EPL Insurance – Make Sure You Ask the Right Questions

Over the last several years there has been a significant increase in the amount of employment claims brought against employers throughout this country. Due to the potential for significant liability exposure as well as court costs and attorneys' fees accompanying such claims, employers have explored different ways to protect their businesses and assets. The insurance industry introduced Employment Practices Liability (EPL) coverage to address this need several years ago. There has been dramatic growth in the number of employers who are purchasing EPL insurance whether through a separate policy or as a rider to a general liability policy. Generally, purchase of EPL insurance is a good business decision for employers and a wise investment.

However, prior to purchasing EPL coverage, employers should ask a number of questions of their insurance agent to ensure that they know what they are purchasing. First and foremost, an employer should question the type of employment claims which will be covered by the policy. Typically, claims filed with the Equal Employment Opportunity Commission, state civil rights agencies as well as lawsuits filed in state or federal court for discrimination will be covered under the policy. However, claims for breach of contract, noncompete agreements and wage and hour claims are normally not covered and are specifically excluded by the policy. Employers should ask their agent to delineate exactly what type of claims will be covered under the EPL policy. We have seen occasions where some of our clients have not clearly understood what type of claim is covered by the insurance.

Prior to purchasing EPL coverage, employers should also determine what the deductible or retention level on the policy is. This is the amount of dollars that the employer must expend before the insurance company pays any expenses, and can range from $2,500 to $250,000 depending upon the particular policy. The employer should also determine whether attorneys' fees and expenses are credited against the deductible. The amount of the deductible or retention may make a policy worthless depending upon the size of the employer and the number of claims that an employer may experience. Many employers with a high retention level do not realize that in addition to paying the premium for the policy, they are also required to pay the retention amount before their insurer is obligated to pay any money in defense of the claim.

Another area of concern for many employers is the choice of defense counsel. If the employer has corporate or employment counsel that it would prefer to use in order to defend any claim that is presented, it is imperative that the employer negotiate this item with the insurance company prior to the purchase of the policy. Many insurance companies will add a rider to their policy to allow counsel to be selected by the employer. The employer's counsel may need to be placed upon the insurance company's panel of attorneys, but this can be negotiated. However, unless it is specifically negotiated at the purchase of the policy, the insurance company in most cases will require that the lawyer or law firm be selected by the insurance company and thereby refuse to let employer's counsel handle the defense of the case. The obvious result is that the employer will be required to pay the legal fees of the attorney selected by the insurance company up to the amount of its deductible before the insurance company begins paying for such attorney fees.

The final issue which employers should clarify prior to the purchase of a policy is who has the right to settle claims. Some policies give exclusive right to settle claims to the insurance company. In these instances, a claim may be settled without the authorization of the employer. This can be particularly problematic for the employer due to the impact it may have on the remaining work force. Although EPL insurance for many employers has proven to be a wise business decision, employers must ask the right questions of their insurance agent prior to purchasing such coverage.