an employer's exposure to claims alleging:
 - wrongful termination, sexual harassment, illegal discrimination, wage and hour violations and more.
- Many claims assert violation of Federal laws, such as Title VII of the Civil Rights Act of 1964, the ADA, ADEA, or FMLA.
- The EEOC interprets and enforces these laws and currently recognizes 11 types of discrimination: age, disability, equal pay/compensation, genetic information, national origin, pregnancy, race/color, religion, retaliation, sex, and sexual harassment.





EPL Claims Are Costly

Single Plaintiff

- Average award for all employment-related cases over past 7 is \$631,000 ⁽¹⁾
- Average award excludes defense costs paid by employers ⁽¹⁾

Class Action Exposure remains prevalent and costly

- '12 Top 10 private plaintiff class action settlements = \$840.43 million ⁽²⁾
 - Employment Discrimination \$48.65 million
 - Wage & Hour \$292 million
 - ERISA \$237 million
 - Government-initiated Enforcement \$262.78 million
- *Wal-Mart Stores, Inc. v. Dukes, et al.* – was cited 541 times in lower court rulings ... and evolving class action precedents will continue developing in the coming year ⁽²⁾

(1) Jury Verdict Research (2011) – www.juryverdictresearch.com
(2) Seyfarth Shaw Annual Workplace Class Action Litigation Report (2013)

Can a nonprofit avoid this exposure altogether?

Nonprofit Risk Management Center
Find the answer here | nonprofitrisk.org

What is EPLI?

- EPLI is a form of professional liability coverage that responds to claims alleging wrongful employment practices.
- EPLI can be purchased:
 - As a stand-alone policy; or
 - As part of another policy (generally: Directors' & Officers' Liability or Association Professional Liability)
- Defense + indemnity



EPL and EPLI Trends

- EPL claim rates often correspond to unemployment rates:
 - from 2007 to 2008, total claims in the U.S. jumped 13%
 - During this time "mass" layoffs increased by roughly a third.
 - In 2012, charges of retaliation, race, and sex discrimination (including harassment and pregnancy) were the most common types of discrimination that prompted EPL filings.

Source: EEOC.gov



EPLI Trends

1. Economic uncertainty underpins carrier decisions (underwriting appetite, policy terms and conditions)
2. EEOC charges still at historically high levels - claim frequency is high
3. The concept of "protected status" continues to evolve
4. Claim severity / indemnity and legal costs are increasingly significant (geography is a key factor)



EPLI Trends

- Average rate increases in 2nd quarter of 2013:
 - 10-20% for EPL across all industries
 - 5-15% on D&O across all industries (except healthcare)
- EPL as part of a package? Or separate policy with separate limits.
- Deductibles are going up.
- Some carriers are retrenching based on bench and jury verdicts.



More Trends – What do Nonprofits Buy?

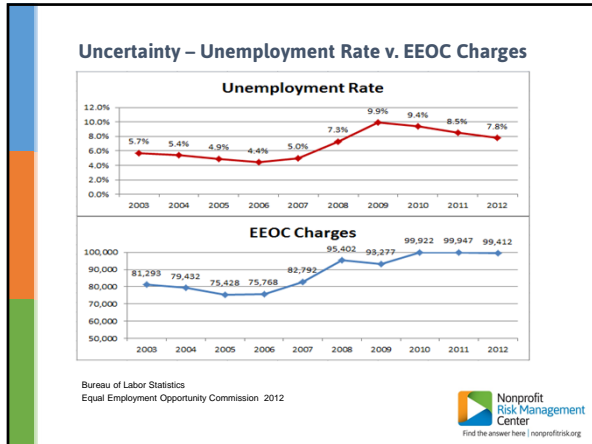
- One carrier:
- 80% buy a \$1M limit for EPLI; 94% buy \$1M or \$2M
 - 60% of EPL costs are for defense costs; however, indemnity expense is growing... Why? It takes terminated or laid off employees longer to find new jobs.

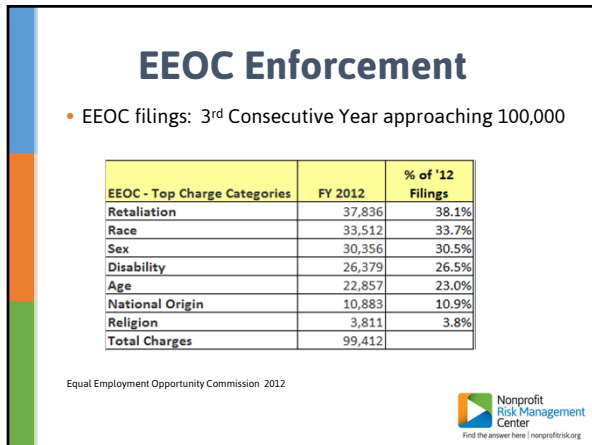


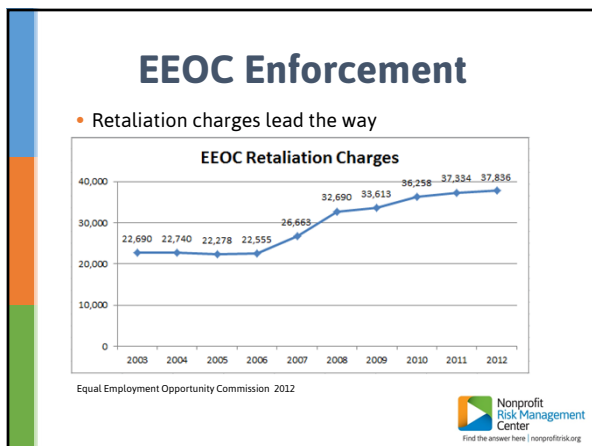
More EPLI Trends

- 10 years ago, EPL was ALWAYS part of D&O
 - Today most nonprofits purchase a "portfolio" product. Your EPL coverage may be part of a policy that includes D&O, cyber liability, fiduciary liability, professional liability and more
- Aggregate shared limit was common in the past; today many carriers are providing a separate limit for EPL
- Claim frequency remains a big issue for EPL, while claim severity is biggest concern for D&O
- Harassment claims have become broader and broader: carriers are responding
- Wage and hour claims are a concern: most policies exclude FLSA violations (more and more it's an absolute exclusion)
 - Some carriers provide a small limit for the defense of FLSA claims.



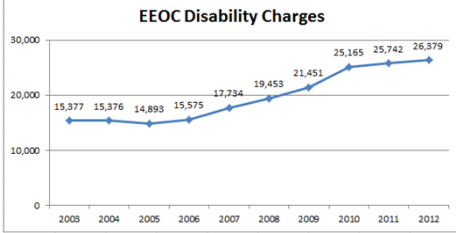






EEOC Enforcement

- Disability charges reaching new heights



ADA Amendments Act passed in 2008 (Final Reg. 2011)
 Equal Employment Opportunity Commission 2012



EEOC Statistics

- In FY 2012, the EEOC:
 - resolved 240 systemic investigations
 - secured monetary benefits of \$36.2 million through conciliation of 46 investigations and predetermination settlements in 29 investigations.
- This is four times the amount recovered in systemic conciliations/predetermination settlements in FY 2011.**

The report indicated that 20 percent of its litigation docket involves systemic lawsuits, predicting 24 percent by 2016.



EEOC Priorities

- Eliminating barriers in recruiting and hiring— exclusionary policies and practices that steer individuals into specific jobs due to their status in a particular group.
- Disparate pay, job segregation, harassment, and human trafficking as particular practices with respect to immigrant, migrant, and other vulnerable workers.
- ADA—reasonable accommodation, coverage, qualification standards, and employers' use of the undue hardship and the direct threat defenses.
 - accommodating pregnancy-related limitations under Title VII of the Civil Rights Act and the ADA; and
 - seeking protection for lesbian, gay, bisexual, and transgender individuals under Title VII.



More EEOC Priorities

- Enforcing the equal pay laws through the use of "directed investigations" and commissioner's charges ("Glass-ceiling" claims)
- Preserving access to the legal system (retaliation and overly broad waivers)
- Scrutiny of pre-hiring testing, background checks, date-of-birth questions and other screening tools that have a disparate impact on particular groups



4 Nuances of EPLI Coverage

- Claims-made vs. claims made and reported
- Duty to defend vs. reimbursement
- Defense costs inside or outside the limit of liability
- Claims for money damages vs. claims for money damages or action by the nonprofit (e.g., reinstatement, accommodation for disability)
 - Lawsuits versus claims brought in both administrative and judicial forums



What is a Claim?

Example of a broad definition:

- "an oral or written demand for monetary or non-monetary damages, including any judicial or administrative proceeding."



“Pure” Claims Made

- A policy requiring that a claim... be made against the insured during the policy period for coverage to apply... *pure claims-made policies do not specify that the claim must also be reported to the insurer during the policy period.* Instead, they indicate only that **the claim must be reported to the insurer "immediately" or "as soon as practicable."** For insureds, pure claims-made policies are preferable to claims-made and reported policies because it is sometimes difficult to report a claim to an insurer when it is made late in a policy period.

Source: www.irmi.com

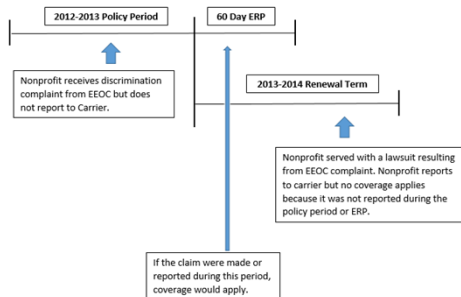


Claims-Made & Reported

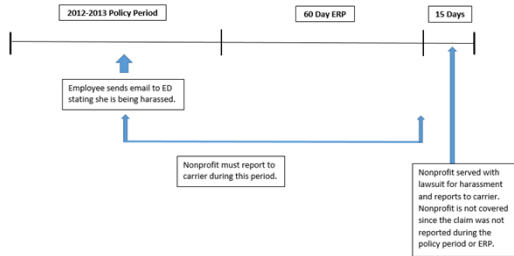
- Most widely used form
- Requires that the “claim” be made during the policy period (or extended reporting period) AND reported to the carrier during this same period of the policy in force.
- How do you know if you have purchased this form?
 - “This is a Claims-Made Policy. This Policy covers only those Claims first made and reported against the Insured during the Policy Period or ERP, if applicable.”



No coverage for late reporting



Notice to supervisor = notice of claim ("claim trigger")



Claims-Made

- It is a nonprofit's obligation to report a claim or a potential circumstance that could give rise to a claim to its EPLI carrier.
- A delay in reporting can jeopardize coverage.
- EPLI policies are very explicit on how and where to report a claim.
- A "pure" claims-made EPLI form requires that claims be reported promptly or as soon as practical (including, possibly after the policy has expired).
- Early reporting: some policies encourage an insured to report any incidents or circumstances that may lead to a future claim.



A word about ERPs



- The ERP extends the period in which a claim may be reported.
- Keep in mind that the "wrongful act" must have occurred during the policy period (prior to expiration).



Duty to Defend

- What does “duty to defend” mean?
- Are there subtleties to this important component of coverage?



Duty of defend

- PLUS: when duty to defend is part of policy, any claim that triggers policy even remotely leads to obligation to defend (e.g., even if allegations are false or fraudulent)
- MINUS: carrier is in control with respect to selection of defense counsel. But there are nuances!
 - Carrier practices differ along a continuum: At one end carrier picks counsel with no input from nonprofit insured. In the middle: carrier seeks input from insured. At the far end: carrier approves nonprofit’s selection of counsel.
 - Ultimate decision/control rests with carrier.



- **Why might insurer control be a good thing?** Reputable carriers have access to top notch EPL specialist attorneys. And they have negotiated rates below what you would probably pay.



If no “duty to defend”...

- **“Duty to pay” or “reimbursement” policy.** The insured is responsible for managing the defense of all claims, with the carrier obligated only to reimburse the insured for the cost of defense, claim settlements, and judgments.
 - PLUS: the nonprofit insured has total flexibility when it comes to counsel selection
 - MINUS: weak bargaining power with prospective counsel, may not have skills to oversee billing and representation (which attorneys in the firm work on the case, how many hours are spent, billing practices, etc.)



Defense costs “inside” or “outside” the limit of liability



Policy Nuance #4:

- Claims for money damages vs. claims for money damages or action by the nonprofit
 - Historically, a key issue
 - More recently: greater consistency in nonprofit EPLI policies



Definition of Insured

- Make sure that the policy's definition of "insured" includes the organization, its directors and officers, managers or supervisors, and all the types of employees that make up your workforce.
 - For instance, if you utilize full-time, part-time, temporary, seasonal, leased, and/or loaned employees, then they should be included in the definition of "insured."
 - Consider whether it's prudent for the policy to cover independent contractors, volunteers and other third parties such as your clients or service recipients.



Key Considerations

- **Duty to Defend** – Is this important to me? What does it mean to my carrier?
- **Defense Costs Outside the Limits** – Am I concerned about funding the cost of a legal defense? Remember: when you're buying defense outside the limits, you don't need as large a limit of liability.
- **Prior Acts Coverage** – Do I need coverage for claims that might occur in the future, but be based on alleged "wrongful acts" that occurred previously?
- Do we need, want, and are we willing to pay for **FLSA coverage**?



Key Considerations, cont.

- **Third Party Coverage** – Are we at risk of claims filed by non-employees? (claims by clients, volunteers, independent contractors, vendors, etc.) Note: third party claims are typically excluded in the CGL which specifically excludes coverage for "harassment" and "discrimination." Also: sexual harassment claims for young participants may be excluded.
- **Punitive Damages** – Rand Corporation study found that 17 percent of all EPL verdicts included punitive damages.
- **Reasonable Deductible** – can you afford the policy deductible?
- **Separate EPLI or part of a portfolio?** What makes most sense for your nonprofit?
- **Agent and Broker resources** – is your advisor a specialist?



The screenshot shows the Seyfarth Shaw LLP website. At the top left is the firm's logo. To the right, there are navigation links: 'About Us', 'People', 'Services', and 'News & Publications'. Below the navigation is a horizontal line. On the left side, there is a vertical menu with categories: 'Firm News', 'Publications / Blog Posts', 'Blogs', 'Accolades', 'Practices & Sectors', and 'Labor & Employment'. The main content area features the heading 'Attorney Publications' followed by the article title 'Ninth Annual Workplace Class Action Litigation Report' dated 01/14/2013, written by 'Attorney: Gerald L. Maatman, Jr.'. A small thumbnail image of the report cover is visible to the right of the text.

The slide features a large 'Thank you!' heading. Below it is a bulleted list of contact information for Melanie Lockwood Herman, Executive Director of the Nonprofit Risk Management Center. The list includes her email address, Melanie@nonprofitrisk.org, and her phone number, (202) 785-3891. In the bottom right corner, there is a logo for the Nonprofit Risk Management Center with the tagline 'Find the answer here | nonprofitrisk.org'.
