

ARE YOU NEXT?



RISK TRANSFER
PROFESSIONAL BUYERS OF INSURANCE

3 OUT OF 5 EMPLOYERS ARE SUED BY FORMER EMPLOYEES EVERY YEAR

WHY EMPLOYMENT PRACTICES LIABILITY INSURANCE IS MORE IMPORTANT
THAN EVER FOR STAFFING FIRMS

By: Andy Kohler, CIC

The Need

Sagging economies like the one we are currently enjoying tend to have significant insurance implications. When businesses around us begin to slow or close and workers subsequently fear they will lose their jobs or be asked to do more for less, there is typically a spike in all types of insurance claims. Staffing companies are no exception to this rule, and they are increasingly vulnerable to a litigious professional and a political world that is “pro-employee”. Far reaching employment laws exasperate and confuse owners, managers, and stakeholders alike. One can no longer afford the luxury of ignorance in this area, as three out of five employers are sued by former employees every year. Although your company might be small enough to avoid the notice of the plaintiff’s attorneys for the moment, the odds are that you will find yourself in the hot seat eventually. Lawsuits can happen to anyone and any company. This has never been truer than it is today.

Case in point: A recent lawsuit was settled for \$600,000 on behalf of 18 Filipino temporary workers for a large staffing firm. The suit specifically alleged that 13 of the 18 employees were fired due to their national origin. The former employees will be paid \$456,000 by the client company and \$144,000 by the staffing firm to settle the claim.

In the Past

Virtually nonexistent before 1990, Employment Practices Liability Insurance (“EPLI”) was developed in response to the growing number of employment-related lawsuits in the early 1990s. EPLI came about approximately the same time as the Clarence Thomas Supreme Court proceedings.

There were many factors that contributed to the development of this policy. First, employers are subject to a variety of federal laws, such as Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA), the Age Discrimination and Employment Act (ADEA), and the Family and Medical Leave Act (FMLA), to name a few. In addition, employers are affected by a plethora of state and municipal laws that deal with employment situations,

WWW.RISKTRANSFERINC.COM

RISK TRANSFER 866.481.9363 TOLL FREE
219 EAST LIVINGSTON STREET 407-481-9363 LOCAL
ORLANDO, FL 32801 407.481.9969 FAX

ARE YOU NEXT?



RISK TRANSFER
PROFESSIONAL BUYERS OF INSURANCE

especially in California and Massachusetts. Furthermore, evolving economic conditions as a result of downsizing and mergers and acquisitions have all led to workforce reductions that spur wrongful termination and retaliation claims.

According to Jury Verdict Research TM, the median award for all discrimination claims shot up to \$317,000, a massive 46% increase from the past year (\$216,000). The problem is, you won't always know who will sue, and you can't always prevent a disgruntled employee from lying or exaggerating just to get even with you. Even if the allegations are groundless, the defense of the suit can be exhaustive of your time, your resources, and most importantly...your money.

Current Environment

To bring you up to speed on the crucial protection that EPLI provides, at its core, the policy supplies a “duty to defend” insuring agreement that covers those who are listed in the policy as insured’s (typically the entity, directors and officers, employees, and named others) against a myriad of employment-related exposures. These vulnerabilities include, but are not limited to: discrimination, harassment, wrongful discharge, retaliation, and so forth.

In the litigious nature of the modern business world, EPLI is an essential purchase to protect the assets of any company. The exposure of an employment-related lawsuit is only further exacerbated during economic downturns, when people are being laid off, asked to take pay decreases, are fearful of the future employment, asked to work more hours, and, as a result, are more likely to sue. Anytime you hire, terminate, or interact with an employee or potential employee, you are at risk. This is particularly true for staffing firms, who are often interacting with a much larger pool of employees than the average company and have less of a tenure and relationship with the employees it payrolls.

That being said, it is important to get acquainted with the extent of employment practices claims, which are common. Discrimination claims based on sex, age, race, or religion pop up in today’s environment like rapidly multiplying weeds and can be menacing to your company’s livelihood if you don’t know how to protect yourself. According to their web site, the Equal Employment Opportunity Commission (EEOC) received 99,922 complaints in 2010, which is in fact 25% more than ten years ago. How many of these companies were unprepared?

Risky Business

Owners and managers often believe that they need a certain type of person to do a certain job due to physical requirements, client demands, privacy reasons, and other factors that are important to an assignment. You should understand this—any such discrimination will put your hiring practices under the microscope unless there’s a high level of correlation between gender, race or nationality and the ability to perform job functions.

WWW.RISKTRANSFER.COM

RISK TRANSFER 866.481.9363 TOLL FREE
219 EAST LIVINGSTON STREET 407-481-9363 LOCAL
ORLANDO, FL 32801 407.481.9969 FAX

ARE YOU NEXT?



RISK TRANSFER
PROFESSIONAL BUYERS OF INSURANCE

Case in point: A female worker filed a lawsuit against a staffing firm claiming age, disability, national origin, race, and sex discrimination in violation of federal laws. The plaintiff specifically alleged that the staffing firm discriminated against applicants according to criteria set up by client companies, that a female was wrongfully terminated because of her pregnancy, and that a male was terminated for his complaints regarding the discriminatory hiring practices. The matter settled for \$580,000, with the staffing firm paying \$500,000 and the two client companies paying a combined \$80,000.

How are you as a business owner or manager supposed to deal with the scrutiny that follows your hiring decisions? Very simple—be prepared to prove your bona fide reason for these qualifications, as well as any efforts you’ve made to mitigate the situation. And purchase EPLI. It may not seem like a big deal until you are being deposed by a highly paid employment attorney whose fees are dependent on the outcome of a claim.

Size Doesn't Matter

Staffing organizations of all sizes are facing an ever-increasing likelihood that they will have to deal with some form of employment-related claim. In fact, over 40% of EPLI claims are against firms with fewer than 100 employees. Workplace conduct that was considered acceptable—or was at least tolerated—just a few years ago can now land an employer in the defendant’s chair. No company is immune. In particular, small to medium-sized firms are becoming increasingly vulnerable, and litigation costs, which could more easily be absorbed by large companies, can and do financially devastate a smaller firm. According to Gordon M. Berger, an experienced employment lawyer, “A single employment law claim can cost a company over \$75,000, not to mention adverse publicity associated with such claims.” Once a claim turns into a lawsuit, results favor the employees; of the suits that go to trial, employees win over two-thirds of the time.

Going into new markets, new sectors, and hiring for new positions is often fraught with risk. As smaller staffing firms take on higher profile clients, it puts them at even greater risk for being the target of lawsuits. Berger goes on to explain that it is vital for “employers to work with outside counsel to develop ‘best practices’ in the employment law arena.” Being prepared is essential for effective management of risks, whether you’re facing an economic downturn, an environmental disaster, or exposure to a lawsuit.

Buyer Beware

Now you recognize the need for EPLI to protect your company, yet coverage remains unpurchased. Tread carefully. Shop around. Closely compare coverage and determine if the policy offers excellent value. No “one size fits all” standardized EPLI policy form exists. Prices and coverage vary greatly, and they don’t always correspond.

Also, when reading through policies, do not assume that the most expensive policy offers

WWW.RISKTRANSFERINC.COM

RISK TRANSFER 866.481.9363 TOLL FREE
219 EAST LIVINGSTON STREET 407-481-9363 LOCAL
ORLANDO, FL 32801 407.481.9969 FAX

ARE YOU NEXT?



RISK TRANSFER
PROFESSIONAL BUYERS OF INSURANCE

the most coverage. Because EPLI policies are not regulated or built like a workers' compensation policy, where each policy is the same in terms of the coverage provided, a thorough analysis must be done on the policy offered and how it relates to the exposures of a given business. These policies are like snowflakes; no form is exactly alike, which is further complicated by the unique exposures created by a staffing entity. For instance, some policies may have a narrower or broader definition of who is insured. Or, in another example, companies that hire independent contractors to perform services may be surprised to find that they have a very real exposure, but that their particular employment practices liability policy does not cover these workers.

And another important difference to watch for is that some EPLI policies allow the employer to choose their own attorney in the event of a suit by one of their employees, while other policies require that the insured use defense counsel assigned by the insurance company. Do you want to use an attorney who knows your business or an attorney who might have just come out of law school and has no history in the staffing sector? My advice is that you read through these policies carefully in detail with a specialized broker before any decisions are made. More than any other insurance policy a staffing company should purchase, this is one that requires the highest level of scrutiny due to the manuscript nature of these forms.

I Rest My Case, Your Honor

There was a time when matters of employment law were exclusively the concern of the company counsel. There of course were certain things managers were told *not* to do—like ask questions about domestic matters during an interview or ask about religious beliefs. But beyond these restrictions, employment law in general was pretty much treated as common sense. However, that was then. Take one quick look at recent, costly court cases and you'll realize those days have gone the way of...oh, the paper resume, or the term "secretary." It is a new corporate world.

Employees are suing like never before. Employment practices liability insurance remains a relative bargain; the cost for coverage is just a fraction of what companies can pay when settlements go against them. Companies today face constant challenges from new regulatory requirements. Are you up to date on current law along with all its fuzzy interpretations, and do you know precisely how those laws apply to situations within your organization? What about the new healthcare rules and regulations that are emerging online? Do you have proper advice on managing your benefits? If you answered "no," you risk employee complaints, lawsuits, and hefty fines.

For the uninformed, it's a recipe for disaster. EPLI should absolutely be part of a comprehensive business insurance strategy. After all, insurance is about asking yourself, "What is at risk? What can I lose, and how do I protect myself?" And when situations get heated, EPLI coverage will serve as a last line of defense to protect your bottom line.

WWW.RISKTRANSFERINC.COM

RISK TRANSFER 866.481.9363 TOLL FREE
219 EAST LIVINGSTON STREET 407-481-9363 LOCAL
ORLANDO, FL 32801 407.481.9969 FAX

ARE YOU NEXT?



RISK TRANSFER
PROFESSIONAL BUYERS OF INSURANCE

Disclaimer: This article should not be construed as legal advice.

Kohler is a professional buyer of insurance with Risk Transfer, LLC (**risktransferinc.com**). Risk Transfer's mission is to educate their clients about the risks within their business environment, and to deliver solutions with the highest integrity and unmatched insurance acumen. Through our specialized insurance companies and alternative risk facilities, we deploy the core competencies and experience to serve the unique insurance needs of staffing organizations. If you have any questions about this article or you would like to speak with Kohler, he can be reached at akohler@risktransferinc.com.

WWW.RISKTRANSFERINC.COM

RISK TRANSFER 866.481.9363 TOLL FREE
219 EAST LIVINGSTON STREET 407-481-9363 LOCAL
ORLANDO, FL 32801 407.481.9969 FAX